Chapter 1
THE PROBATE COURTS, PROBATE JUDGES, AND THE JUDICIARY

The Revised
HANDBOOK FOR PROBATE
JUDGES OF GEORGIA
2010
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1. PROBATE COURTS

1.1 Structure of the Probate Court System

Because of its history, the probate court in Georgia is truly unique among all of the state’s courts. It is the only class of court in the state not required to have uniform jurisdiction.\(^1\) There is a probate court for each of the 159 counties. From the very smallest to the largest counties, there is but one judge of the probate court in each county, regardless of the county’s population. Many metropolitan and urban counties employ associate judges and/or hearing officers to assist the judge of the probate court in handling the caseload, but the position of judge of the probate court is held only by one elected person.

Prior to 1975, the probate court was known as the Court of Ordinary, and the judge of the probate court was known as the Ordinary. An excellent history of the probate court is set forth in Appendix 1 to this Chapter. The Ordinary once was the governing authority within the county, and, as such, in addition to the judicial authority and duties, the Ordinary ran the business of the county. Over time, the legislative and executive functions of county business were removed for the most part from the Courts of Ordinary and were vested in Boards of Commissioners.\(^2\) It is from that history that probate courts still retain many administrative and ministerial functions that might seem out of place, so to speak, in a court of record.

The following timeline shows the evolution of the probate courts from the county governing authority to its current structure as the probate court:

\begin{itemize}
  \item **1798** Constitution of State of Georgia establishes Justices of the Inferior Courts.
  \item **1799** The Act which establishes jurisdiction over matters testamentary is passed. This Act also provided for authority to issue marriage licenses and letters of administration.
  \item **1851** Act passed which establishes the Court of the Ordinary, changing the title from Inferior Court; also governs a wide range of county matters, including county
\end{itemize}

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\(^1\) Ga. Const., Art. VI, §3, ¶1.

\(^2\) As of July 1, 2009, there were still a few counties having a single commissioner serving as the governing authority.
infrastructure (roads, bridges, buildings), elections, taxes, and “other matters conferred on them by law.”

1868 New Constitution gave the same authority over county affairs that had been given to the Inferior Courts to the Courts of Ordinary.

1877 The revised Georgia Constitution provided that the General Assembly could appoint county commissioners to govern matters pertaining to county “roads and revenues,” beginning the trend to separate county management matters from the Court of Ordinary.

1975 – The name of the Court of Ordinary is changed to the Probate Court and the name of the judicial officer is changed from Ordinary to Judge of the Probate Court.

1983 Georgia’s current Constitution became effective, which makes no further provision regarding a “Court of Ordinary.”

1987 – Statutes defining “Government by judge of the probate court” were repealed as being obsolete, since all counties by then had Boards of Commissioners as the governing authority.

1.2 Additional Jurisdiction and Duties in Certain Courts

1.2.1 Criminal

In counties in which there is not a state court, the probate court is the traffic court for the county, and the judge of the probate court hears traffic, game and fish, and certain misdemeanor cases. For many of the rural and small urban courts, the traffic and criminal caseload comprises the majority of the judicial function of the court and the judge’s time dedicated to judicial duties. The traffic and criminal jurisdiction is only briefly covered in this Handbook.

1.2.2 Magistrate Court

In certain counties, through local legislation, the judge of the probate court also serves as the Chief Magistrate of the Magistrate Court. In those counties, the duties and responsibilities of the judge of the probate court sitting as the Chief Magistrate are governed by Chapter 10 of Title 15 of the Official Code of Georgia Annotated and are not covered in this Handbook.
1.2.3 Elections

In every county in which a Board of Elections and Registration has not been created, the judge of the probate court serves as the Elections Superintendent for the county and may also serve in that capacity for municipalities within the county. As the Elections Superintendent, the judge of the probate court reports to the Secretary of State, as the elections supervisor for the state. The duties and responsibilities of the Elections Superintendent are governed by Title 21 of the Official Code of Georgia Annotated and are not covered by this Handbook.

1.2.4 Vital Records

In some counties, the judge of the probate court serves as the Vital Records Custodian for the county, maintaining the birth and death records for the county. As such, the judge of the probate court reports to the State Office of Vital Records, a division of the state Department of Community Health (DCH), and the duties and responsibilities are governed by Chapter 10 of Title 31 of the Official Code of Georgia Annotated. This subject is not covered by this Handbook.

1.3 Article 6 Probate Courts with Expanded Jurisdiction

There is, in effect, a two-tiered system of probate courts in Georgia. In counties having a population of 96,000 or greater, the judge of the probate court must, with one exception, be an attorney with the same qualifications and experience as a superior court judge. These courts are referred to in this Handbook and in practice as Article 6 Probate Courts, being governed by Article 6, Chapter 9 of Title 15 of the Official Code of Georgia Annotated. The one exception is that a non-attorney judge of the probate court already serving when the county population reaches or exceeds 96,000 may continue to serve and may run for re-election; any other candidate must be an attorney and meet the requirements of Article 6.

In Article 6 Probate Courts, all matters are tried before a licensed attorney judge, with

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4 See Section 2.1 below.
the right to trial by jury, whenever applicable. Appeals from Article 6 Probate Courts are taken directly to the Court of Appeals or the Supreme Court in the same manner as are appeals from the superior courts. In all other probate courts, regardless whether the judge is an attorney or a non-attorney, appeals are taken to the superior court of the county, where the matter may again be tried fully without regard to the outcome in the probate court. This is known as a *de novo* review or trial, with the matter then being tried before a licensed attorney judge, with the right to trial by jury, whenever applicable. See Chapter 2, Section 8 on Appeals.

Furthermore, Article 6 Probate Courts also have additional concurrent jurisdiction with the superior courts with regard to:  
1. Declaratory judgments involving fiduciaries;  
2. Tax motivated estate planning disposition of property of a minor or ward;  
3. Approval of settlement agreements disposing of an estate contrary to the terms of a testator’s will;  
4. Appointment of a new trustee in the event of certain vacancies;  
5. Acceptance of the resignation of a trustee at the request of the beneficiaries or upon petition by a trustee;  
6. Motions seeking an order for disinterment and deoxyribonucleic acid (DNA) testing in connection with proceedings to determine heirs of a decedent;  
7. Conversion to a unitrust and related matters; and  
8. Adjudication of petitions in equity for direction and construction of wills.

As of July 1, 2009, there are 15 Article 6 Probate Courts in the following counties: Bibb, Chatham, Cherokee, Clarke, Clayton, Cobb, DeKalb, Dougherty, Forsyth, Fulton, Gwinnett, Hall, Henry, Muscogee, and Richmond.

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6 O.C.G.A. §§9-4-4, 9-4-5, and 9-4-6.  
7 O.C.G.A. §§29-3-36 and 29-5-36.  
8 O.C.G.A. §53-5-25 [53-5-20 of the Pre-1998 Code].  
9 O.C.G.A. §53-12-170.  
10 O.C.G.A. §53-12-175.  
12 O.C.G.A. §53-12-221.  
Attorneys must be aware of these differences, should know when they are appearing in an Article 6 Probate Court, and should proceed accordingly on behalf of their clients. Although some judges of the probate courts serving in counties having a population less than 96,000 are attorneys, their courts are not Article 6 Probate Courts, and the provisions of that Article do not apply in those courts. Similarly, the fact that a county’s population equals or exceeds 96,000 does not assure that the court is an Article 6 Probate Court, since a non-attorney judge may continue to serve. See Section 2.1 below.

2. PROBATE JUDGES

2.1 Election of Probate Judges

The judges of the probate court are elected county Constitutional Officers\textsuperscript{14}, who serve four year terms. The elections are held in the same years as are the presidential elections.

The statutory qualifications for the office of judge of the probate court are that the candidate must:

1. Have been a resident of the county for at least two years prior to qualifying for election to the office and continue to reside there during the term of office.
2. Be a registered voter of the county.
3. Be a citizen of the United States and the state.
4. Have attained the age of 25 years prior to the date of qualifying for election to the office.
5. Have obtained a high school diploma or its recognized equivalent.
6. Have not been convicted of a felony or any offense involving moral turpitude.\textsuperscript{15}

In addition, in any county having a population of more than 96,000 persons according to the United States decennial census of 2000 or any future such census, a candidate also must have attained the age of 30 years and have been admitted to the practice of law for seven years preceding election. The law provides an exception such that a judge of the

\textsuperscript{14} See Section 7 below: Probate Judges as Constitutional County Officers
\textsuperscript{15} O.C.G.A. §15-9-2(a).
probate court holding office on or after June 30, 2009 may continue to hold such office and may seek reelection, notwithstanding the population having exceeded 96,000.\textsuperscript{16}

The term of office for a judge of the probate court is four years and until the successor is elected and qualified, beginning on January 1 and expiring on January 1 four years later.\textsuperscript{17} The judge of the probate court is elected in the November election preceding the expiration of the term of office.\textsuperscript{18} Candidates for judge of the probate court run in partisan primaries and elections, except where the General Assembly has provided by local act for the nonpartisan election of the judge of the probate court.\textsuperscript{19} A majority vote is required for election in the primaries, the general and nonpartisan, and special elections.\textsuperscript{20}

2.2 Bonding Requirements

The judge of the probate court must furnish a bond or surety in the sum of $25,000.00, which may be increased in any county by local legislation, for the faithful discharge of the duties of the judge of the probate court.\textsuperscript{21} The bond must be filed by the first day of January after the election\textsuperscript{22} and must be made payable to the Governor and his successor in office.\textsuperscript{23} The office of judge of the probate court becomes vacated upon a failure to give bond within the time prescribed.\textsuperscript{24} No official acts may be performed until the bond is approved and filed as required.\textsuperscript{25} The bond of the judge of the probate court is approved by a judge of the superior court of the circuit.\textsuperscript{26} The cost of the bond must be paid by the country governing authority (the county commission).\textsuperscript{27}

During the term of the judge of the probate court, if the judge of the superior court determines that the bond is insufficient or that the security is insolvent, it is the duty of the

\begin{itemize}
\item \textsuperscript{16} O.C.G.A. §15-9-4.
\item \textsuperscript{17} O.C.G.A. §15-9-1.
\item \textsuperscript{18} O.C.G.A. §§21-2-2(12), 21-2-9.
\item \textsuperscript{19} Ga. Const. art. VI, §VII, ¶ I. The portion of this provision which relates to judges of the probate court states that they will "be selected in the manner and for the term they were selected on June 30, 1983, unless otherwise provided by local law."
\item \textsuperscript{20} O.C.G.A. §21-2-501.
\item \textsuperscript{21} O.C.G.A. §15-9-7. A typographical error seems to exist in this Code Section which reads “duties as clerk of the judge the probate court. Coded Section 15-9-8 requires the judges of the superior courts to “approve the official bonds of the probate judges.”
\item \textsuperscript{22} O.C.G.A. §45-4-14.
\item \textsuperscript{23} O.C.G.A. §45-4-1.
\item \textsuperscript{24} O.C.G.A. §45-5-1 (a)(6).
\item \textsuperscript{25} O.C.G.A. §45-4-22(a).
\item \textsuperscript{26} O.C.G.A. §15-9-8.
\item \textsuperscript{27} O.C.G.A. §45-4-7.
\end{itemize}
superior court judge to require sufficient bond or security. Upon failure of the judge of the probate court to comply with the order, a vacancy must be declared as if the judge of the probate court had failed to give security in the first instance.\textsuperscript{28}

If the judge of the probate court accepts and holds custodial accounts for minors or incapacitated adults, it is the responsibility of the judge to increase his official bond if necessary.\textsuperscript{29}

\subsection*{2.3 Oath of Office}

Before entering on the duties of office, the judge of the probate court must take the following oath:

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“I do swear that I will well and faithfully discharge the duties of judge of the probate court for the County of ____________, during my continuance in office, according to law, to the best of my knowledge and ability, without favor or affection to any party, and that I will only receive my legal fees. So help me God.”\textsuperscript{30}
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The judge of the probate court also must take the oaths required of all civil officers as follows:\textsuperscript{31}

\begin{enumerate}
\item That he/she is not the holder of any unaccounted for public money due this state; that he/she is not the holder of any office of trust under the government of the United States, any other state, or any foreign state which he/she is by the laws of the State of Georgia prohibited from holding;
\item That he/she is otherwise qualified to hold said office according to the Constitution and laws of Georgia;
\item That he/she will support the Constitution of the United States and of this state; and
\item That he/she has been a resident of the county for the time required by the Constitution and laws of Georgia.\textsuperscript{32}
\end{enumerate}

\begin{footnotes}
\item[29] O.C.G.A. §29-6-8.
\item[31] Id.
\item[32] O.C.G.A. §45-3-1.
\end{footnotes}
A loyalty oath, that the officer will support and defend the Constitution of the United States and the Constitution of the State of Georgia, is also required.\textsuperscript{33}

The oath of office is to be taken before a judge of the superior courts of the circuit.\textsuperscript{34}

Even though the law requires that the oath is taken before performing any official acts, except where specifically otherwise provided by law, the official acts of an officer are valid regardless of an omission to take and file the oaths.\textsuperscript{35}

### 2.4 Continuing Educational Requirements

Every judge of the probate court must become and remain a “certified judge of the probate court.” In order to certified initially, the judge or judge-elect must complete the initial training course, known as the “New Judges’ Orientation” (currently a 40-hour course of training), prescribed by the Probate Judges Training Council (“Council”) and the Institute of Continuing Judicial Education of Georgia (ICJE) within one year after taking office.\textsuperscript{36} Thereafter, to remain certified, the judge must complete the annual additional training (currently set at 12 hours annually) prescribed by the Council and ICJE.\textsuperscript{37} However, for the initial training or for any annual training thereafter, a judge may request a six-month administrative extension of the time during which to fulfill the training requirement from the Council. Additional extensions beyond the six-month administrative extension may be requested only for reasons of disability, hardship or extenuating circumstances and may be approved on a case-by-case basis by the Council. A certificate of completion of the required training issued by ICJE must be filed with the Council within one year after taking office and annually thereafter, or within the time of any extensions granted.\textsuperscript{38}

Should any judge fail to fulfill the initial and/or annual training requirements, within the time required or within any extensions granted, the Probate Judges Training Council is required to notify the Judicial Qualifications Commission\textsuperscript{39} of the failure, and the

\textsuperscript{33} O.C.G.A. §§45-3-11, 45-3-13. The loyalty oath, as set forth in the statute also requires the officer to swear that he/she is not a member of the Communist Party. However, the Attorney General has issued an opinion that such portion of the loyalty oath is unconstitutional and should not be given. 1985 Op. Att’y Gen. No. 85-19.

\textsuperscript{34} O.C.G.A. §15-9-8.

\textsuperscript{35} O.C.G.A. §45-3-10.

\textsuperscript{36} O.C.G.A. §15-9-1.1(a).

\textsuperscript{37} O.C.G.A. §15-9-1.1(b).

\textsuperscript{38} O.C.G.A. §15-9-1.1(c).

Commission is required, unless it finds that the failure was caused by facts beyond the control of the judge, to recommend to the Supreme Court the removal of the judge from office. 40

The expenses of the required training must be paid by the judge or judge elect. However, the judge or judge-elect shall be reimbursed by ICJE when funds are available to it for such purpose. To the extent that funds are not available and the expenses are not reimbursed by ICJE, the county in which the judge serves or the judge-elect is to serve shall reimburse the judge or judge-elect. 41

2.5 Restrictions on the Practice of Law and Service as a Fiduciary

Judges of the probate courts who are attorneys, other than in Article 6 Probate Courts, may not practice law, alone or with anyone else, (1) in any case or proceeding in that judge’s own probate court; (2) in any other case in a case or matter of which that judge’s own probate court has, has had, or may have jurisdiction; or (3) in any other court or any matter whatever in behalf of or against any executor, administrator, guardian, trustee, or other person acting in a representative capacity whose duty it is to make returns to that judge’s probate court, except to give such advice or instructions as may be required in the capacity as judge of the probate court. 42

Additionally, the judges of the Article 6 Probate Courts are considered to be fulltime judges and are prohibited from practicing law, as are superior court judges. 43

While serving as such, the judge of the probate court cannot be an executor, administrator, guardian, or other agent of a fiduciary nature required to account to that judge’s own court. If the judge of the probate court was serving in such a capacity at the time of election, the letters and powers immediately abate upon taking the office. However, the judge may serve as an executor, administrator, guardian, or conservator where the jurisdiction over the matter is in another county or the judge is required to account to the judge of the probate court of another county. 44

40 O.C.G.A. §15-9-1.1(d).
41 O.C.G.A. §15-9-1.1(e).
44 O.C.G.A. §15-9-2(b).
Notwithstanding the foregoing statutory provision, Canon 5.D. of the Code of Judicial Conduct provides that judges should not serve in any such fiduciary capacity, except concerning estates, trusts or persons of members of the judge’s family and then only if such service will not interfere with the proper performance of the judge’s judicial duties. Family members, for these purposes, include spouse, child, grandchild, parent, grandparent or other relative with whom the judge maintains a close familial relationship. Nonetheless, the Canon provides that judges should not serve even as a family fiduciary if it is likely that they will be engaged in proceedings that would ordinarily come before their own courts or the estates, trusts or wards represented likely will become involved in adversarial proceedings in their own courts.45

A judge of the probate court who fails to account faithfully as a fiduciary after becoming judge for all trusts held at the time of election is ineligible for reelection.46

2.6 Associate Judges

As of July 1, 2009, associate judges may be appointed by the judge of the probate court of any county, subject to the approval of the governing authority of the county.47 Associate judges serve at the pleasure of the judge of the probate court; however, the term of an associate judge cannot extend beyond the term of the appointing judge. Compensation for associate judges is fixed by the judge of the probate court with the approval of the county governing authority, and the salary and any employment benefits are to be paid from county funds. Every associate judge appointed by a judge of the probate court must have the same qualifications of the elected judge (that is, be eligible to run for election to the office), excepting only the residency requirements.48 Every associate judge is required to take and subscribe the following oath:

“I do swear that I will well and faithfully discharge the duties of associate judge of the probate court for the County of ____________ during my continuance in office,

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48 Id.
according to law, to the best of my knowledge and ability, without favor or affection to any party. So help me, God."  

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

Both full- and part-time associate judges are vested with all of the authority of the judge of the probate court, and a judgment rendered by an associate judge will be considered a final judgment in the probate court for purposes of appeals. If the judge of the probate court also serves as chief magistrate for the county, an associate judge of the probate court may serve in the magistrate court without further oath, certificate or commission.

Full-time associate judges are required to complete all of the educational (training) requirements which apply to judges of the probate courts, and part-time associate judges are required to attend a minimum of nine hours of related training. The cost for the attendance of associate judges at training courses is to be paid from county funds. Full-time associate judges are prohibited from practicing law. Part-time associate judges are prohibited from practicing law in any case, proceeding or matter in the court in which serving or in any other court in any case, proceeding or matters of which the court in which serving has pending jurisdiction or has jurisdiction. Full- and part-time associate judges are prohibited from giving legal advice or counsel on any matter of any kind which has arisen directly or indirectly in the court in which serving, except as may be incidental to such service. Furthermore, the limitations which are applicable to judges of the probate courts regarding fiduciary roles apply to both full- and part-time associate judges.

49 Id.
50 Id.
51 Id.
52 Id. It is uncertain whether this was intended to be an annual requirement. The Code Section does not make an annual reference. Since full-time associate judges must meet all requirements which apply to probate judges, presumably, the annual requirements for the probate judges, as well as the initial training (the new judges’ orientation course), apply to full-time associate judges.
53 Id.
Whenever the judge of the probate court is disqualified to act in any case under the provisions of Code Section 15-9-13, any associate judge serving in the court shall also be disqualified.\textsuperscript{54} See Appendix A1-4 for a sample order appointing Associate Judge(s).

2.7 Chief Clerk, Clerks and Deputy Clerks

By law, the judge of the probate court is the clerk of the probate court.\textsuperscript{55} This is also unique to the probate courts. However, the judges of the probate courts have the authority to appoint one or more clerks, for whose conduct they are responsible.\textsuperscript{56} A judge of the probate court may appoint and designate one Chief Clerk, unless otherwise provided by local law.\textsuperscript{57} There are no specific qualifications to be appointed as a clerk or Chief Clerk of a probate court. It would seem to be the best practice to enter a formal Order appointing the Clerk or Chief Clerk of the Court and for the Clerk to take an oath. See Appendix A1-2 for a sample Order appointing a Clerk or Chief Clerk.

Unless the employees of the judge of the probate court have been enrolled in a civil service system within the county, the clerks of the probate court work solely at the pleasure of the judge of the probate court. See Section 7 on Probate Judges as Constitutional County Officers.

Probate court clerks may “do all acts the judges of the probate courts could do which are not judicial in their nature.”\textsuperscript{58} This phrase is not further defined by the Code, and there are no reported cases annotated under this Code Section explaining what is meant by the phrase. Black’s Law Dictionary defines a “judicial act” as: “An act which involves exercise of discretion or judgment. An act which undertakes to determine a question of right or obligation or of property as foundation on which it proceeds.”\textsuperscript{59} It would seem to be the clear intent of the statute that probate court clerks have the authority to do all acts of a ministerial nature which the judge of the probate court could do, especially when the judge’s authority arises from his or her position as clerk of the probate court. By appointing and employing

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\textsuperscript{54} Id.
\textsuperscript{55} O.C.G.A. §15-9-36(a).
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} O.C.G.A. §15-9-36(b).
clerks, the judge of the probate court obviously expects to assign duties which would, in all other courts, fall upon the clerk of the court. Black’s defines a “ministerial act” as “one which a person or board performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority without regard to or the exercise of judgment upon the propriety of the act being done.”

Clearly, the recording of the minutes of proceedings of court, the receipt, filing and processing of pleadings and orders, etc. would be ministerial acts within the authority of the clerks. Additionally, the issuance of orders for service and of citations which are in compliance with the mandate of the law and do not involve the exercise of discretion (i.e., the making of a decision) should be authorized under this Code Section. For example, the law requires service upon all heirs of a decedent in connection with a petition to probate a will; the issuance of an order of service in accordance with that requirement and the citation to those entitled to notice is not an act requiring a decision or discretion, and, therefore, is ministerial only. The determination of who should serve and be appointed as guardian-ad-litem for certain parties, on the other hand, might be considered a judicial act, unless a court has (a) a strict rotation system of appointment, and (b) there is no known reason for a special decision on who should be appointed in a specific case. See Chapter 3 on Probating Wills.

Also, the issuance of licenses and permits which a judge of the probate court would be obligated to issue without the exercise of discretion, such as marriage licenses, veteran’s exemption permits, fireworks permits, etc., when the applicant(s) meet(s) all of the statutory requirements, would be ministerial. At the time of publication of this Revised Handbook, there still remains discretion and a judicial determination whether applicants are entitled to have firearms licenses issued. However, there is pending before the General Assembly at least one bill which would remove the issuance of these licenses from the probate courts.60 The determination of entitlement to a license, when the criminal histories or the application evidence that an applicant might not be entitled, would be a judicial act which could not be delegated to the clerks. When there is no disqualifying or potentially disqualifying information disclosed in the petition or the criminal histories, the issuance of a license is

60 HB 615, introduced during the 2009 Session.
mandatory and would seem, therefore, to become a ministerial act which may be delegated to the clerks.

There is a very limited circumstance under which “the clerk of the judge of the probate court” may act even in contested matters. If the judge of the probate court (1) is disqualified or unable, because of sickness absence or other reason, to act, (2) has not appointed an attorney to act, and (3) there is not a city or state court judge in the county or, for some reason, the judge(s) of either the city or state court cannot serve, the clerk of the probate court may “exercise all of the jurisdiction of the judge of the probate court.” This does not appear to be in any common practice in the state and should probably be resorted to only for emergency or urgent matters. The authority would not apply in any circumstance where the inability of the judge of the probate court to serve arises from any unlawful act or the accusation of any unlawful act of the part of the judge of the probate court.

In counties having a population of 96,000 or greater, according to the 1990 or any future U. S. census, the chief clerk, if one has been appointed, or a clerk designated by the judge of the probate court may exercise all of the jurisdiction of the judge of the probate court in uncontested matters in the probate court; provided, however, the chief clerk or designated clerk must have been a member of the State Bar of Georgia (a licensed attorney) for at least three years or have been a clerk in the probate court for at least five years. This authority is not limited by the statute to Article 6 Probate Courts and applies to any county with a population equal to or exceeding 96,000 without regard to whether the judge of the probate court in the county is an attorney. If there is no Chief Clerk, it would be the best practice to enter a formal Order designating a clerk to exercise this authority which cites the requisite experience. See Appendix A1-2 which contains alternative language for this designation.

The duties of the judges of the probate court acting as clerks and/or of the clerks are more fully covered in Chapter 14 of the Handbook.

62 O.C.G.A. §§15-9-36(b) and 15-9-13(c).
63 O.C.G.A. §15-9-13(a).
64 O.C.G.A. §15-9-36(c).
2.8 Judicial Assistance – Substitute for Judge

Judges of the probate courts, like all judges, cannot be in their offices at all times. There are times when matters of a judicial nature in the probate court must be handled, but the judge of the probate court is not available and does not have an associate judge serving who is available. The judge may be absent from the court for any number of reasons: illness; family leave; education and training; vacations; etc. There may also be times when the current caseload is such that assistance is needed for the orderly and timely disposition of matters before the court. Disqualification and recusal are specifically discussed in Section 2.9. Although the procedures below may be permissible under the law in cases of disqualification, it is recommended and may be mandatory that the rules concerning recusal be followed, unless the appointment of the substitute in accordance with these provisions is consented to by all parties or counsel.

There are several different procedures for obtaining the assistance of some other qualified person to act for the judge of the probate court in a judicial matter: a court to court request by agreement; a formal request for assistance; the appointment of a judge pro tempore; the appointment of a judge pro hac vice; and service by a city or state court judge or the clerk of the judge of the probate court.

2.8.1 Court to Court Request by Agreement

Under the Constitution, any judge who is otherwise qualified may exercise judicial power in any other court upon the request and with the consent of the judges of that court and of the judge's own court under rules prescribed by law. The term “judge” in that Article includes justices, judges, senior judges, magistrates, and every other such judicial officer of whatever name existing or created. The general rules for requesting assistance from judges of other courts are set forth in O.C.G.A. §15-1-9.1. The Code provides that any judge other than a superior court judge may request assistance from any other judge who is not a superior court judge, who is otherwise qualified to serve, and who agrees to serve.

Therefore, a probate court judge may request assistance from the judge of any other court in the state, except for superior court judges, and, if that judge agrees to serve, may

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65 Ga. Const. Art. VI, §I, ¶ III.
66 Id.
designate that judge to serve. A written designation must be recorded in the minutes of the requesting court.\(^{68}\) The issuance of a written order of appointment would be the best practice to accomplish this designation. The judge agreeing to serve must be qualified to serve in the requesting probate court, except for the residency requirement, and exercises all of the power and authority of the requesting judge of the probate court.\(^{69}\) See Appendix A1-3 for a sample order of appointment.

Senior judges of the superior, state and juvenile courts, senior judges of Article 6 Probate Courts, part-time judges, and retired judges or judges emeritus of state courts are entitled to compensation equal to the annual salary of the requesting judge of the probate court divided by 235 for each day served, plus either actual expenses or, when service is outside the county of the judge’s residence and at the judge’s option, the per diem allowance for members of the General Assembly and mileage at the same rate as state employees. All other judges (that is, full-time judges in office) are entitled to actual travel and lodging expenses only.\(^{70}\)

By special provision applicable to the probate courts, any judge of a probate court may serve as the judge of any other probate court in which such judge would be qualified to serve upon written request. The judge serving as requested exercises only the jurisdiction, power and authority of the requesting judge of the probate court and shall receive either actual expenses or, at the judge’s option, the per diem allowance for members of the General Assembly and mileage at the same rate as state employees.\(^{71}\) Thus, the fact that the judge of an Article 6 Probate Court is serving in a non-Article 6 court does not make the court being served an Article 6 Probate Court.

Additionally, any senior judge of the probate courts may serve as the judge in any probate court in which such judge would be qualified to serve upon written request. The senior judge serving as requested exercises all but only the jurisdiction, power and authority of the requesting judge of the probate court and shall receive the amount normally paid to a substitute judge in the requesting court, plus either actual expenses or, when service is outside the county of the judge’s residence and at the judge’s option, the per diem allowance

\(^{68}\) Id.
\(^{69}\) O.C.G.A. §15-1-9.1(e) and (h).
\(^{71}\) O.C.G.A. § 15-9-140.
for members of the General Assembly and mileage at the same rate as state employees.\textsuperscript{72} The amounts to be paid in either such case shall be paid by the governing authority from funds available for the operations of the requesting probate court.\textsuperscript{73} Although not specifically required by these Code Sections, a written designation should be recorded in the minutes of the requesting court, and the issuance of a written order of appointment would be the best practice to accomplish this designation. See Appendix A1-5 for a sample order.

\textbf{2.8.2 Formal Request for Assistance}

When the judge of the probate court is unable to preside because of disability, illness, or absence or is performing military duty, or when the judge of the probate court determines that temporary assistance is needed to conduct the business of the court, the judge of the probate court may:

(1) Make a written request for assistance to (a) the chief judge of any other court within the county, (b) a senior judge of the superior court of the county, or (c) a retired or judge emeritus of any court of the county, and the chief judge or requested judge may serve or the chief judge may assign a judge of his/her court to so serve;\textsuperscript{74} or

(2) Make a written request for assistance to the administrative judge of the judicial administrative district in which the requesting judge’s court lies; the administrative judge then designates a judge to preside as requested.

In either case, a written designation is to be recorded in the minutes of the requesting probate court, which shall identify the court in need of assistance, the county where located, the time period covered, the specific case or cases for which assignment is sought, if applicable, and the reason that assistance is needed.\textsuperscript{75} See Appendix A1-6 for sample request for assistance.

\textbf{2.8.3 Appointment of a Judge Pro Tempore or Pro Hac Vice}

Whenever a judge of the probate court is disqualified to act in any case or is unable to act because of sickness, absence, or some other reason, the judge of the probate court may

\textsuperscript{72} O.C.G.A. § 15-9-141.
\textsuperscript{73} O.C.G.A. §§15-9-140 and 141.
\textsuperscript{74} O.C.G.A. §15-1-9.1(2)
\textsuperscript{75} O.C.G.A. §15-1-9.1(f).
appoint an attorney at law who is a member of the State Bar of Georgia to exercise the jurisdiction of the probate court. However, if the inability of the judge of the probate court to act arises from any unlawful act or the accusation of an unlawful act on the part of the judge of the probate court, the judge may not appoint an attorney to act.\textsuperscript{76} Furthermore, in any matter in which the judge of the probate court is disqualified under the provisions of Code Section 15-9-13, any associate judge serving in that court is also disqualified.\textsuperscript{77}

When the appointment is for a period of time and grants authority to the appointed attorney in all judicial matters which might arise during that time, the attorney serves as \textit{Judge Pro Tempore} (for a time) or \textit{Judge Pro Tem}. When the appointment is for a certain case (cases) or matter (matters), the attorney serves as \textit{Judge Pro Hac Vice} (for this occasion or matter). A written order making the appointment is required, must be recorded, and must specify the time period or case(s) covered by the appointment.\textsuperscript{78} See Appendix A1-7 and A1-8 for sample orders.

When so serving, the attorney’s signature must be followed by the following:

“Exercising the jurisdiction of the probate court pursuant to an order of Judge \underline{_________} dated \underline{_______} as provided by O.C.G.A. §15-9-13(a).”\textsuperscript{79}

When an attorney is serving as the clerk or chief clerk of the court, the fact that the attorney signs an order which references the incorrect authority for so serving, if the service of that attorney-clerk is authorized under this Code Section, the facts that the attorney signs as “clerk” or there is a reference to another Code Section will not make the actions of the attorney void.\textsuperscript{80}

\section*{2.8.4 Service by a City or State Court Judge or by the Probate Court Clerk}

The statute allowing for the appointment of an attorney provides that, whenever a judge of the probate court is disqualified to act in any case or is unable to act because of sickness, absence, or some other reason, and the judge does not appoint an attorney at law to serve, the judge of the city or state court, as the case may be, shall exercise all the jurisdiction

\textsuperscript{76} O.C.G.A. §15-9-13(a).
\textsuperscript{77} O.C.G.A. §15-9-2.1(g).
\textsuperscript{78} Uniform Probate Court Rule 3.
\textsuperscript{79} Id.
of the judge of the probate court “in the case.” If there is no such judge or if the judge of
the city or state cannot serve, the clerk of the judge of the probate court shall exercise all the
jurisdiction of the judge of the probate court “in the case.”

In counties having a population of 96,000 or more, the chief clerk, or if there is no
chief clerk, a clerk designated by the judge, may exercise all the jurisdiction of the judge of
the probate court concerning uncontested matters. Such power may be exercised regardless
of whether the judge of the probate court is present. This power may only be exercised by a
chief clerk or designated clerk who has been a member of the State Bar of Georgia for at
least three years or has been a clerk of the probate court for at least five years.

2.9 Disqualification and Recusal
2.9.1 Disqualification in General

There are times when a judge should not or must not serve as the judge hearing or
deciding a matter before the court. Georgia law specifically provides that no judge shall:

1. Sit in any case or proceeding in which the judge is pecuniarily (monetarily)
   interested;
2. Preside, act or serve in any case or matter when such judge is related by
   consanguinity (blood) or affinity (marriage) within the sixth degree as
   computed according to the civil law to any party interested in the result of the
   case or matter;
3. Sit in any case or proceeding in which the judge he has been counsel, nor in
   which the judge has presided in any inferior court, when a ruling or decision
   of the judge is the subject of review, without the consent of all parties in
   interest.

However, no judge shall be disqualified from sitting in any case or proceeding because of the
fact that the judge is a policyholder or is related to a policyholder of any mutual insurance

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81 O.C.G.A. §15-9-13(a).
82 O.C.G.A. §15-9-13(b) As pointed out in Section 2.6, this does not appear to be in any common practice in
the state and should probably be resorted to only for emergent or urgent matters. This authority would not
apply in any circumstance where the inability of the judge of the probate court to serve arises from any unlawful
act or the accusation of any unlawful act of the part of the judge of the probate court.
83 O.C.G.A. §15-9-36(c).
company which has no capital stock. Furthermore, any judge, irrespective of a relationship to a party to the case or an interest in the case, shall be qualified to try any civil case where there is no defense filed (uncontested), except where a party to the case objects.

The Code of Judicial Conduct requires all judges to uphold the integrity and independence of the judiciary, to avoid impropriety and the appearance of impropriety, and perform the duties of the judicial office impartially and diligently. Canon 3E provides that judges shall disqualify themselves in any proceeding in which their “impartiality might reasonably be questioned,” including but not limited to instances where:

1. The judge has a personal bias or prejudice concerning a party or a party’s lawyer, or personal knowledge of disputed facts concerning the proceeding;
2. The judge has served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness to it;
3. The judge or the judge’s spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person, or any other member of the judge’s family residing in the judge’s household is (a) a party to the proceeding, or an officer, director, or trustee of a party; (b) acting as a lawyer in the proceeding; (c) known by the judge to have more than a de minimis (minor or of little consequence) interest that could be adversely affected by the proceeding; or (d) to the judge’s knowledge likely to be a material witness in the proceeding.

Nonetheless, a judge is not disqualified automatically because of an accusation of a ground of recusal, and a judge should not disqualify himself/herself whenever a legally

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85 O.C.G.A. §15-1-8. There are also certain provisions concerning superior court judges and part-time judges who, as attorneys, represented certain clients which are omitted.
87 See Appendix A1-14 for the Code of Judicial Conduct.
88 Canon 1, Code of Judicial Conduct.
89 Canon 2, Code of Judicial Conduct.
90 Canon 3, Code of Judicial Conduct.
91 Jones County, et al. v. A Mining Group, LLC et al., 285 Ga. 465 (2009). “Impartiality might reasonably be questioned means a reasonable perception of lack of impartiality by the judge, held by a fair minded and reasonable person based upon objective fact or reasonable inference,” not based upon the perception of either party or their counsel.
insufficient ground has been alleged\textsuperscript{92}, nor should a judge decline to try a matter solely because it may be unpopular or notorious.

\subsection*{2.9.2 Proceeding with Consent after Disclosure}

It is important for a judge to be keenly aware of the circumstances which require recusal or disqualification, as well as those in which disqualification is appropriate to avoid any impropriety or the appearance of impropriety. Whenever a judge is concerned that circumstances might warrant disqualification, the circumstances causing concern or the facts known to the judge should be disclosed to all parties and counsel\textsuperscript{93}; the judge should proceed in the matter only if all parties at interest and their counsel consent and agree that the judge’s ability to hear and decide the matter impartially is unaffected by the circumstances or facts.

Such agreement and consent should be “on the record.” If the proceeding is being recorded by the court or by a court reporter, the oral announcement should suffice. Otherwise, it would be best that the consent be made in writing. See Appendix A1-9 for a sample.

\subsection*{2.9.3 Voluntary Recusal}

It is always preferable for a judge whose recusal is \textit{required} to make a voluntary recusal. It is always preferable also for a judge whose recusal \textit{might be warranted} to offer to recuse after disclosure of the circumstances or facts known to the judge. In deciding when recusal might be appropriate, a judge should honestly and earnestly ask himself/herself (1) whether the judge can fairly and impartially decide the matter without favor or disfavor toward any party at interest and (2) if the judge hears the matter and rules on the issues, whether, after the fact, the judge’s impartiality in making the specific ruling could not reasonably be questioned. If the answer to either self-inquiry is “no,” the judge should voluntarily recuse himself or herself from hearing the matter.

Uniform Probate Court Rule 19 addresses the subject of recusal. Recusals may be voluntarily made by the judge or may be the subject of a formal motion for recusal. As noted above, voluntary recusal should be preferred, but a judge should not offer to recuse or grant


\textsuperscript{93} White v. Sun Trust Bank, 245 Ga. App. 828 (2000). Judge should have at least disclosed ownership of stock in the nominated corporate executor.
recusal simply because a suggestion has been made or a motion has been filed which is legally insufficient. In Section 2.7 above, it was noted that the appointment of a substitute for the judge of the probate court is statutorily permitted in certain cases of disqualification. Given those provisions and the fact that all parties at interest in a case or matter may waive a judge’s disqualification, it would seem permissible for a judge of the probate court to enter an order of voluntary recusal and appoint another judge or an attorney to hear the matter with the consent of the parties. See Appendix A1-10 for a sample order. However, if the parties do not so consent or if a motion for recusal is filed, the procedure required under Uniform Probate Court Rule 19 must be followed.

Except as stated in the preceding paragraph, for a voluntary recusal, whether on the judge’s own motion or that of one of the parties, the judge of the probate court should take no part in selecting the person assigned to hear the matter, and a state court judge for the county (presumably starting with the chief judge where there is more than one state court judge), if available, or if not, a superior court judge from the same circuit (presumably starting with the chief judge where there is more than one superior court judge) shall appoint a state court judge or an attorney with at least 2 years’ experience to sit in place of the recused judge. See Appendix A1-11 for Sample Order of Voluntary Recusal and Referral.

2.9.4 Disqualification after Motion to Recuse is Filed

If a Motion to Recuse is filed, recusal is not automatic at that point. Instead, the judge of the probate court presented with the motion first, and before taking any further action in the case, shall (1) immediately determine the timeliness of the motion and the legal sufficiency of the affidavit and (2) determine, assuming any of the facts alleged in the affidavit to be true, whether recusal is warranted. If the motion was not timely filed, the affidavit is not legally sufficient, or, even assuming the facts alleged in the affidavit to be true, recusal is not warranted, the motion should be denied, and the judge of the probate court should proceed to hear the case or matter. See Appendix A1-12 for a sample order denying motion to recuse. NOTE: A proposed modification to Uniform Probate Court Rule 19

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96 Uniform Probate Court Rule 19.
97 Uniform Probate Court Rule 19.2.
may cause this procedure to change such that the decision whether the motion is timely and the affidavit is sufficient must also be referred to another judge.

A motion to recuse may be based upon allegations of the judge’s conduct and relationships that occurred before the action was assigned to the judge. Furthermore, a recusal motion may be filed in an action which is the renewal of a previous action dismissed without prejudice, even if before the same judge as the dismissed proceeding.\footnote{98 Morgan v. Propst, --- Ga. App. --- (2009); No A09A1340; 2009 WL 3682137.}

On the other hand, if the motion was timely, the affidavit is sufficient, and recusal would be authorized if some or all of the facts alleged in the affidavit are true, the judge of the probate court must refer the motion to be heard by a state court judge for the county (presumably starting with the chief judge where there is more than one state court judge), if available, or if not, a superior court judge from the same circuit (presumably starting with the chief judge where there is more than one state court judge).\footnote{99 Id.} If the motion is sustained (granted), the judge hearing and deciding the motion shall appoint a state court judge (other than himself or herself) or an attorney with at least 2 years’ experience to sit in place of the recused judge.\footnote{100 Uniform Probate Court Rule 19.3.}

The foregoing notwithstanding, the Court of Appeals has upheld the voluntary recusal of a probate judge after a motion was filed and the assignment of the case to another judge in the circuit by the clerk of the probate court. The appellant having shown no harm resulting from the voluntary recusal, the relief he/she sought having been granted, the Court found no error.\footnote{101 Estate of Sands-Kadel, 292 Ga. App. 343 (2008).}

The Court of Appeals has also ruled that, when a judge should have been disqualified, all proceedings that occurred after the filing of the motion to recuse are “invalid and of no effect.”\footnote{102 Morgan v. Propst, supra.}

See Appendix A1-13 for an Order of Referral of Motion to Recuse.

A Motion to Recuse must be accompanied by an affidavit asserting the facts upon which the motion is founded. It must be filed no later than five days after the affiant first learned of the grounds for disqualification and no later than ten days before the hearing or trial which is the subject of the motion, unless good cause is shown for the failure to meet the
time requirements. However, in no event shall the motion be allowed to delay the trial or proceeding for which a date has already been set.\textsuperscript{103}

3. **VACANCIES IN OFFICE**

Vacancies in the office of judge of the probate court are filled in two different ways, depending upon whether the judge of the probate court has appointed a full-time Associate Judge in accordance with O.C.G.A. §15-9-2.1 or a Chief Clerk in accordance with O.C.G.A. §15-9-36.

3.1 **Vacancy in County with an Associate Judge or a Chief Clerk Serving**

In any county in which a full-time associate judge has been appointed, the person serving as the senior (longest serving) associate judge, who meets all qualifications for the office of the judge of the probate court for that county, excepting only the residency requirements, is first in line to fill the vacancy and is eligible to serve the remainder of the term of the former judge, including the power to dispose of all unfinished proceedings pursuant to Code Section 15-9-12. In order to be eligible to seek election to the next term of office, the associate judge must have become a resident of the county and thereafter will be eligible to succeed himself/herself as long as he/she remains a resident of the county.\textsuperscript{104} This new provision, enacted in 2009, indicates that the senior associate judge is “first in line to serve” and is “eligible to fill the vacancy.” Presumably, if there is such an associate judge who agrees to fill the vacancy, he/she succeeds to the office of judge of the probate court for the remainder of the term, as fully as though elected in a special election to fill the vacancy. Presumably, if there is such an associate judge who declines to serve, the vacancy will be filled in accordance with the provisions set forth below in Section 3.2. It is unclear under the new law what happens if the senior most associate judge declines to serve and there is another full-time associate judge otherwise qualified who is willing to serve. The phrase “first in line” might be held to mean that other full-time associate judges who are otherwise qualified may fill the vacancy for the remainder of the term in a declining order of length of service.

\textsuperscript{103} Uniform Probate Court Rule 19.1
\textsuperscript{104} O.C.G.A. §15-9-2.1(f).
In any county in which a chief clerk of the judge of the probate court has been appointed who meets all qualifications for the office of the judge of the probate court for that county and there is no full-time associate judge qualified under the preceding paragraph, the person serving as chief clerk at the time a vacancy occurs discharges the duties of the office of the judge of the probate court until the first day of January after the next general election occurring more than 60 days after the vacancy or for the expiration of the remaining term of office, whichever occurs first. If the next general election which is more than 60 days after the occurrence of the vacancy is not one at which county officers are elected, a special election is held at the same time as the general election to fill the remainder of the term of the office of judge of the probate court. However, if any vacancy occurs after January 1 of the last year of a term of office, the person assuming the duties of the judge of the probate court will serve for the remainder of the term.

The Chief Clerk serving in accordance with this provision does not become the judge of the probate court but discharges all the duties (exercises all the powers) of the judge. The Chief Clerk, while so serving, is to receive the same compensation, less any longevity raises, as the former judge of the probate court, to be paid in the same manner. The suggested manner of signing all official documents and orders would be: “Chief Clerk, exercising the duties of the Judge of the Probate Court of ____ County, pursuant to O.C.G.A. §15-9-11.1.”

3.2 Vacancy in County with no Chief Clerk

In counties where there is no Chief Clerk or when the Chief Clerk is not qualified to hold the office of judge of the probate court in that county, then, in descending order, the chief judge (if any and if available) of the state or city court, or the clerk of the superior court (if available), or some person appointed by the chief judge of the superior court, serves as judge of the probate court until such vacancy is filled.

Within ten days after the vacancy occurs, the person serving as judge of the probate court in accordance with these rules must order a special election to be held to fill the

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vacancy for the unexpired term, notice of which shall be published in the official organ (newspaper in which citations of the judge of the probate court are published).\textsuperscript{109}

The person serving in accordance with these provisions does serve as the judge of the probate court, exercising all powers of the judge. The compensation for the person so serving is to be set and paid by the Board of Commissioners of the county from the general funds of the county.

4. **DISCIPLINE OF JUDGES**

The Georgia Constitution provides that any judge may be removed, suspended, or otherwise disciplined for willful misconduct in office, or for willful and persistent failure to perform the duties of the office, or for habitual intemperance, or for conviction of a crime involving moral turpitude, or for conduct prejudicial to the administration of justice which brings the judicial office into disrepute. The Constitution further provides that any judge may be retired for disability which is a serious and likely permanent interference with the performance of his official duties.\textsuperscript{110} The Supreme Court is required to adopt rules of implementation, and has done so as explained below.

The Georgia Constitution also creates a Judicial Qualifications Commission with the power to discipline, remove and require involuntary retirement of judges. The composition of the Commission is set forth in the Constitution.\textsuperscript{111} Pursuant to the requirement mentioned in the preceding paragraph, the Rules of the Judicial Qualifications Commission were adopted by the Supreme Court on April 25, 1985.\textsuperscript{112} See Appendix A1-14 for the Rules of the Judicial Qualifications Commission.

There are certain initial and annual training requirements for judges of the probate courts. Failure to obtain the required training may result in a recommendation by the Judicial Qualifications Commission to the Supreme Court that the judge be removed from office.\textsuperscript{113}

Upon indictment for a felony by a grand jury of this state or the United States which felony relates to and adversely affects the administration of justice, the state Constitution

\textsuperscript{109} O.C.G.A. §15-9-11.
\textsuperscript{110} Ga. Const. art. VI, §7, ¶ 7.
\textsuperscript{111} Ga. Const. art. VI, §7, ¶ 6.
\textsuperscript{112} 254 Ga. 891 (1985).
\textsuperscript{113} O.C.G.A. §15-9-1.1(d).
provides a means by which the indicted judge may be suspended, with pay, pending the final disposition of the case or the expiration of the judge's term of office, whichever occurs first. Upon final conviction of a felony, the office is vacated immediately without further action. The vacancy must be filled in the manner provided by law for filling vacancies in such office caused by death or resignation.

The Supreme Court has the authority to regulate the conduct of judges, including conduct during judicial elections. The Supreme Court adopted the Code of Judicial Conduct effective March 15, 1984. See Appendix A1-15 for the Code of Judicial Conduct. All of the official Opinions of the Judicial Qualifications Commission, as well as other information, are available on the JQC’s new website at www.gajqc.com.

5. JUDICIAL IMMUNITY

The United States Supreme Court has held that a functional approach must be used in determining whether or not immunity attaches to a particular action, and in determining what level of immunity, if any, is appropriate. Thus, it is the nature of an act, rather than the title of the official, that determines whether immunity, and what type of immunity, is appropriate. Judicial acts must be distinguished from administrative, legislative or executive functions that judges may occasionally be required to perform. Also, judges may be immune from one type of remedy but subject to other types.

Judges have absolute immunity from liability for money damages for judicial acts which are not taken in the clear absence of jurisdiction. For this purpose, an action is a "judicial act" if it is a function normally performed by a judge where the parties had expectations that they were dealing with the judge in a judicial capacity. Judicial immunity does not apply to lawsuits which seek injunctive or declaratory relief, and a judge against whom such relief is granted may be subject to liability for attorney's fees of the prevailing party.

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With respect to administrative functions which involve discretion, such as the termination of an employee, the judge is covered by a limited, or qualified, immunity, and is protected from money damages if two requirements are met: that the act is discretionary, involving the personal deliberation and judgment of the official; and that the action is done in good faith.\textsuperscript{120} In their capacity as employers, seldom will the actions of the judge taken in connection with employer decisions be immune.

Actions which are not adjudicatory in nature and are administrative acts which do not involve discretion are referred to as “ministerial acts” and do not carry the protection of judicial immunity.\textsuperscript{121} The doctrine of judicial immunity does not reach so far as to immunize a judge from criminal conduct proscribed by an act of Congress, under 42 U.S.C. §1983 or the provisions of the Civil Rights Act.\textsuperscript{122}

The Georgia appellate courts have taken a similar approach to judicial immunity to that of the federal courts. More specifically, judicial immunity was first applied to the Ordinary in 1895.\textsuperscript{123} The Georgia courts have consistently held that judicial immunity allows judges to exercise within their lawful jurisdiction untrammeled determination without apprehension of subsequent damage suits.\textsuperscript{124} Judicial immunity is overcome in only two sets of circumstances. First, a judge is not immune from liability for non-judicial actions, \textit{i.e.}, actions not taken in the judge’s judicial capacity. Second a judge is not immune for actions, though judicial in nature, taken in complete absence of all jurisdiction.\textsuperscript{125}

Judges are immune from liability even when civil rights violations are alleged by parties in an action under the jurisdiction of the court. That is to say, the mere fact that a party alleges than a judicial action taken by a judge violated the party’s civil rights does not remove the immunity.\textsuperscript{126} However, judges may not assume immunity against civil rights violation brought by employees or other parties alleging violations for actions clearly outside

\textsuperscript{123} Paulding Co. v. Scroggins, 97 Ga. 253 (1895).
the jurisdiction of the court, actions which are ministerial only, or actions which apply in the judge’s position as an employer.

Judicial immunity is also extended to judges pro tempore or those appointed to serve as a judge on a specific or temporary basis, during the specified time of service and as to judicial acts performed during the term of service.\textsuperscript{127}

\section{PROBATE JUDGES AND THE JUDICIARY}

\subsection{The Georgia Council of Probate Judges}

The Council of Probate Court Judges of Georgia (“CPCJ”) was created in 1988 to effectuate the constitutional and statutory responsibilities conferred on it by law and to further the improvement of the probate courts and the administration of justice.\textsuperscript{128} The CPCJ is composed of the elected judges and judges emeriti (retired) from each county. The CPCJ has its own constitution and bylaws and elected officers. It is funded by state appropriation as part of the overall judiciary budget. However, the Council also raises funds through the annual dues of membership and the sale of certain materials, including this Handbook.

The CPCJ is charged with ensuring justice based on statutory responsibilities and improving the administration of probate courts. The Council provides practical resources for members; including training materials and an email list serve to foster communication and support between courts.

\textbf{Associate judges may become members of the Council but may not vote or be elected to office.}

The Council maintains an excellent and informative website at \url{www.gaprobate.org}. All Georgia Probate Court Standard Forms, as well as public service information, are available on the Web site. The website also includes a roster of members, contact information, and links to the Web sites of the individual courts, where applicable.

The Council is organized into 14 districts, which group neighboring counties geographically. One representative from each district serves on the Probate Judges Training Council. The district map is also available on the Council website.

6.2 Probate Judges Training Council

The Probate Judges Training Council was created by statute to assist and coordinate with the Institute for Continuing Judicial Education in Georgia concerning educational programs for judges of the probate courts and probate judges elect, to assist probate judges in improving the operations of the probate courts, and to perform such other duties as may be required by law or requested by the judges of the probate courts.129

The Council is comprised by one member judge of the probate court from each of the 14 districts and the President of the CPCJ. Council members serve four-year terms and are eligible for re-election.

6.3 Judicial Council of Georgia

The Judicial Council of Georgia was created by statute in 1973130 as the state level judicial agency charged with developing policies for administering and improving the courts at all levels. Twenty-four representatives of the appellate and trial courts make up the Judicial Council. The Chief Justice and the Presiding Justice of the Supreme Court serve as chairperson and vice-chairperson, respectively. The remaining membership consists of: the chief judge and another judge of the Court of Appeals; the presidents and presidents-elect of the councils of superior, state, probate, juvenile, and magistrate court judges; and the 10 superior court district administrative judges. The president of the Council of Municipal Court Judges serves as an ex-officio member.

A primary responsibility of the Judicial Council is to advise the General Assembly and Governor on the need for new superior court judgeships.

The staff of the Administrative Office of the Courts serve as staff to the Judicial Council. The full Council meets not less than twice each calendar year. The Council’s website is at www.georgiacourts.org/councils/jc.html.

6.4 Institute for Continuing Judicial Education

The Institute of Continuing Judicial Education (“ICJE”), located at the University of Georgia, is a joint creation of the Supreme Court of Georgia, the Judicial Council, and the

129 O.C.G.A. §15-9-100.
University of Georgia. Originally founded as the Georgia Judicial College in 1973, it became the ICJE in 1979. It is the judicial branch agency designated to sponsor and provide basic and continuing education to the Georgia judiciary. It also bears primary responsibility for basic training and continuing education to support personnel and volunteer agents in the judiciary and to elected officials with regard to the state’s judiciary.

ICJE holds semiannual or annual programs for the judges and clerks of the superior, state, juvenile, probate, magistrate and municipal courts and for the administrative law judges of the Office of State Administrative Hearings and the Workers Compensation Board, as well as for the administrative assistants to trial court judges and magistrates. Training and instruction are also offered to the appellate and trial court law clerks, juvenile court probation officers, and court administrators, as well as to volunteers serving the judiciary, such as jury commissioners, foster care review panelists, and lawyer disciplinary hearing officers.

The Institute’s website is at www.uga/edu/icje.

6.5 Administrative Office of the Courts

The Administrative Office of the Courts (“AOC”) was created by statute in 1973 to provide administrative support to judges and court officials. Specifically, the AOC is required to: assist judges, administrators, clerks of courts, and other court officer and employees as requested; propose improvements in the courts and in the administrative and business processes within the judiciary; compile statistical and financial data on the work of the courts; analyze data on civil cases for use by the courts and the General Assembly; recommend procedures to expedite the handling of cases; act as fiscal officer for the courts and submit judicial budget appropriation requests; and recommend ways to improve the judicial system in Georgia.¹³¹

AOC reports directly to and provides staff and support services for the Judicial Council. It also provides administrative staff and support services to special commissions established by the Supreme Court or the Judicial Council.

AOC’s website is at www.georgiacourts.org.

6.6  Report of Income to Supreme Court

Each year, the judge of the probate court (and all other judicial officers) is required to make a written report to the Georgia Supreme Court of any and all income received or earned by the judge, over and above the judge’s salary and official compensation. The report is to include “the dates, places, and nature of any activities involving personal services for which (the judge) receives compensation, and the name of the payor and the amount of compensation so received.” The report is due between January 1 and April 15, reporting the previous year’s income. A copy of the judge’s federal income tax return is sufficient compliance with this requirement. The reports and/or copies of tax returns are maintained by the Clerk of the Supreme Court under seal, available for inspection only by the Justices and members of the Judicial Qualifications Commission (“JQC”).132 There are no Opinions of the JQC defining specifically what compensation for “personal services” means. It would seem to imply that the judge is being paid for performing some activity personally but not passive income from investments. Certainly income from speaking, writing, publishing, etc. would be included.133 Additionally, gifts, bequests, favors, and loans in excess of $100 in value must be reported in the same manner as compensation.134 This would include, in the author’s opinion, any fee charged and/or gratuity received for performing marriages away from the courthouse and/or other than during normal business hours. If there is any doubt about what must be reported, the safest method of reporting is to send a copy of the federal income tax return.

In all extra-judicial activities, especially those involving income from personal services, the judge must participate only in those activities which do not otherwise violate the Code of Judicial Conduct.

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132 Canon 1, Code of Judicial Conduct.
133 For example, the compensation being paid to the author is subject to reporting.
134 Canon 5(c), Code of Judicial Conduct.
7. PROBATE JUDGES AS CONSTITUTIONAL COUNTY OFFICERS\textsuperscript{135}

The office of judge of the probate court is one of the four offices of county governmental officials known as the “constitutional officers:” probate judges, sheriffs, tax commissioners and clerks of superior court. These positions are all so designated in Art. 9, §1, ¶ 3 of the Georgia Constitution of 1983. Since these offices are designated in and created by the Constitution, these offices may be abolished only by constitutional amendment, and no individual constitutional office in a county may be abolished, except by merger of counties.\textsuperscript{136}

Relations between the county governing authority and the constitutional officers can, at times, be strained, especially over budgetary matters. It would seem best that due recognition be given always to the respective offices, their independence, and the mutual desire and obligation to serve the best interests of the voters who have elected them.

7.1 Budgetary Matters

It is the obligation of the county governing authority to provide office space in the county courthouse or some other suitable facility and to fund the reasonable expenses of the operations of the offices of the constitutional officers.\textsuperscript{137}

It is the obligation of the constitutional officer to prepare and submit to the county governing authority a budget of the estimated required expenditures for the operation of the his/her office. The budget request is subject to review and modification by the county governing authority. However, the changes made to a constitutional officer’s budget request may be judicially reviewed for abuse of discretion. The issue before the court reviewing the actions of the county governing authority concerning the budget is whether the governing authority fulfilled its duty to adopt a budget making reasonable and adequate provision for

\textsuperscript{135} Acknowledgment and appreciation are expressed to the Constitutional Officers Association of Georgia (COAG) and to Charles W. Byrd, Esq., and Kelley C. Moore, Esq., of the firm of Walker Hulbert Gray & Byrd LLP in Perry, GA, for permission to extract materials and/or paraphrase from “The Handbook for Georgia’s Superior Court Clerks, Tax Commissioners, Probate Judges and Sheriffs’” ©2008 Constitutional Officers Association of Georgia, Inc.

\textsuperscript{136} Hines v. Etheridge, 173 Ga. 870 (1931).

the personnel, equipment and supplies necessary to enable the officer to perform the duties of the office.\textsuperscript{138}

Once the budget of a constitutional officer has been set by the county governing authority, the decision how to spend the budget appropriated rests solely with the officer; the county governing authority may not dictate to a constitutional officer how the budget is to be spent. In other words, even though the budget may have been submitted to the county governing authority in a format setting forth categories of estimated expenditures or “line items,” the governing authority may not restrict the expenditures of an officer to those categories or the specific “line items.”\textsuperscript{139}

7.2 Legal Disputes and Attorneys’ Fees

In his/her official capacity, the judge of the probate court is entitled to advice from, and representation by, the county attorney. In the event of a dispute between a constitutional officer and the county governing authority over budgetary or any other legal matters, the constitutional officer is entitled to representation by an independent attorney at the expense of the county. However, the officer must first make a written request to the county governing authority for independent counsel for the officer. If that request is denied, the officer may then seek a determination by the chief judge of the superior court that an ethical conflict exists which would prevent the county attorney from representing the officer in the litigation and for authority to employ independent counsel. Additionally, the attorney’s fees for the officer’s representation must be no more than the rate which the county pays the county attorney for similar such representation or in accordance with a schedule of rates for outside counsel which has been adopted by the county governing authority.\textsuperscript{140}

7.3 Employees of the Probate Court

Unless the employees of the judge of the probate court have been enrolled in or made a part of a civil service or merit system in the county, the employees of the judge of the


\textsuperscript{140} O.C.G.A. §44-9-21(e).
probate court are not employees of the county governing authority, even though they are paid
with county funds. They are employees solely of the judge, serving at the will and pleasure
of the judge.\textsuperscript{141} However, counties are authorized to create a civil service system for county
employees, and a constitutional officer may, by written request, subject the employees of the
officer to such system.\textsuperscript{142} If the employees of the judge of the probate court have been so
enrolled, removal or dismissal of employees is subject to that system and may require a
showing of “good cause.”\textsuperscript{143} Furthermore, once the employees of a constitutional officer
have been enrolled in a civil service system, all positions of employment thereafter remain
subject to the system and may not be removed from the system.\textsuperscript{144} Therefore, it is
incumbent upon any judge of the probate court in office to strongly consider the long-
term effect of such a decision and its binding nature on all successors in office before
submitted his/her employees to a county civil service or merit system.

7.4 Constitutional Officers Association of Georgia (“COAG”)

COAG is a membership association comprised of holders of the offices of probate
judge, sheriff, tax commissioner, and clerk of superior court. Its mission is to ensure the
quality of county government through increased professionalism and cooperation among its
members. Through the association, the constitutional officers can share common goals and
interests, network with other officers from across the state, and speak with a common voice
on matters of common interests, thereby empowering the member officers to better serve the
citizens of Georgia. COAG’s website is at \url{www.coag.info}.

\textsuperscript{142} O.C.G.A. §36-1-21.
\textsuperscript{144} O.C.G.A. §36-1-21(b).
APPENDIX TO CHAPTER 1
THE PROBATE COURTS, PROBATE JUDGES,
AND THE JUDICIARY

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Important Notice

Several sample orders and forms have been included in this Appendix. These sample orders and forms have not been officially sanctioned by the Georgia Council of Probate Court Judges. They have, unless otherwise noted, been prepared by the author. They are provided solely as samples. They should be modified or adapted to the specific court for the specific purpose, with any unnecessary material being deleted and any additional material being added.

William J. Self, II
APPENDIX A1-1

History of the Probate Court in Georgia

Preface: This history, taken directly from the original Handbook for Probate Judges in Georgia, authored by Hon. Floyd Propst, former Judge of the Probate Court of Fulton County, is an excellent background of the probate courts in the State of Georgia from their foundation to their current organization.

1.1 HISTORICAL BACKGROUND

The probate court has been designated as such since 1975. Prior to 1975, it was known as the Court of Ordinary and the county officer in charge of such court was designated as the Ordinary. It seems incongruous that an office of such importance in the life of our respective communities should once have borne a name so commonplace as “Ordinary.” To the average person that name gave no clue as to the scope of its work, or to the fine contributions the occupant of the office could make to the community.

1.2. HISTORICAL BACKGROUND: ORDINARY

The word "Ordinary" is derived from the Latin word "ordinarius" meaning regular or orderly. During the epoch of the Roman Empire the officer who heard and decided, in the first instance, the more important cases in both the civil and criminal fields was known as the ordinary judge. In addition, he usually occupied the post of President or Governor of the province.

In the Medieval Church, judicial powers were vested in the Bishop to maintain law and order in his geographical territory, known as his "diocese." The ecclesiastical law, which was to a large extent based upon the laws of Rome, gave to the Bishop, when he was acting as a judicial officer, the Roman title of Judge Ordinary. It was largely true during this period that the judicial powers of the Bishop were exercised by a deputy who was frequently referred to as the surrogate. The jurisdiction exercised by the Medieval Church extended over marriages and family law in general, and over cases of testamentary and intestate succession, at least insofar as the personal estate of the decedent was concerned.

Under the modern English law the Ordinary was a judge possessing immediate jurisdiction in his own right and not by special deputation. A Bishop of a diocese, by virtue of his ecclesiastical office, had original jurisdiction over matters relating to the material as well as the spiritual welfare of his diocese. His jurisdiction as Ordinary embraced what is generally known as Ecclesiastical Law. Even at the present time a Bishop of the Church of England is sometimes referred to as the Judge Ordinary. Although Bishops of the Church of England have surrendered many of their judicial functions to persons whose duty is to interpret the law, a Bishop still retains, by reason of his position as Judge Ordinary, the authority to decide certain legal rights connected with the church. Many of these same powers, such as the right to decide whether a divorced person may be married by the clergy in the church, are still exercised by the Bishop in the Episcopal Church in America, where the title of "Ordinary" continues to survive.

When the English colony of Georgia was established, it was only logical that the law then in force in England should become an integral part of the internal government of the colony. Thus, the office of Ordinary is perhaps the oldest and one of the most important in the governmental system of the counties of Georgia. The commission of the English king appointing the Royal Governors of Georgia not only named them as Commanders-in-Chief of the armed forces but also designated them as Ordinaries of the Colony. The Royal Governors usually did not act themselves but designated Registers of Probate to act for them. Since it was held by the Royal Governors, the office has had several changes in title as it evolved through the years.

1.3 HISTORICAL BACKGROUND: INFERIOR COURT

The Constitution of 1798, under Article 3, Section 4, contains the origin of what was known as the inferior court. This section reads as follows: "Justices of the inferior courts shall be appointed by the general assembly and be commissioned by the governor, and shall hold their commissions during good behavior, or as long as they respectively reside in the county for which they shall be appointed ... ." Thus, the lawmakers apparently intended that these Justices, like the Bishops of the Church of England, should hold their offices for life. Section 6 of the same Article of this Constitution delegates to these Justices the duties of the Ordinary: "The powers of a court of ordinary, or register of probates, shall be vested in the inferior courts of each county from whose decision there may be an appeal to the superior court .... ."

An Act to carry into effect the above cited Section 6 was passed February 16, 1799. In part it reads as follows:

[T]he inferior courts in each county shall have jurisdiction and authority to hear and determine all causes, matters, suits, and controversies, testamentary, which shall be brought before them, touching the proof of wills; and shall examine and take the proof of wills, grant probate thereof and shall hear and determine the right of administration of estates of persons dying intestate, and ... do all other things touching the granting letters testamentary and letters of administration, according to law and right ... .

In addition to jurisdiction over testate and intestate succession, the Judges of the Inferior Courts were given jurisdiction as a court of law and authority over the administration of county affairs.\(^\text{146}\)

The Act of 1799 also provided for the appointment of a clerk who was given authority to issue marriage licenses and temporary letters of administration. These powers are still exercised today by the clerks of the probate court.\(^\text{147}\)

From time to time different legislative acts further defined and clarified the duties of the Judge of the Inferior Court sitting for Ordinary purposes, and by the Acts of 1826 there was a requirement that fiduciary bonds be made payable to the "Inferior Court" sitting as a Court of Ordinary, which represents a return to the previous designation as a Court of Ordinary.


Until 1851, Justices of the Inferior Court acted as Judges of the Court of Ordinary. By the Act of 1851, their duties were transferred to the recreated position of Judge of the Court of Ordinary, or Ordinary. The Act of 1851 provided,

[T]he several Courts established in pursuance of the provisions [of the 1851] amended Constitution shall be known by the name and style of the Court of Ordinary, and ... the person who shall be or may have been elected in pursuance of provisions of said amended Constitution, shall be known as the Ordinary, and ... all laws now of force which apply to the Justices of the Inferior Court sitting as the Court of Ordinary [shall] be and the same are hereby continued and made applicable to the proceedings of the said Courts of Ordinary and to the Ordinary of said Court.

Thus, by the Act of 1851, the Court of Ordinary reached its full development as a court in our judicial system from an historical standpoint and has remained relatively unchanged as to organization since that time.

1.4 HISTORICAL BACKGROUND: COUNTY MATTERS

The Constitution of 1798 gave the inferior courts jurisdiction over county affairs. This was changed in the Constitution of 1868 which provided, "The courts of ordinary shall have such powers in relation to roads, bridges, ferries, public buildings, paupers, county officers, county funds, and taxes, and other matters as shall be conferred on them by law."

By virtue of the development of the system of county commissioners, the judge of probate court gradually lost jurisdiction over county administrative matters. It is difficult to state precisely when this occurred because it varied from county to county. Boards of county commissioners were established by special Act in many counties before the Constitution of 1877, which authorized the General Assembly to appoint commissioners of roads and revenues in any county, without regard to statewide uniformity. The terms "commissioners of roads and revenues" and "county commissioners" are synonymous.148

Code Sections 36-5-1 through 36-5-8 ("Government by judge of the probate court") were repealed in 1987 because they had become obsolete. Before authority over county administrative affairs was transferred to the county commissioner or commissioners, the judge of the probate court had original and exclusive jurisdiction over the following subject matters pertaining to county affairs:

1. Directing and controlling all the property of the county as he might deem expedient according to law.
2. Levying a general tax for general county purposes and a special tax for particular county purposes.
3. Establishing, altering, or abolishing all roads, bridges and ferries in conformity to law.
4. Establishing and changing militia districts.
5. Supplying, by appointment, all vacancies in county offices, and ordering elections to fill them.
6. Examining, settling and allowing all claims against the county.

7. Examining and auditing the accounts of all officers having the care, management, keeping, collection, or duty to disburse money belonging to the county or appropriated for its use and benefit, and bringing them to a settlement.

8. Making such rules and regulations for the support of the poor of the county, for county police and patrol, and for the promotion of health and quarantine, as authorized by law or not inconsistent with any law.

9. Regulating peddling and fixing the cost of licenses to peddle.  

The judge of the probate court also had statutory authority:

1. To sit at any time as a court for county purposes and for the exercise of any power the judge possessed as a quasi-corporation, contra-distinguished from his power as a court.

2. To appoint any person to discharge any trust authorized by his powers, where no other person was designated by law, and to regulate such person's compensation, and to take bond and security.

3. To approve all official bonds required of him by law and sent to him by the Governor with the dedimus, to qualify such officers, and to deliver to them their commissions.

4. To exercise such other powers as are granted by law or are indispensable to his jurisdiction.

As seen in prior section concerning jurisdiction and elsewhere in this book (particularly in Chapter 20 concerning miscellaneous duties), vestiges of some of these powers remain with the judge of the probate court. The Act creating the county commissioners of a particular county, or other special Acts based upon population, may provide additional limitations upon the authority of the judge of the probate court of a particular county. Therefore, each judge of the probate court should check the legislation in this area which affects his county so the judge will know the exact limit within which he is authorized to act.

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APPENDIX A1-2

IN THE PROBATE COURT OF ________ COUNTY
STATE OF GEORGIA

IN RE: __________________________ : DOCKET NO.
(CHIEF) CLERK OF PROBATE COURT :

ORDER APPOINTING (CHIEF) CLERK

Pursuant to the authority granted in O.C.G.A. §15-9-36,
IT IS ORDERED that [NAME] is hereby appointed (Chief) Clerk of the Probate Court of ________ County, effective on this date, to serve until further Order of this Court.

[If applicable in counties having a population of 96,000 or greater]
It further appearing to the Court that [NAME] ( ) has been admitted to the practice of law in Georgia for not less than three years or ( ) has been a Clerk in this Court for more than five years and that ________ County has a population in excess of 96,000,

IT IS FURTHER ORDERED that [NAME] is hereby designated and granted the authority, pursuant to the provisions of O.C.G.A. §15-9-36(c)(1), to exercise all the jurisdiction of the judge of this Court concerning uncontested matters.

SO ORDERED on [DATE].

_________________________________
[NAME] JUDGE
PROBATE COURT OF ___ COUNTY

OATH OF CLERK

I, [NAME], do solemnly swear or affirm that I will well and truly perform all the duties required of me as (Chief) Clerk of the Probate Court of ________ County, fairly and impartially and in full accordance with the laws of this State, to the best of my ability.
So help me, God.

_________________________________
[NAME] (CHIEF) CLERK
PROBATE COURT OF ___ COUNTY

Sworn to and subscribed before
me on [DATE].

_______________________________
Judge, Probate Court of _____ County

_______________________________
FILED

_______________________________
(Dep.) CLERK
APPENDIX A1-3

IN THE PROBATE COURT OF ___________ COUNTY
STATE OF GEORGIA

IN RE: [Judge's Name] : DOCKET NO: :

REQUEST FOR JUDICIAL ASSISTANCE
AND ORDER OF
APPOINTMENT OF JUDGE PRO TEMPORE

It appearing to the Court that the undersigned Judge of this Court will be absent from the Court (or requires the assistance of another Judge to dispose of matters pending before the Court) on [Date(s)], and

The undersigned having requested assistance in that regard from Hon. [Name] of the Court of _________ County, pursuant to O.C.G.A. §15-1-9.1(1), and

It appearing that the said Hon. [Name], being qualified to serve in this Court, has agreed to serve by appointment as Judge Pro Tempore.

IT IS, THEREFORE, ORDERED that Hon. [Name and Court] be, and he/she is hereby, appointed as Judge Pro Tempore of the Probate Court of _________ County to preside over all matters coming before this Court on [Date(s)], with full authority in the premises.

SO ORDERED, on [Date].

[Judge's Name]
Judge, Probate Court of _________ County

__________________
Filed

__________________
(Dep.) CLERK
APPENDIX A1-4

IN THE PROBATE COURT OF ___________ COUNTY
STATE OF GEORGIA

IN RE: \[NAME\] : DOCKET NO. ___________

ORDER APPOINTING ASSOCIATE JUDGE OF THE PROBATE COURT

Pursuant to the authority granted under O.C.G.A. §15-9-2.1 and with the approval of the Board of Commissioners of this county, as the governing authority of the county, there has been created in this Court the position of Associate Judge of the Probate Court.

It appearing to the Court that [NAME] has all of the qualifications which are required to serve as the elected judge of this Court, except the residency requirement) and is, therefore, eligible for appointment under O.C.G.A. §15-9-2.1(c)(1), and

It appearing to the Court that the said [NAME] has agreed to serve as an Associate Judge of this Court on a (full-time) (part-time) basis, with the compensation for such service being fixed by the undersigned and having been approved by the governing authority of the county, which compensation has been accepted by the said [NAME],

IT IS, THEREFORE, ORDERED that [NAME] be and is hereby appointed as Associate Judge of the Probate Court of _________ County, upon the taking of the oath prescribed in O.C.G.A. §15-9-2.1(d) and the posting of a surety bond for his/her service as such Associate Judge in the amount of $_________. The Associate Judge shall serve solely at the pleasure of the undersigned, limited, however, to the term of the undersigned as the elected Judge of this Court.

IT IS FURTHER ORDERED that the herein appointed Associate Judge shall be vested with all authority, jurisdiction and power of the elected Judge of this Court in all matters, pursuant to O.C.G.A. §15-9-2.1(b), and all judgments made and entered by the Associate Judge shall have the same force, effect, and finality as if made and entered by the elected Judge of this Court.

IT IS FURTHER ORDERED that the said Associate Judge shall not, during the term of service as such, (engage in the practice of law outside the service as Associate Judge) (shall not engage, directly or indirectly, in the practice of law in any manner in any case, proceeding, or matter of any kind in this Court or in any other court in any case, proceeding, or other matters of which this Court has pending jurisdiction or has jurisdiction.

IT IS FURTHER ORDERED that the Clerk of this Court shall record this Order, the oath, and the bond of the herein appointed Associate Judge on the Minutes of the Court.

IT IS FURTHER ORDERED that the Clerk of this Court shall mail a certified copy of this Order to the Council of Probate Court Judges, and the Associate Judge herein appointed shall become a non-voting member of the Council but shall not be eligible to serve as an officer of same.
SO ORDERED on ________________.

__________________________ JUDGE
PROBATE COURT OF _____ COUNTY

OATH OF ASSOCIATE JUDGE

I do swear (or affirm) that I will well and faithfully discharge the duties of the Associate Judge of the Probate Court of _____ County during my continuance in office, according to the law, to the best of my knowledge and ability, without favor or affection to any party. So help me God.

I do further swear (or affirm) that I am not the holder of any unaccounted for money due this State or any political subdivision or authority thereof; that I am not the holder of any office of trust under the government of the United States, any other state, or any foreign state which I am prohibited by law from holding; that I am otherwise qualified to hold the office according to the Constitution and laws of Georgia; and that I will support the Constitution of the United States and of this State. So help me God.

Sworn to and subscribed before me on ________________.

__________________________
Judge/Clerk
Probate Court of _____ County

Filed

(Dep.) CLERK
APPENDIX A1-5

IN THE PROBATE COURT OF__________ COUNTY
STATE OF GEORGIA

IN RE: [Judge's Name] : DOCKET NO:
[Judge's Name] :

REQUEST FOR JUDICIAL ASSISTANCE
AND ORDER APPOINTING A
SENIOR JUDGE AS JUDGE PRO TEMPORE

It appearing to the Court that the undersigned Judge of this Court will be absent from the Court (or requires the assistance of another Judge to dispose of matters pending before the Court) on [Date(s)], and

The undersigned having requested assistance in that regard from Hon. [Name], a Senior Judge of the Probate Courts, pursuant to O.C.G.A. §15-9-141(b), and

It appearing that the said Hon. [Name], being qualified to serve in this Court, has agreed to serve by appointment as Judge Pro Tempore.

IT IS, THEREFORE, ORDERED that Hon. [Name], a Senior Judge of the Probate Courts, be, and is hereby, appointed as Judge Pro Tempore of the Probate Court of County to preside over all matters coming before this Court on [Date(s)], with full authority in the premises.

SO ORDERED, on [Date].

[Judge's Name]
Judge, Probate Court of _________ County

Filed

(Dep.) CLERK
IN THE PROBATE COURT OF ______________ COUNTY
STATE OF GEORGIA

IN RE: [Judge's Name] : DOCKET NO: [Judge's Name]

REQUEST FOR JUDICIAL ASSISTANCE
AND
APPOINTMENT OF JUDGE PRO TEMPORE

COMES NOW, [Judge's Name], Judge of the Probate Court, who will be absent from the Court and unable to serve in matters coming before the Court on [Date(s)], and, pursuant to O.C.G.A. §15-1-9.1(b)(2), hereby requests the assistance of a Judge of the [Court] to serve as Judge Pro Tempore in the Probate Court of ______________ County, and

It appearing that Hon. [Name and Court], being qualified, has agreed to serve by appointment as Judge Pro Tempore of the Probate Court of ______________ County, it is requested that he/she be so appointed.

Submitted this [Date].

___________________________________
[Judge's Name], JUDGE,
Probate Court, ______________ County

IT IS ORDERED that Hon. [Name and Court] be, and he/she is hereby, appointed as Judge Pro Tempore of the Probate Court of ______________ County to preside over all matters coming before the Court on [Date(s)], with full authority in the premises.

SO ORDERED, on [Date].

___________________________________
[Name of Chief Judge], CHIEF JUDGE
[Court]

_______________________
Filed

_______________________
(Dep.) CLERK
APPENDIX A1-7

IN THE PROBATE COURT OF ____________ COUNTY
STATE OF GEORGIA

IN RE: [Judge's Name] : DOCKET NO:
[Judge's Name] :

APPOINTMENT OF JUDGE PRO TEMPORE

It appearing to the Court that the undersigned Judge of this Court, will be absent from the Court and unable to serve in matters coming before the Court on/during [dates] and;

It appearing to the Court that ________________ is a competent and disinterested attorney at law who is a member of the State Bar of Georgia and who is duly admitted to the Bar of this Court, thereby being qualified to serve by appointment as Judge Pro Tempore of the Probate Court of ____________ County,

IT IS THEREFORE, ORDERED that ________________ be, and she/he is hereby, appointed as Judge Pro Tempore of the Probate Court of ________ County to preside over all matters coming before the Court on/during ________, with full authority in the premises.

SO ORDERED, on ________________.

____________________________________
[Judge's Name] JUDGE,
PROBATE COURT, ________ COUNTY

Filed

_____________________
(Dep.)CLERK
APPENDIX A1-8

IN THE PROBATE COURT OF _____________ COUNTY
STATE OF GEORGIA

IN RE: [Judge's Name] : DOCKET NO:
[Judge's Name] :

APPOINTMENT OF JUDGE PRO HAC VICE

It appearing to the Court that the undersigned Judge of this Court is unable to serve in
matter of In Re: Estate of [Estate Name], Docket No. _______ and

It appearing to the Court that ________________ is a competent and disinterested
attorney at law who is a member of the State Bar of Georgia and who is duly admitted to the
Bar of this Court, thereby being qualified to serve by appointment as Judge Pro Hac Vice of
the Probate Court of ____________ County,

IT IS THEREFORE, ORDERED that ________________ be, and she/he is hereby,
appointed as Judge Pro Hac Vice of the Probate Court of _________ County to preside over
the above referenced matter, with full authority in the premises.

SO ORDERED, on ________________.

____________________________________
[Judge's Name] JUDGE,
PROBATE COURT, _______ COUNTY

Filed

(Dep.)CLERK
APPENDIX A1-9

IN THE PROBATE COURT OF _______________ COUNTY
STATE OF GEORGIA

IN RE: : DOCKET NO. ____________
[Case Caption]: :
:

WAIVER OF ANY POTENTIAL CONFLICT OF INTEREST OR CAUSE FOR RECUSAL OF JUDGE

The Judge of the Probate Court of ________ County has disclosed to the parties and their counsel the following facts, which might, under certain circumstances, present a potential or perceived conflict of interest or grounds for recusal:

The undersigned counsel for all parties (and each pro se party) hereby voluntarily waive any disqualification of the Judge of the Probate Court of ________ County and specifically agree that he/she may hear and decide the matters pending before the Court and all subsequent matters which may arise in this case, until counsel for a party or any pro se party otherwise advises the Court in writing. All parties stipulate and agree that they do not find the facts disclosed to be of sufficient concern or impact as to warrant disqualification and agree and accept that the Court will render all rulings and decisions without regard to those facts.

Dated: _________________.

Name: ____________________
Counsel for ____________________
___ or Pro Se

Name: ____________________
Counsel for ____________________
___ or Pro Se

Name: ____________________
Counsel for ____________________
___ or Pro Se

FILED: _______________
Date ____________________
(Dep.) CLERK
APPENDIX A1-10

IN THE PROBATE COURT OF ____________ COUNTY
STATE OF GEORGIA

IN RE: : DOCKET NO.

ORDER OF VOLUNTARY RECUSAL AND
APPOINTMENT OF JUDGE PRO HAC VICE

On his own motion, the undersigned Judge of the Probate Court of __________ County does hereby voluntarily recuse himself from hearing and/or ruling upon the pending matters in dispute in the above-styled case)(the following specific matters presently pending for which the undersigned has recused himself:).

With the consent of the parties, by and through counsel, the undersigned does hereby appoint the Honorable ____________________________, Judge of the ____________ Court of County (or an Attorney at law), as Judge Pro Hac Vice, to hear, determine and rule upon (the pending matters in dispute)(the specific matters set forth in the foregoing Order) with regard only to the above-styled case. This appointment shall terminate upon the disposition of (the presently pending matters)(the specific matters set forth above), unless additional proceedings are filed in which the undersigned also recuses himself, in which event such additional proceedings shall also be heard and determined by the said Judge Pro Hac Vice.

SO ORDERED on ________________.

__________________________________

[NAME] JUDGE
PROBATE COURT OF _____ COUNTY

Acknowledged and consented to by:

________________________
Attorney for Petitioner

________________________
Attorney for Caveator/Respondent

________________________
Filed
APPENDIX A1-11

IN THE PROBATE COURT OF __________ COUNTY
STATE OF GEORGIA

IN RE: DOCKET NO.

ORDER OF VOLUNTARY RECUSAL AND REFERRAL
FOR THE APPOINTMENT OF JUDGE PRO HAC VICE

On his own motion, the undersigned Judge of the Probate Court of ________ County does hereby voluntarily recuse himself from hearing and/or ruling upon (the pending matters in dispute in the above-styled case)(the following specific matters presently pending for which the undersigned has recused himself:).

Further, the undersigned does hereby refer to Hon. _____________________, Judge of the State/Superior Court of ________ County, the matter of the appointment of a Judge Pro Hac Vice to hear, determine and rule upon (the pending matters in dispute)(the specific matters set forth above) with regard only to the above-styled case.

SO ORDERED on ____________.

__________________________________
[NAME] JUDGE
PROBATE COURT OF _____ COUNTY

ORDER OF APPOINTMENT
OF JUDGE PRO HAC VICE

The foregoing Order of Voluntary Recusal having been referred to the undersigned for the appointment of a Judge Pro Hac Vice to hear, determine and rule upon (the pending matters in dispute)(the specific matters set forth in the foregoing Order) with regard only to the above-styled case,

IT IS ORDERED that the Honorable ________________________, Judge of the Court of ___________ County (or an Attorney at law), be and is hereby appointed as Judge Pro Hac Vice, to hear, determine and rule upon (the pending matters in dispute)(the specific
matters set forth in the foregoing Order) with regard only to the above-styled case. This appointment shall terminate upon the disposition of (the presently pending matters in dispute)(the specific matters set forth above), unless otherwise ordered by this Court.

This Order shall be recorded in the records of the above-styled case in the Probate Court of __________ County.

SO ORDERED on ________________.

________________________, JUDGE
STATE/SUPERIOR COURT
OF __________ COUNTY

Filed

________________________
(Dep.) CLERK
APPENDIX A1-12

IN THE PROBATE COURT OF ___________ COUNTY
STATE OF GEORGIA

IN RE: : DOCKET NO.

ORDER REFERRING MOTION TO RECUSE
AND STAYING PROCEEDINGS

________________________ having filed a Motion to Recuse [Name], Judge of the Probate Court of __________ County, in the above-styled matter, and the same having been read and considered,

IT IS ORDERED that the issue of recusal, as it applies to (the pending matters in dispute)(the following specific matters presently pending which are the subject of the Motion to Recuse: ), is hereby referred to the Honorable __________________________, Judge of the State Court of __________ County for determination.

IT IS FURTHER ORDERED that all matters presently pending before the Court which require an order or ruling from the Court, excepting only the Motion to Recuse hereby referred, are hereby stayed pending the determination of the Motion to Recuse.

SO ORDERED on ________.

________________________
[NAME] JUDGE
PROBATE COURT OF _____ COUNTY

ORDER SETTING HEARING ON
MOTION TO RECUSE

The foregoing Order Referring Motion to Recuse having been received and having been read and considered,

IT IS ORDERED that the said Motion to Recuse shall be heard by the undersigned
on [Date] at ___M. in [Chambers][Courtroom __ of the State/Superior Court of County].

SO ORDERED on ________________.

___________________________________

[NAME]               JUDGE
STATE/SUPERIOR COURT OF
_________ COUNTY
ORDER DENYING MOTION TO RECUSE

A Motion to Recuse the undersigned Judge of the Probate Court of _______ County having been filed by ___________ in the above-styled case, and the same having been read and considered, and it appearing to the Court that the motion was not timely filed in accordance with Uniform Probate Court Rule 19 and/or that the allegations made in support of the Motion, even if assumed to be true, would not warrant recusal of the undersigned with regard to the matters pending before the Court in the above-styled case,

IT IS, THEREUPON, ORDERED that the Motion to Recuse be, and the same is hereby, DENIED by the Court.

SO ORDERED on ____________________.

[NAME] ___________________ JUDGE
PROBATE COURT OF _____ COUNTY

Filed __________________

(Dep.) CLERK
APPENDIX A1-14

Georgia Code of Judicial Conduct

Preamble

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system.

Every judge should strive to maintain the dignity appropriate to the judicial office. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law. As a result, judges should be held to a higher standard, and should aspire to conduct themselves with the dignity accorded their esteemed position.

The Code of Judicial Conduct is intended to establish standards for ethical conduct of judges. It consists of broad statements called Canons, specific rules set forth in Sections under each Canon, a Terminology Section, an Application Section and Commentary. The text of the Canons and the Sections, including the Terminology and Application Sections, is authoritative. The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons and Sections. The Commentary is not intended as a statement of additional rules. When the text uses "shall" or "shall not," it is intended to impose binding obligations the violation of which can result in disciplinary action. When "should" or "should not" is used, the text is intended as advisory and as a statement of what is or is not appropriate conduct, but not as a binding rule under which a judge may be disciplined. When "may" is used, it denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific proscriptions.

The Canons and Sections are rules of reason. They should be applied consistent with constitutional requirements, statutes, other court rules and decisional law, as well as in the context of all relevant circumstances. The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions, or on judges' First Amendment rights of freedom of speech and association.

The Code is designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through disciplinary agencies. It is not designed for nor intended as a basis for civil liability or criminal prosecution. Furthermore, the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding.

The text of the Canons and Sections is intended to govern conduct of judges and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to
be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system. The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards. The mandatory provisions of the Canons and Sections describe the basic minimal ethical requirements of judicial conduct. Judges and candidates should strive to achieve the highest ethical standards, even if not required by this Code. As an example, a judge or candidate is permitted under Canon 7, Section B, to solicit campaign funds directly from potential donors. The Commentary, however, makes clear that the judge or candidate who wishes to exceed the minimal ethical requirements would choose to set up a campaign committee to raise and solicit contributions. The Code is intended to state only basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.

Terms explained below are noted with an asterisk (*) in the Sections where they appear. In addition, the Sections where terms appear are referred to after the explanation of each term below.

"Appropriate Authority" denotes the authority with responsibility for initiation of disciplinary process with respect to the violation to be reported. See Sections 3D(1) and 3D(2).

"Candidate." A candidate is a person seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she appoints and/or forms a campaign committee, makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, or authorizes solicitation or acceptance of contributions or support. The term "candidate" has the same meaning when applied to a judge seeking election or appointment to non-judicial office. See Preamble and Sections 7A(1), 7A(2), 7B(1), 7B(2) and 7C.

"Comment" in connection with a case refers to valuative statements judging the professional wisdom of specific lawyering tactics or the legal correctness of particular court decisions. In contrast, it does not mean the giving of generally informative explanations to describe litigation factors including the prima facie legal elements of case types pending before the courts, legal concepts such as burden of proof and duty of persuasion or principles such as innocent until proven guilty and knowing waiver of constitutional rights, variable realities illustrated by hypothetical factual patterns of aggravating or mitigating conduct, procedural phases of unfolding lawsuits, the social policy goals behind the law subject to application in various cases, as well as competing theories about what the law should be. See Section 3B(9).

"Court personnel" does not include the lawyers in a proceeding before a judge. See Sections 3B(7)(c) and 3B(9).
"De minimis" denotes an insignificant interest that could not raise reasonable question as to a judge's impartiality. See Section 3E(1)(c).

"Economic interest" denotes ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party, except that:
(i) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;
(ii) service by a judge as an officer, director, advisor or other active participant in an educational, religious, charitable, fraternal or civic organization, or service by a judge's spouse, parent or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;
(iii) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association, is not an economic interest in the organization unless a proceeding pending or impending before the judge could substantially affect the value of the interest;
(iv) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities. See Section 3E(2).

"Fiduciary" includes such relationships as executor, administrator, trustee, and guardian. See Sections 3E(2) and 5D.
"Invidious discrimination" is any action by an organization that characterizes some immutable individual trait such as a person's race, gender or national origin, as well as religion, as odious or as signifying inferiority, which therefore is used to justify arbitrary exclusion of persons possessing those traits from membership, position or participation in the organization. See Section 2C.

"Knowingly", "knowledge", "known" or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. See Sections 3D(1), 3D(2) and 3E(1).

"Law" denotes court rules as well as statutes, constitutional provisions and decisional law. See Sections 2A, 3A, 3B(2), 3B(7), 4A, 4B, 4C, 5C(4), 5F and 5G.

"Member of the judge's family residing in the judge's household" denotes any relative of the judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resided in the judge's household. See Sections 3E(1)(c) and 5C(4).

"Non-public information" denotes information that, by law, is not available to the public. Non-public information may include but is not limited to: information that is sealed by statute or court order, impounded or communicated in camera; and information offered in grand jury proceedings, pre-sentencing reports, dependency cases or psychiatric reports. See Section 3B(11).
"Political organization" denotes a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office. See Section 7A(1).

"Public election." This term includes primary and general elections; it includes partisan elections, nonpartisan elections and may include (as context demands) retention elections. See Sections 7A(1), 7A(2), 7B(1), and 7B(2).

"Require." The rules prescribing that a judge "require" certain conduct of others are, like all of the rules in this Code, rules of reason. The use of the term "require" in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control. See Sections 3B(3), 3B(4), 3B(6), 3B(9) and 3C(2).

"Third degree of relationship." The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece. See Section 3E(1)(c).

Canon 1 Judges Shall Uphold the Integrity and Independence of the Judiciary.

An independent and honorable judiciary is indispensable to justice in our society. Judges shall participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe such standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Commentary: Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

Canon 2 Judges Shall Avoid Impropriety and the Appearance of Impropriety in All Their Activities.

A. Judges shall respect and comply with the law* and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Commentary: Public confidence in the judiciary is eroded by irresponsible or improper conduct of judges. Judges must avoid all impropriety and appearance of impropriety. Judges must expect to be the subject of constant public scrutiny. Judges must therefore accept restrictions on their conduct that might be viewed as burdensome by the ordinary citizen, and they should do so freely and willingly. The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a
judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired. See also, Commentary under Section 2C.

B. Judges shall not allow their family, social, political or other relationships to influence their judicial conduct or judgment. Judges shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor should they convey or permit others to convey the impression that they are in a special position to influence them. Judges should not testify voluntarily as character witnesses.

Commentary: Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and improper use of the prestige of office in all of their activities. For example, it would be improper for a judge to allude to his or her judgeship to gain a personal advantage such as deferential treatment when stopped by a police officer for a traffic offense. Similarly, judicial letterhead must not be used for conducting a judge's personal business.

A judge must avoid lending the prestige of judicial office for the advancement of the private interests of others. For example, a judge must not use the judge's position to gain advantage in a civil suit involving a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judgee's office. As to the acceptance of awards. See Section 5C (4)(a) and Commentary. Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation. However, a judge must not initiate the communication of information to a sentencing judge or probation or corrections officer, but may provide to such person information for the record in response to a formal request.

Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for a judgeship. See also Canon 7, regarding use of a judge's name in political activities. A judge must not testify voluntarily as a character witness, because to do so may lend the prestige of the judicial office in support of a party for whom the judge testifies. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may, however, testify when properly summoned. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

C. Judges shall not hold membership in any organization that practices invidious
Commentary: Membership by a judge in an organization that practices invidious discrimination may give rise to perceptions that the judge's impartiality is impaired. Section 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but rather depends on how the organization selects members and other relevant factors, such as whether the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or whether it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex or national origin persons who would otherwise be admitted to membership. See New York State Club Ass'n, Inc. v. City of New York, 108 S. Ct. 2225, 101 L.Ed.2d1 (1988); Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U. S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d. 474 (1987); Roberts v. United State Jaycees, 468 U. S. 609, 104 S. Ct. 3244, 82 L.Ed.2d.462 (1984). Ultimately, each judge must determine in the judge's own conscience whether an organization of which the judge is a member practices invidious discrimination.

Canon 3 Judges Shall Perform the Duties of Their Office Impartially and Diligently

A. Judicial Duties in General.

The judicial duties of judges take precedence over all their other activities. Their judicial duties include all the duties of their offices prescribed by law*. In the performance of these duties, the following standards apply:

B. Adjudicative Responsibilities.

(1) Judges shall hear and decide matters assigned to them, except those in which they are disqualified.

(2) Judges should be faithful to the law* and maintain professional competence in it. Judges shall not be swayed by partisan interests, public clamor, or fear of criticism.

(3) Judges shall require* order and decorum in proceedings over which they preside.

(4) Judges shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom they deal in their official capacity, and shall require* similar conduct of lawyers, and of staffs, court officials, and others subject to their direction and control.

Commentary: The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and business-like while being patient and deliberate.
(5) Judges shall perform judicial duties without bias or prejudice. Judges shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status, and shall not permit staff, court officials and others subject to judicial direction and control to do so.

Commentary: Judges must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to their direction and control. Judges must perform judicial duties impartially and fairly. Judges who manifest bias on any basis in a proceeding impair the fairness of the proceeding and bring the judiciary into disrepute. Facial expression, body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. Judges must be alert to avoid behavior that may be perceived as prejudicial.

(6) Judges shall require* lawyers in proceedings before the court to refrain from manifesting, by words and conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status, against parties, witnesses, counsel or others. This Section, 3B(6), does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status, or other similar factors, are issues in the proceeding.

(7) Judges shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law*. Judges shall not initiate or consider ex parte communications, or consider other communications made to them outside the presence of the parties concerning a pending or impending proceeding, except that:

(a) where circumstances require, ex parte communications for scheduling, where administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) Judges may obtain the advice of a disinterested expert on the law* applicable to a proceeding before the court, if they give notice to the parties of the person consulted and the substance of the advice, and afford the parties reasonable opportunity to respond.

(c) Judges may consult with court personnel* whose function is to aid them in carrying out their adjudicative responsibilities, or with other judges.

(d) Judges may, with the consent of the parties, confer separately with the parties or their lawyers in an effort to mediate or settle matters before the court.
(e) Judges may initiate or consider any ex parte communications when expressly authorized by law* to do so.

Commentary: The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge. Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if they party is unrepresented, the party, who is to be present or to whom notice is given. An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief amicus curiae. Certain ex parte communication is approved by Section 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, judges must discourage ex parte communication and allow it only if all the criteria stated in Section 3B(7) are clearly met. Judges must disclose to all parties all ex parte communications described in Section 3B(7)(a) and 3B(7)(b) regarding a proceeding pending or impending before them. Judges must not independently investigate facts in a case and must consider only the evidence presented. Judges may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions. Judges must take reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on their staff. If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.

(8) Judges shall dispose of all judicial matters fairly, promptly, and efficiently.

Commentary: In disposing of matters promptly, efficiently and fairly, judges must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. Judges should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. Judges should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by courts.

(a) The obligation of a judge to dispose of matters promptly and efficiently must not take precedence over the judge's obligation to dispose of matters fairly and with patience.

Commentary: Prompt disposition of the court's business requires judges to devote adequate time to their duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with them to that end.

(9) Judges shall not, while a proceeding is pending or impending in any court, make any
public comment* that might reasonably be expected to affect its outcome or impair its fairness or make any non-public comment that might substantially interfere with a fair trial or hearing. Judges shall require* similar abstention on the part of court personnel* subject to their direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

Commentary: The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. This Section does not prohibit judges from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where a judge is a litigant in an official capacity, the judge must not comment publicly.

(10) Judges shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

Commentary: Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial.

(11) Judges shall not disclose or use, for any purpose unrelated to judicial duties, non-public information* acquired in a judicial capacity.

C. Administrative Responsibilities

(1) Judges shall diligently discharge their administrative responsibilities without bias or prejudice, maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) Judges shall require* their staffs, court officials and others subject to their direction and control to observe the standards of fidelity and diligence that apply to the judges and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) Judges with supervisory authority for judicial performance of other judges should take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) Judges shall not make unnecessary appointments. Judges shall exercise the power of appointment impartially and on the basis of merit. Judges shall avoid nepotism and favoritism. Judges shall not approve compensation of appointees beyond the fair value of services rendered.

Commentary: Appointees of judges include assigned counsel, officials such as referees, commissioners, special masters, receivers, guardians and personnel such as clerks, secretaries, and bailiffs. Consent by the parties to an appointment or an award of
compensation does not relieve the judge of the obligation prescribed by Section 3C(4).

D. Disciplinary Responsibilities

(1) Judges who receive information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. Judges having knowledge* that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the appropriate authority*.

(2) Judges who receive information indicating a substantial likelihood that a lawyer has committed a violation of the Standards of Conduct of the State Bar of Georgia should take appropriate action. Judges having knowledge* that a lawyer has committed a violation of the Standards of Conduct of the State Bar of Georgia that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority*.

(3) Acts of judges, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1) and 3D(2) are part of their judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against these judges.

Commentary: Appropriate action may include direct communication with the judge or lawyer who has committed the violation, or other direct action if available, and reporting the violation to the appropriate authority or other agency or body. Section 3D(1) requires judges to inform the Judicial Qualifications Commission of any other judge's violation of the Code of Judicial Conduct, if the violation raises a substantial question of fitness for office and if the violation is actually known to the reporting judge. Section 3D(2) also requires judges to report to the State Bar of Georgia any violation by a lawyer of the Standards of Conduct, if the violation raises a substantial question of the lawyer's fitness as a lawyer and, again, if the violation is actually known to the reporting judge.

E. Disqualification

(1) Judges shall disqualify themselves in any proceeding in which their impartiality might reasonably be questioned, including but not limited to instances where:

Commentary: Under this rule, judges are subject to disqualification whenever their impartiality might reasonably be questioned, regardless of whether any of the specific rules in Section 3E(1) apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that firm appeared, unless the disqualification was waived by the parties after disclosure by the judge. Judges should disclose on the record information that the court believes the parties or their lawyers might consider relevant to the question of disqualification, even if they believe there is no legal basis for disqualification. The rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a
judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as possible.

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter of controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

Commentary: A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b); judges formerly employed by a governmental agency, however, should disqualify themselves in a proceeding if their impartiality might reasonably be questioned because of such association.

(c) the judge or the judge's spouse, or a person within the third degree of relationship* to either of them, or the spouse of such a person, or any other member of the judge's family residing in the judge's household*:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known* by the judge to have a more than de minimis* interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge* likely to be a material witness in the proceeding.

Commentary: The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Section 3E(1)(c)(iii) requires the judge's disqualification.

(2) Judges shall keep informed about their personal and fiduciary* economic interests*, and make a reasonable effort to keep informed about the personal financial interests of their spouses and minor children residing in their households.

F. Remittal of Disqualification.

Judges disqualified by the terms of Section 3E may disclose on the record the basis of their disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any
basis for disqualification other that personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

**Commentary:** A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently to the court, judges must not solicit, seek or hear comment on possible remittal or waiver of the disqualification, unless the lawyers jointly propose remittal after consultation as provided in Section 3F. A party may act through counsel, if counsel represents on the record that the party has been consulted and consents. As a practical matter, judges may wish to have all parties and their lawyers sign a remittal agreement.

**CANON 4 Judges May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice.**

Judges, subject to the proper performance of their judicial duties, may not engage in the following quasi-judicial activities, if in so doing they cast doubt on their capacity to decide impartially any issue that may come before them;

A. Judges may speak, write, lecture, teach and participate in other activities concerning the law*, the legal system, and the administration of justice.

B. Judges may appear at public hearings before an executive or legislative body or official on matters concerning the law*, the legal system, and the administration of justice, and they may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice.

C. Judges may serve as members, officers, or directors of an organization or governmental agency devoted to the improvement of the law*, the legal system, or the administration of justice. They may assist such organizations in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. They may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

**Commentary:** As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, judges are encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law.

Non quasi-judicial, or non law-related, extra-judicial activities are governed by Canon 5.
CANON 5 Judges Shall Regulate Their Extra-Judicial Activities to Minimize the Risk of Conflict with Their Judicial Duties.

A. Avocational Activities.

Judges may not engage in such avocational activities as detract from the dignity of their office or interfere with the performance of their judicial duties.

Commentary: Complete separation of judges from extra-judicial activities is neither possible nor wise; they should not become isolated from the society in which they live.

B. Civic and Charitable Activities.

Judges may not participate in civic and charitable activities that reflect adversely upon their impartiality or interfere with the performance of their judicial duties. Judges may serve as officers, directors, trustees, or non-legal advisors of educational, religious, charitable, fraternal, or civic organizations not conducted for the economic or political advantage of their members, subject to the following limitations:

(1) Judges shall not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before them or will be regularly engaged in adversary proceedings in any court.

Commentary: The changing nature of some organizations and of their relationship to the law makes it necessary for judges regularly to re-examine the activities of each organization with which they are affiliated to determine if it is proper for them to continue their relationship with it. For example, in many jurisdictions charitable hospitals are now more frequently in court than in the past. Similarly, the boards of some legal aid organizations now make policy decisions that may have political significance or imply commitment to causes that may come before the courts for adjudication.

(2) Judges shall not solicit funds for any educational, religious, charitable, fraternal or civic organization, or use or permit the use of the prestige of their office for that purpose, but they may be listed as officers, directors, or trustees of such organizations. A judge should not be a speaker or the guest of honor at any organization's fund raising event, but may attend such events.

(3) Judges shall not give investment advice to such an organization, but they may serve on its board of directors or trustees even though it has the responsibility for approving investment decisions.

Commentary: A judge's participation in an organization devoted to quasi-judicial, or law-related, extra-judicial activities is governed by Canon 4.

C. Financial Activities.
(1) Judges should refrain from financial and business dealings with lawyers, litigants, and others that tend to reflect adversely on their impartiality, interfere with the proper performance of their judicial duties, or exploit their judicial positions.

(2) Subject to the requirement of subsection (1), judges may hold and manage investments, including real estate and engage in other remunerative activity including the operation of a business.

(3) Judges should manage their investments and other financial interests to minimize the number of cases in which they are disqualified. As soon as they can do so without serious financial detriment they should divest themselves of investments and other financial interests that might require frequent disqualification.

(4) Neither judges nor members of their families residing in their households* should accept a substantial gift, bequest, favor or loan from anyone except as follows:
   (a) judges may accept gifts incident to a public testimonial to them; books supplied by publishers on a complimentary basis for official use; or invitations to judges and their spouses to attend bar-related functions or activities devoted to the improvement of the law*, the legal system, or the administration of justice;
   (b) judges or members of their families residing in their households may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges, or a scholarship or fellowship awarded on the same terms applied to other applicants.
   (c) judges or members of their families residing in their households may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before them, and if its value exceeds $100, the judges report it in the same manner as they report compensation in Canon 6C.

Commentary: This subsection does not apply to contributions to a judge's campaign for judicial office, a matter governed by Canon 7.

5) Judges are not required by this Code to disclose their income, debts, or investments, except as provided in this Canon and Canons 3 and 6.

Commentary: Canon 3 requires judges to disqualify themselves in any proceeding in which they have a financial interest; Canon 5 requires judges to refrain from financial activities that might interfere with the impartial performance of their judicial duties; Canon 6 requires them to report all compensation they receive for activities involving personal services outside their judicial office. Judges have the rights of an ordinary citizen, including the right to privacy in their financial affairs, except to the extent that limitations thereon are required to safeguard the proper performance of their duties. Owning and receiving income from investments do not as such affect the performance of a judge's duties.
(6) Information acquired by judges in their judicial capacity should not be used or disclosed by them in financial dealings or for any purpose not related to their judicial duties.

D. Fiduciary* Activities.

Judges should not serve as executors, administrators, trustees, guardians, or other fiduciaries, except for the estates, trusts, or persons of members of their families and then only if such service will not interfere with the proper performance of their judicial duties. "Member of their families" include a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. As family fiduciaries, judges are subject to the following restrictions:

(1) They should not serve if it is likely that as fiduciaries, they will be engaged in proceedings that would ordinarily come before them, or if the estates, trusts, or wards become involved in adversary proceedings in the court on which they serve or one under its appellate jurisdiction.

(2) While acting as fiduciaries, judges are subject to the same restrictions on financial activities that apply to them in their personal capacities.

Commentary: Judge's obligations under this Canon and their obligations as fiduciaries may come into conflict. For example, a judge should resign as trustee if it would result in detriment to the trust to divest it of holdings whose retention would place the judge in violation of Canon 5C(3).

E. Arbitration.

Judges shall not act as arbitrators or mediators for compensation. This prohibition does not apply to senior judges who serve as judges.

F. Practice of Law.

Judges shall not practice law, unless allowed by law*.

G. Extra-judicial Appointments.

A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law*, the legal system, or the administration of justice, if acceptance of such appointment might reasonably cast doubt upon the judge's impartiality or demean the judge's office.

Commentary: Valuable services have been rendered in the past to the states and the nation by judges appointed by the executive to undertake important extra-judicial assignments. The appropriateness of conferring these assignments on judges must be reassessed, however, in light of the demands on judicial manpower created by today's crowded dockets and the need
to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not be expected or permitted to accept governmental appointments that could interfere with the effectiveness and independence of the judiciary.

CANON 6 Judges Should Regularly File Reports of Compensation Received for Quasi-Judicial and Extra-Judicial Related Activities.

Judges may not receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, if the source of such payments gives the appearance of influencing the judge in his judicial duties or otherwise gives the appearance of impropriety. Such compensation is subject to the following restrictions:

A. Compensation.

Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.

B. Expense Reimbursement.

Expense reimbursement should be limited to the actual cost of travel, food, and lodging and other necessary expense reasonably incurred by the judge and, where appropriate to the occasion, by their spouses. Any payment in excess of such an amount is compensation.

C. Reports.

Except as hereinafter provided to the contrary, full-time judges should report the dates, places, and nature of any activities involving personal services for which they received compensation, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. Judge's reports for each calendar year should be filed between January first and April fifteenth of the following year in the office of the Clerk of the Supreme Court of Georgia. A copy of a judge's federal income tax return shall be considered a sufficient compliance with this paragraph. Such report or tax return shall be filed under seal and shall be available for inspection only by the Justice of the Supreme Court of Georgia and the members of the Judicial Qualifications Commission.

CANON 7 Judges Shall Refrain from Political Activity Inappropriate to Their Judicial Office.

A. Political Conduct in General.

(1) A judge or a candidate* for public election* to judicial office shall not:
(a) act or hold himself or herself out as a leader or hold any office in a political organization*;

(b) make speeches for a political organization or candidate or publicly endorse a candidate for public office;

**Commentary:** A candidate does not publicly endorse another candidate for public office by having his name on the same ticket.

(c) solicit funds for or pay an assessment or make a contribution to a political organization, or purchase tickets for political party dinners, or other functions, except as authorized in subsection A(2).

(2) Judges holding an office filled by public election* between competing candidates*, or candidates for such office, may attend political gatherings and speak to such gatherings on their own behalf when they are candidates for election or re-election.

**B. Campaign Conduct**

(1) Candidates*, including an incumbent judge, for any judicial office that is filled by public election* between competing candidates:

(a) shall prohibit officials or employees subject to their direction or control from doing for them what they are prohibited from doing under this Canon and shall not allow any other person to do for them what they are prohibited from doing under this Canon;

(b) shall not make statements that commit the candidate with respect to issues likely to come before the court;

**Commentary:** This Canon does not prohibit a judge or a candidate from publicly stating his or her personal views on disputed issues, see Republican Party V. White, 536 U.S. 765 (2002). To ensure that voters understand a judge's duty to uphold the constitution and laws of Georgia where the law differs from his or her personal belief, however, judges and candidates are encouraged to emphasize in any public statement their duty to uphold the law regardless of their personal views.

(c) shall not use or participate in the publication of a false statement of fact concerning themselves or their candidacies, or concerning any opposing candidate or candidacy, with knowledge of the statement's falsity or with reckless disregard for the statement's truth or falsity;

**Commentary:** The determination of whether a candidate knows of falsity or recklessly disregards the truth or falsity of his or her public communication is an objective one, from the viewpoint of a "reasonable attorney", using the standard of "objective malice". See In re Chmura, 608 N.W. 2d 31 (Mich. 2000)
(d) shall be responsible for the content of any statement or advertisement published or communicated in any medium by a campaign committee if the candidate knew of or recklessly disregarded the content of said statement or advertisement prior to its release;

(e) and except where a statement or advertisement is published or communicated by a third party, shall be responsible for reviewing and approving the content of his or her statements and advertisements, and those of his or her campaign committee. Failure to do so will not be a defense to a complaint for violation of this Canon.

(2) Candidates*, including an incumbent judge, for a judicial office that is filled by public election* between competing candidates, may personally solicit campaign contributions and publicly stated support. Candidates, including incumbent judges, should not use or permit the use of campaign contributions for the private benefit of themselves or members of their families.

Commentary: Although judges and judicial candidates are free to personally solicit campaign contributions and publicly stated support, see Weaver Bonner, 309 F 3d 1312 (11th Cir. 2002), they are encouraged to establish campaign committees of responsible persons to secure and manage the expenditure of funds for their campaigns and to obtain public statements of support of their candidacies. The use of campaign committees is encouraged because they may better maintain campaign decorum and reduce campaign activity that may cause requests for recusal or the appearance of partisanship with respect to issues or the parties which require recusal.

C. Applicability

(a) This Canon generally applies to all incumbent judges and judicial candidates*. A successful candidate, whether or not an incumbent, is subject to judicial discipline by the Judicial Qualifications Commission for his or her campaign conduct.

(b) A lawyer who is a candidate* for judicial office shall comply with all provisions of the Code of Judicial Conduct applicable to candidates* for judicial office. An unsuccessful lawyer candidate* is subject to discipline for campaign conduct by the State Bar of Georgia pursuant to applicable standards of the State Bar of Georgia, and the Judicial Qualifications Commission shall immediately report any such alleged conduct to the office of the General Counsel of the State Bar of Georgia for such action as may be appropriate under applicable bar rules.

(c) An unsuccessful non-lawyer candidate* is subject to discipline for campaign misconduct by the Judicial Qualifications Commission, and in addition to any other sanctions authorized by the Rules of the Judicial Qualifications Commission, the Commission, after full hearing, is authorized to recommend that such individual be barred from seeking any elective or appointive judicial office in this State for a period not to exceed 10 years.

Application of the Code of Judicial Conduct
Anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions, including an officer such as an administrative law judge of an executive branch agency or of the Board of Worker’s Compensation, an associate judge, special master, or magistrate, or any person who is a candidate for any such office is a judge for the purpose of this Code. All judges shall comply with this Code except as provided below.

A. Part-time judges.

A part-time judge is a judge who serves on a continuing or periodic basis, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge. Part-time judges:

(1) are not required to comply with Canon 5D [fiduciary activities], 5E [arbitration], 5F [practice of law], and 5G [extra-judicial appointments], and are not required to comply with Canon 6C [annual financial reporting].

(2) should not practice law in the court on which they serve, or in any court subject to the appellate jurisdiction of the court on which they serve, or act as lawyers in proceedings in which they have served as judges or in any proceeding related thereto.

B. Judge Pro Tempore.

A judge pro tempore is a person who is appointed to act temporarily as a judge.

(1) While acting as such, a judge pro tempore is not required to comply with Canon 5C(3) [financial activities], 5D [fiduciary activities], 5E [arbitration and mediation], 5F [practice of law], and 5G [extra-judicial appointments], and Canon 6C [annual financial reporting].

2) Persons who have been judges pro tempore should not act as lawyers in proceedings in which they have served as judges or in other proceeding related thereto.

C. Time for Compliance.

A person to whom this Code becomes applicable shall comply immediately with all provisions of this Code except Sections 5C(1), 5C(2), 5C(3) [personal and family financial activities] and 5D [fiduciary activities], and shall comply with these Sections as soon as reasonably possible and shall do so in any event within the period of one year.

Commentary: If serving as a fiduciary when selected as judge, a new judge may, notwithstanding the prohibitions in Section 5D, continue to serve, but only for that period of time necessary to avoid serious adverse consequences to the beneficiary of the fiduciary relationship, and in no event longer than one year. Similarly, if engaged at the time of judicial selection in a business activity, a new judge may, not withstanding the prohibitions in Section 5C(1), 5C(2), and 5C(3), continue in that activity for a reasonable period, but in no event longer than one year.
D. In addition to the foregoing, the Commission shall have continuing jurisdiction over individuals to whom this Code is applicable regarding allegations of misconduct occurring during such individual’s service as an officer of a judicial system if a complaint is filed no later than one (1) year following service of such judicial officer.

This Code shall become effective January 7, 2004.
DEFINITION OF SANCTIONS

The Constitution of the State of Georgia of 1983 provides that "The Supreme Court shall adopt rules of implementation" for discipline, removal, and involuntary retirement of judges (OCGA Article VI, Section VII, Paragraph VII). The following are rules adopted by the Supreme Court governing the functions of the Judicial Qualifications Commission:

The following working definition for disciplinary sanctions shall apply in all proceedings of the Commission, both formal and informal:

(a) **Admonition:** A private communication reminding a judge of ethical responsibilities and giving a gentle or friendly warning to avoid future misconduct or inappropriate practices. An admonition may be used to give authoritative advice and encouragement or to express disapproval of behavior that suggests the appearance of impropriety even though it meets minimum standards of judicial conduct.

(b) **Private Reprimand:** A private communication that declares a judge's conduct unacceptable under one of the grounds for judicial discipline but not so serious as to merit a public sanction.

(c) **Public Reprimand:** A public communication administered by a judicial officer which declares a judge's conduct unacceptable under one of the grounds for judicial discipline but not so serious as to warrant a censure.

(d) **Censure:** A public declaration by the Supreme Court that a judge is guilty of misconduct that does not require removal from office.

(e) **Suspension:** A decision by the Supreme Court to suspend a judge from office temporarily, with or without pay, for serious misconduct that merits more than a censure but less than removal. This sanction is flexible, and there are no restrictions on the length of a suspension.

(f) **Removal:** A decision by the Supreme court to remove a judge permanently from office for serious misconduct.

(g) **Retirement:** A decision by the Supreme Court to retire a judge for a disability that seriously interferes with the performance of judicial duties that is or is likely to become permanent.
RULE 1 Members and Their Terms

(a) The power to discipline, remove and cause involuntary retirement of judges is vested in the Judicial Qualifications Commission, which consists of seven members, as follows:

(1) Two judges of any court of record selected by the Supreme Court;
(2) Three members of the State Bar of Georgia, who have been active status members of the State Bar for at least ten years, and who shall be elected by the Board of Governors of the State Bar; and
(3) Two citizens, neither of whom shall be members of the State Bar, who shall be appointed by the Governor (Article VI, Section VII, Paragraph VI, Constitution of Georgia of 1983).

(b) All members of the Commission shall serve for terms of four years each and until their successors are elected or appointed and are qualified. Whenever any member ceases to hold the office or to possess the qualifications which entitle the member to be appointed a member, the member’s membership shall terminate, and the appointing authority shall select a successor for the unexpired term. No member of the Commission shall receive any compensation for services, but shall be allowed necessary expenses for travel, board and lodging incurred in the performance of Commission duties. No member of the Commission, except judges, shall hold any other public office or be eligible for appointment to a State judicial office while holding membership on the Commission. No member shall hold office in any political party or organization. No act of the Commission shall be valid unless concurred in by a majority of its membership.

(c) A vacancy shall occur when a Commission member becomes unable to continue service for any reason. An appointment to fill a vacancy for the duration of the unexpired term shall be made by the appropriate authority. If a vacancy is not filled at the end of sixty (60) days, the Commission shall appoint from the category to be represented a member who shall serve until such time as an appointment shall be made by the appropriate authority.

(d) A temporary vacancy shall occur when a Commission member becomes unable to attend a formal hearing for any reason. The Commission is authorized but not required to appoint a former member from the category to substitute at such formal hearing and subsequent action related to the hearing in lieu of such non-serving member.

RULE 2 Officers and Their Duties

(a) The Commission shall select from its members a Chairperson, a Vice Chairperson, and such other officers as the Commission may consider proper and helpful in carrying out its functions, who shall serve at the pleasure of the Commission. A member may be elected to more than one office.

(b) The Chairperson shall preside at all general meetings of the Commission as well as at formal hearings concerning the conduct or disability of a judge. If the Chairperson is not a
lawyer, the Chairperson shall appoint a member of the Commission who is a lawyer to preside at any hearing held by the Commission. The Chairperson shall be responsible for the custody and safekeeping of all the records of the Commission, shall promptly furnish to members of the Commission copies of all complaints, notices, answers and other documents filed in connection with proceedings before the Commission, and shall perform such other duties as are indicated in these rules or as are customarily performed by a Chairperson. The Chairperson shall also annually make a report to the Supreme Court of the actions of the Commission, but shall not set forth therein the name of or otherwise identify a judge with respect to matters which are confidential under the provisions of Rule 20.

(c) In the event the Chairperson is absent, or is otherwise unable to attend a meeting or to perform the duties of office at a particular time, those duties shall be performed by the Vice Chairperson, and in the absence of the Vice Chairperson, by a member of the Commission designated by those present.

(d) The Director or, if the Director is absent, such member of the Commission as the Chairperson shall designate, shall have the duty of recording in the minute book, as a permanent record of the Commission, the action of the Commission at each meeting.

(e) The Commission may, at its discretion, designate a Director who shall serve at the pleasure of the Commission and shall have such duties, powers and authority as may be, from time to time, fixed, determined or delegated by the Commission. The Director may be authorized by the Commission to issue subpoenas on its behalf.

(f) Notwithstanding the foregoing provisions, the Chairperson, with the concurrence of a majority of the Commission, may at any time designate any judicial member of the Commission to preside at any formal hearing held by the Commission. Any such designation shall be made by written order signed by the Chairperson or the Director.

**RULE 3 Meetings**

(a) The Chairperson may, and upon the request of three members shall, call a meeting of the Commission. The Chairperson shall give reasonable notice to each member by telephone or other means of the time and place of the meeting.

(b) Decisions by the Commission to conduct an investigation of a judge, order a judge to submit to a physical examination, proceed against a person for contempt for failing to respond to a subpoena of the Commission, issue a public statement, institute contempt proceedings against a person for violation of the confidentiality provisions of the rules, hold or not to hold a formal hearing, hear additional evidence, make a report to the Supreme Court recommending removal, other discipline or retirement of a judge, or deciding after a formal hearing not to make such a report, shall be made at a formal meeting of the Commission. Decisions with respect to other matters may be arrived at through communications between the members of the Commission, but a report of such action shall be made by the
Chairperson at the next meeting of the Commission and entered in the minutes of that meeting.

(c) Four members of the Commission shall constitute a quorum for the transaction of business at any formal meeting or for the conduct of a formal hearing, and if a quorum is present at a meeting, the vote of a majority of those in attendance shall be considered the official action of the Commission, except that a vote of a majority of the members of the Commission shall be required for a recommendation of discipline to the Supreme Court.

RULE 4 Complaints and Investigations

(a) The Commission shall require that all complaints shall be made to it in writing and the Commission, when it considers it appropriate, may require that the same be verified. A complaint shall not be a prerequisite to action by the Commission, but the Commission may act on its own motion in those cases where the Commission considers it appropriate.

(b) Upon receiving a complaint or otherwise receiving information indicating that a judge may have been guilty of willful misconduct in office, or willful and persistent failure to perform the duties of a judge, or habitual intemperance, or conduct prejudicial to the administration of justice which brings the judicial office into disrepute, or that a judge may have a disability that seriously interferes with the performance of the judge's duties which is or is likely to become permanent, the Commission may make an initial inquiry of the judge for such written comments with respect to the matters involved as the judge may wish to make; and, with or without making such initial inquiry, and with or without notice or other information being given to the judge, as the Commission may consider best, the Commission may conduct an investigation of the conduct or condition of the judge for the purpose of determining whether formal proceedings should be instituted and a hearing held. However, prior to any determination that a formal hearing will be held, the judge shall be sent a copy of the complaint or a synopsis of the matters to be or which have been investigated and the judge shall thereupon be given reasonable opportunity to make such statement to the Commission as the judge considers desirable. Such statement may be made, as the judge may elect, personally or by counsel, verbally or in writing, and may or may not be under oath. In exercising this right, the judge shall not have the right to call witnesses nor to confront nor cross-examine the person making the complaint or any person interviewed by the Commission or its duly authorized representative. If, after being notified by the Commission, the judge does not respond within a reasonable time or within the time fixed by the Commission, the right to make such statement shall thereupon terminate. In making an investigation, the Commission may issue subpoenas for witnesses to appear before the Commission's representative for the purpose of making a sworn statement and may likewise issue subpoenas for the production of books, papers and other evidentiary matters which are pertinent to the inquiry.

(c) Whenever the Commission reaches the conclusion that a complaint fails to state, or the facts developed upon an initial inquiry to the judge or an investigation fail to show, any reason for the institution of disciplinary proceedings, the Commission shall so advise the
complainant. The Commission shall also so notify the judge, except that with respect to complaints which are rejected because they fail to state any grounds for disciplinary proceedings, the Commission may, but is not required to, advise the judge thereof.

(d) After receipt of a complaint or of information indicating that a judge may have been guilty of conduct which might warrant discipline, or that a judge may be disabled, the Commission, before voting to hold a formal hearing, may delegate to one or more of its members the authority and responsibility to personally and confidentially confer with the judge subject to the inquiry, and to make informal recommendations to the judge concerning the subject matter of the inquiry and a satisfactory disposition thereof; and if the judge agrees to the Commission's suggested disposition, the matter may be disposed of on the basis of the agreement reached. The Commission shall file a report of the disposition in the Supreme Court.

(e) The foregoing shall not be construed to mean that the Commission may not at any time entertain and act upon a proposal from a judge for disposition of any matter pending before the Commission concerning such a judge, provided that if such proposal is made after notice of formal hearing, and is found acceptable to the Commission, a report thereof shall be filed in the Supreme Court and such report shall not be considered confidential.

(f) At any time after receipt of a complaint or otherwise receiving information indicating that a judge may have been guilty of conduct which, while insufficient to warrant the institution of formal proceedings, nevertheless warrants sanctions, the Commission may informally: (i) admonish and/or reprimand a judge; (ii) direct professional counseling and assistance for a judge; (iii) impose conditions on a judge's future conduct or instruct a judge to make specific changes in particular matters of conduct; or (iv) adjust the complaint by any other appropriate means consistent with these rules.

RULE 5  Institution of Formal Proceedings – Notice – Judge’s Answer

(a) When after receiving a complaint or otherwise obtaining information concerning the conduct or physical or mental condition of a judge, the Commission has made such investigation of the complaint or information as the Commission considers needful and proper, and the judge has been given the opportunity to make a statement to the Commission as stated in Rule 4(b), the Commission concludes that a formal hearing should be held, the Commission shall issue, as promptly as possible, a written notice to the judge advising the judge of the institution of formal proceedings to inquire into the charges against the judge. The proceedings shall be entitled: "Before the Commission on Judicial Qualifications, Inquiry Concerning Judge _________________."

(b) The notice shall specify the charges against the judge with sufficient fullness to enable the judge to understand the nature thereof and shall advise the judge of the right to file a written answer to the charges; and a copy of such notice shall be filed in the Supreme Court.

(c) Within thirty (30) days after service of the notice of formal proceedings, the judge shall
file with the Commission an original and six (6) copies of a verified answer. The notice of formal proceedings and the answer shall constitute the pleadings. No further pleadings shall be filed, except by way of amendment as provided for in Rule 9.

**RULE 6  Hearings Before Commission or a Special Master**

Upon the filing of an answer or upon expiration of the time for its filing, the Commission shall promptly order a hearing to be held before it concerning the removal, other discipline or retirement of the judge, or the Commission may request the Supreme Court to appoint a Special Master to hear and take evidence in such matter and to report thereon to the Commission. The Commission shall set a time and place for the hearing, and shall give notice thereof to the judge at least twenty (20) days before the date thereof.

**RULE 7 Conduct of Hearing**

(a) At the time and place set for the hearing, the Commission or the Special Master may proceed with the hearing whether or not the judge has filed an answer or appears at the hearing.

(b) The proceedings at the hearing shall be reported by a qualified reporter.

(c) At the hearing before the Commission or a Special Master appointed by the Supreme Court, legal evidence only shall be received, and oral evidence shall be taken on oath or affirmation.

(d) The Chairperson or presiding member of the Commission, if the hearing is held before the Commission, or the Special Master appointed to conduct the hearing, shall administer oaths or affirmations to witnesses, rule on the admissibility of evidence, and otherwise direct the manner or order of proceedings as a judge of a court of record.

(e) The Rules of Evidence applicable to civil cases shall apply at all hearings before the Commission or the Special Master, and the standard of proof shall be clear and convincing evidence. In all such hearings, the burden of proof shall be upon the counsel for the Commission. 29

**RULE 8  Rights of Judge in Connection with Hearing**

(a) Within fifteen (15) days after such notice of formal hearing has been mailed to or otherwise served upon the judge, it shall be the duty of the Commission to furnish to the judge as of the time of such notice the names of all persons and their addresses who have been interviewed by the Commission or its representative in investigating the charges set out in the notice of a formal hearing, as well as a copy or transcript of all statements of testimony, whether signed or unsigned, of any person so interviewed in connection with such
charges and copies of all documents, writings, papers, records or other evidentiary material relevant to such charges which have been obtained by the Commission or its representative and reviewed by the Commission.

(b) If, after furnishing such information and prior to the date of the hearing, the Commission or its representative shall interview any other person or persons in connection with such charges, the Commission shall promptly inform the judge or the judge's counsel of the name and address of such other person or persons.

(c) If a witness is discovered or interviewed or any documentary or other tangible evidence is discovered or comes into the possession of the Commission or its representative after the hearing has begun, the Commission shall promptly inform the judge or the judge's counsel of the name and address of such witness and promptly furnish a copy of such documentary or other tangible evidence to the judge or the judge's counsel.

(d) The foregoing provisions shall not be construed as requiring that the Commission furnish to the judge any communications between members of the Commission or its representative or any other records of the Commission.

(e) In either of the situations described in Paragraphs (b) and (c), the Commission, upon compliance with the requirements of such paragraphs, shall be authorized to hear the testimony of any such witness or to admit into evidence any documentary or tangible evidence. However, the Commission may take such action with respect to the hearing either by way of postponement, recess or adjournment of the hearing to some future date as, upon a specific motion made by the judge therefore, may seem proper for the protection of the judge in the adequate presentation of a defense.

(f) At the hearing the judge shall have the right and reasonable opportunity to defend against the charges by the introduction of evidence; to be represented by counsel; to examine and cross-examine witnesses; and to have subpoenas issued for attendance of witnesses to testify or for the production of books, papers and other evidentiary matters.

(g) When a transcript of testimony has been prepared at the expense of the Commission, a copy thereof, upon request, shall be available for use by the judge and counsel in connection with the proceedings, or the judge may arrange to procure a copy at his or her expense. The judge shall have the right, without any order or approval, to have all or any portion of the testimony in the proceedings transcribed at the judge's expense.

(h) If, in a proceeding before the Commission, the Commission should be in doubt as to the competency of the judge, the Commission may appoint a guardian ad litem or take such other action as the Commission may consider appropriate.

**RULE 9 Amendments to Notice and Answer**

The Special Master, at any time prior to the conclusion of the hearing, or the Commission, at
any time prior to its determination, may allow or require amendments to the notice of formal proceedings and may allow amendments to the answer. The notice may be amended to conform to proof or set forth additional facts and charges whether occurring before or after the commencement of the hearing. In case an amendment is allowed to the notice of formal hearing, the judge shall be given reasonable time both to answer the amendment and to prepare and present a defense against the matters set forth therein.

RULE 10 Report of Special Master

(a) Within twenty (20) days after the conclusion of a hearing before a Special Master and the Master's receipt of a transcript of the evidence, the Special Master shall prepare and transmit to the Commission a report which shall contain a brief statement of the proceedings, findings of fact, any conclusions of law with respect to the issues presented by the notice of formal hearing and the answer thereto, or if there be no answer, findings of fact and any conclusions of law with respect to the allegations in the notice of formal hearing. The report shall also contain the Special Master's recommendation as to whether the Commission shall or shall not recommend discipline. The report shall be accompanied by a transcript of the evidence.

(b) Upon receiving the report of the Special Master, the Commission shall promptly serve a copy on the judge.

RULE 11 Objections and Briefs

(a) Within fifteen (15) days after a copy of the Special Master's report is served on the judge, the judge may file with the Commission an original and six (6) copies of a statement of objections to the findings of fact and conclusions of law contained in the report of the Special Master and may file an original and six (6) copies of a brief in support thereof.

(b) If the judge does not contest the findings of fact or conclusions of law as set forth in the Special Master's report, the judge may, nevertheless, within such time file an original and six (6) copies of a brief in support of a claim that such findings and conclusions are not sufficient to justify removal, other discipline or retirement.

(c) In making a report, the Commission, when there is a report of a Special Master, may accept, modify or reject any or all of the findings of fact and conclusions of law of the Special Master as well as the Special Master's recommendation to the Commission that it recommend or not recommend discipline.

(d) If a formal hearing is held by the Commission, the judge may, within a reasonable time after the termination of the hearing as may be fixed by the Commission, file an original and six (6) copies of a brief with the Commission in support of the judge's claim that the Commission should not recommend removal, other discipline or retirement.
RULE 12 Additional Evidence

In a proceeding pending before it, the Commission may, at any time after a formal hearing is held, order an additional hearing for the taking of additional evidence; provided that where a Special Master has been appointed, additional evidence shall be taken by the Special Master upon his or her own motion or by order of the Commission, and no such hearing for the taking of additional evidence shall be held by the Commission itself until after the Special Master has made a report. After the Special Master has made a report, the Commission may take additional evidence, or direct the Special Master to do so and report findings of fact and conclusions of law with respect thereto. The judge shall be given ten (10) days notice of the hearing to take additional evidence.

RULE 13 Extension of Time

The Chairperson of the Commission may extend the periods not to exceed thirty (30) days in the aggregate for filing an answer, for the commencement of a hearing before the Commission, for the transmittal of the Special Master’s Report to the Commission, and for filing a statement of objections to the report of the Special Master, and a Special Master may similarly extend the time for the commencement of a hearing. The Commission may grant such additional extension of time as it may consider proper.

RULE 14 Recommendation of the Commission of Removal, Other Discipline, or Retirement

(a) The Commission may make a report recommending to the Supreme Court that a judge be (1) removed from office; (2) removed from office and prohibited from thereafter holding judicial office; (3) suspended from office for a specified period of time together with such other conditions and restrictions as the Commission may consider proper; (4) censured; (5) reprimanded; (6) retired; or (7) subjected to such other discipline as may seem to the Commission appropriate. In the case of a recommendation of censure, the same, if approved by the Supreme Court, shall be administered in open Court. If the Commission recommends a reprimand and such recommendation is approved by the Court, the same shall be administered by the Court at such place and in such manner as the Court may consider proper.

(b) The report shall be signed by the members of the Commission concurring therein and shall indicate if any member or members dissent from the report. Any member who does not agree with the report of the majority of the Commission may file a written dissent or special concurrence which shall be made a part of the record. The report shall be filed in the Supreme Court and shall be accompanied by the Special Master's report, if any, and a transcript of the evidence. A copy of the report as filed shall be promptly served upon the judge and evidence of such service shall be filed in the Supreme Court.
RULE 15 Suspension by the Commission for Felony Indictment

(a) Upon indictment for a felony by a grand jury of this State or by a grand jury of the United States of any judge, the Commission shall, subject to subparagraph (b) of this Rule, review the indictment, and if it determines that the indictment relates to, and adversely affects the administration of the office of this indicted judge, and that the rights and interests of the public are adversely affected thereby, the Commission shall suspend the judge immediately and without further action pending the final disposition of the case or until the expiration of the judge's term of office, whichever occurs first. During the term of office to which such judge was elected and in which the indictment occurred, if a nolle prosequi is entered, if the public official is acquitted, or if after conviction the conviction is later overturned as a result of any direct appeal or application for a writ of certiorari, the judge shall be immediately reinstated to the office from which he or she was suspended. While a judge is suspended under this subparagraph and until final conviction, the judge shall continue to receive compensation. For the duration of any suspension under this subparagraph, the Governor shall appoint a replacement judge. Upon a final conviction with no appeal or review pending, the office shall be declared vacant and a successor to that office shall be chosen as provided in the Constitution of the State of Georgia of 1983 or the laws enacted in pursuance thereof.

(b) The Commission shall not review the indictment for a period of fourteen (14) days from the day the indictment is received. This period of time may be extended by the Commission. During this period of time, the indicted judge may, in writing, authorize the Commission to suspend him or her from office. Any such voluntary suspension shall be subject to the same conditions for review, reinstatement or declaration of vacancy as are provided in this subparagraph for a nonvoluntary suspension.

(c) After any suspension is imposed under this subparagraph, the suspended judge may petition the Commission for a review. If the Commission determines that the judge should no longer be suspended, the judge shall immediately be reinstated to office.

(d) The findings and records of the Commission and the fact that the public official has or has not been suspended shall not be admissible in evidence in any court for any purpose. The finding and records of the Commission shall not be open to the public.

(e) The provisions of this subparagraph shall not apply to any indictment handed down prior to January 1, 1985.

(f) If a judge who is suspended from office under the provision of this subparagraph is not first tried at the next regular or special term following the indictment, the suspension shall be terminated and the judge shall be reinstated to office. The judge shall not be reinstated under this provision if he or she is not so tried based on a continuance granted upon a motion made only by the defendant.

RULE 16 Petition to Modify or Reject Commission’s Recommendation

(a) A petition to the Supreme Court to modify or reject the recommendation of the
Commission for removal, other discipline or retirement of a judge may be filed with six (6) copies within thirty (30) days after service of a copy of the Commission's report on the judge. The petition shall be verified, shall be based on the record, shall specify grounds relied on, and shall be accompanied by proof of service of seven (7) copies of the petition and of the brief on the Commission. Within twenty (20) days after service of the petition and brief, the Commission may serve and file a responsive brief. Within fifteen (15) days after service of such brief, the petitioner may file a reply brief, seven (7) copies of which shall be served on the Commission.

(b) Failure to file a petition within the time provided may be deemed a consent to a determination on the merits based upon the record filed by the Commission.

(c) A petition filed under this rule shall be heard in such manner as may be ordered by the Supreme Court.

RULE 17 Commission’s power to Secure Assistance

(a) In conducting investigations, the preparation of notices, presentation of evidence at a formal hearing, preparation and filing of briefs and other documents, or in otherwise carrying out its functions, the Commission may utilize the services of the Attorney General of this State or one of the Attorney General's deputies or assistants, and in addition thereto, or in lieu thereof, may secure and pay for the services of a member of the Bar of this State in any or all of such matters.

(b) The Commission may also employ such assistants as it considers necessary for the performance of the duties and in the exercise of the powers conferred upon the Commission; subpoena or arrange for and compensate medical or other experts and reporters; subpoena witnesses; and arrange for the attendance of witnesses not subject to subpoena; and pay from funds available to it all expenses reasonably necessary for effectuating the purposes of Article VI, Section VII, Paragraph VII, of the 1983 Constitution of the State of Georgia.

RULE 18 Powers of Commission
Subpoenas, Depositions, Contempt, Physical Examinations, Witness Fees

(a) The Commission, through its Chairperson or Director, shall have the power to issue subpoenas for the attendance of witnesses at a formal hearing held before the Commission or a Special Master under Rule 7, for the production at such hearing of books, papers and other evidentiary matter.

(b) After notice is given to a judge that a formal hearing will be held under Rule 5, either the Commission or the judge may take the depositions of any witness upon reasonable written notice thereof given to the judge or the Commission of the time and place of taking of such depositions. The original of the deposition shall be returned to the Commission and at the hearing may be opened and used by either party under the same conditions and in the same
manner and for the same purposes as depositions in civil cases. In connection with the taking
of such depositions, the Commission, through its Chairperson or Director, shall have the
power to issue a subpoena for the attendance of the witness whose testimony is to be taken
and for the production at the taking of the deposition of books, papers and other evidentiary
matter.

(c) If any person refuses to attend, testify, or produce any writings or things required by a
subpoena issued by the Commission, as authorized under subparagraph (b) of Rule 4 or
under this rule, the Commission may petition the judge of the Superior Court of the circuit in
which the person may be found, or if a judge of that circuit is involved in the proceedings,
then to any judge of an adjoining circuit, for an order compelling the person to attend and
testify or produce the writings or things required by the subpoena. The Court shall order the
person to appear before it at a specified time and place and then and there shall consider why
the person has not attended, testified or produced writings or things as required. A copy of
said order shall be served upon the person to whom the subpoena of the Commission was
directed. If it appears to the Court that the subpoena was regularly issued, the Court shall
order the person to appear before the Commission, or a Special Master, at the time and place
fixed in the order and to testify or produce the required writings or things. Failure to obey the
order shall be punishable as contempt of court. The proceedings so instituted shall state in
general terms, without identifying the judge, the nature of the pending matter, the name and
residence of the person whose testimony is desired, and directions, if any, of the Commission
requesting an order requiring the person to appear and testify and to produce writings or
things as required by the Commission's subpoena. If the proceedings are instituted prior to
the giving of notice of a formal hearing, the proceedings shall not identify the judge by name
but only as a number.

(d) Each witness shall receive for attendance the same fees and allowances prescribed by
OCGA Section 24-10-24 for witnesses in civil cases.

(e) The Commission shall also have the authority, after notice to the judge and a hearing, to
require that a judge involved in proceedings before the Commission submit to a physical or
mental examination, or both, and specify the time, place, manner, conditions and scope of the
examination and the physician or physicians by whom it is to be made.

RULE 19 Notices

(a) All notices provided for under these rules shall be in writing and shall be served upon the
judge personally by a member of the Commission, or by a representative designated by the
Chairperson, or may be served by registered or certified mail, return receipt requested.

(b) All notices provided for under these rules shall be in writing and shall be served upon the
judge personally by a member of the Commission, or by a representative designated by the
Chairperson, or may be served by registered or certified mail, return receipt requested.

(c) All notices mailed to a judge or counsel shall be enclosed in a sealed envelope marked on
the face thereof, “Confidential – to be opened by addressee only.

RULE 20 Confidentiality and Exceptions

(a) The proceedings of the Commission, including, but not limited to, the fact of filing of complaints with the Commission, investigations to determine whether there is probable cause that judicial misconduct has occurred, conferences of the Commission with respect to matters pending before it, correspondence and other communications, information learned from any investigation by the Commission and all other papers and documents shall be kept confidential. Information obtained independently of any such complaint or investigation need not be maintained as confidential. Further, the requirement that participants maintain confidentiality shall cease at the time of the decision of the Commission on whether to initiate formal hearing against a judge, or at the time the complaint in question is resolved, closed, or otherwise settled through formal disposition. However, this confidentiality requirement shall not apply to notice of a formal hearing, a formal hearing, reports of the Commission to the Supreme Court recommending discipline, and decisions of the Commission made after a formal hearing that the judge with respect to whom the hearing was held was not guilty of misconduct justifying a recommendation of discipline. When, notwithstanding the rule of confidentiality set out in the first sentence of this subparagraph, the existence of a complaint filed with the Commission or any investigation of a judge whether or not based upon a complaint shall in some way become public, the Commission, at the request of the judge or upon its own motion if it considers such to be desirable, may make such statement with respect to the handling and status of the proceedings as the Commission may consider appropriate. When, in the exercise of its functions, the Commission has information concerning conduct of a member of the Bar which the Commission feels should be considered by the Disciplinary Board of the State Bar of Georgia for the purpose of determining whether such conduct constitutes a violation of the Code of Professional Responsibility, the Commission shall have the authority and it shall be its duty to refer the matter to the Board for such action as the Board may consider appropriate. The Commission shall be further authorized, in its discretion, to disclose to the Judicial Nominating Commission of the State of Georgia and to the Governor of the State, or any Commission, Board or Committee officially appointed to evaluate nominees for federal judgeships, including, but not limited to, a committee appointed by the American Bar Association for such purpose, any information involving any prospective nominee for judicial appointment which the Commission feels such Commission, Board or Committee should consider in passing upon the qualifications and fitness of the nominee for judicial appointment.

(b) All persons acting for the Commission in investigating a judge or participating in an official capacity in any proceedings relating thereto, including court reporters, shall be specifically advised by the Chairperson or by the Commission's representative of the requirement of confidentiality with respect to such matters as are confidential under subparagraph (a) of this Rule and shall be directed not to disclose any information acquired by them to any person not officially or formally connected with the investigation or proceedings.
(c) All subpoenas and other proceedings which may be issued or conducted by the Commission prior to service of a notice of formal hearing shall not name the judge against whom the charges are pending, but shall style the proceedings by number as set out in Rule 5.

(d) If there shall be probable cause for inquiry concerning, or prosecution of, a witness for perjury in proceedings before the Commission, the record of the proceedings or papers filed in connection therewith shall be disclosed to the extent required by the inquiry or prosecution.

(e) A judge about whom an inquiry or investigation is being made may request release of information concerning the complaint and investigation, and the Commission, if it considers appropriate, may comply with such request.

(f) Any person violating the rule of confidentiality as set forth in this section shall be subject to punishment for contempt of the Supreme Court.

(g) The rule of confidentiality as set forth in this section shall not apply to any information which the Commission considers to be relevant to any current or future civil or criminal action against a judge, and upon receipt of a duly issued subpoena or court order by any state or federal court of record, the Commission is authorized to comply with the same to the extent required by such subpoena or court order.

(h) The rule of confidentiality set forth in this section shall not apply to any complaint alleging a violation of Canon 7 of the Code of Judicial Conduct which the Commission, in its sole discretion, determines should be handled on an expedited basis in manner set forth in Rule 27.

**RULE 21 Immunity**

Complaints, reports or testimony in the course of proceedings under these rules shall be deemed to be made in the course of judicial proceedings. Members of the Commission, Commission counsel and the Commission staff shall be absolutely immune from suit for all conduct in the course of their official duties. All other participants shall be entitled to all rights, privileges and immunities afforded to participants in actions filed in the courts of this state, and shall be immune from civil liability with respect to all papers filed with, or statements made or testimony given to, the Commission or the Supreme Court or given in any investigation or proceeding pertaining to a complaint against a judge, when done in good faith.

**RULE 22 Advisory Opinions**

(a) The Commission shall be authorized to render official formal advisory opinions concerning a proper interpretation of the Code of Judicial
Conduct, which advisory opinions the Commission shall publish and disseminate.

(b) The Commission shall examine and reconsider any of its advisory opinions upon the request of the Supreme Court.

(c) The Commission and the Supreme Court shall consider compliance with an advisory opinion to be evidence of a good faith effort to comply with the Code of Judicial Conduct, but only to the extent that the underlying facts are identical.

(d) The Supreme Court’s determination of the propriety of particular conduct shall supersede any conflicting advisory opinion of the Commission.

**RULE 23 Other Powers**

The Commission shall have such other powers and authority as may be reasonably necessary for the proper and efficient performance of its functions in carrying out the intent of the constitutional amendment creating the Commission.

**RULE 24 Complaint Against a Member of the Supreme Court**

A complaint against a member of the Supreme Court shall proceed in the same manner as a complaint against any other judge except:

(a) If the Commission recommends a sanction and the respondent consents to the sanction, the Commission shall impose the sanction and there shall be no appeal or further review by the Court.

(b) If the Commission recommends a sanction and the respondent objects to the sanction, the Commission shall proceed in the manner outlined in Rule 14. However, all current members of the Court shall be automatically disqualified and a substitute Court consisting of the current Chairperson and the six (6) immediate past Chairpersons of the Council of Superior Court Judges shall be impaneled to decide the matter in lieu of the sitting members of the Supreme Court. If any such Chairperson shall be disqualified or otherwise fails or refuses to serve, the next preceding Chairperson of the Council shall serve as a member of the substitute Court.

**RULE 25 Emergency Interim Relief**

(a) Incident to any preliminary investigation or formal proceeding conducted pursuant to these rules or upon receipt of sufficient evidence demonstrating that the continued service of
any judge is causing immediate and substantial public harm and an erosion of public confidence in the orderly administration of justice and appears to be violative of the Georgia Code of Judicial Conduct, the Commission may petition the Supreme Court for injunctive or other relief, including temporary suspension or reassignment of the judge.

(b) The petition shall state the evidence justifying the emergency relief sought with particularity and shall be verified by the Chairperson and/or the Director of the Commission.

(c) Simultaneously with the filing of said petition, a copy shall be personally served upon the Respondent by any person approved by the Chairperson and/or the Director of the Commission. In the event personal service cannot be perfected, service may be perfected by registered or certified mail, return receipt requested, to the last known address of the Respondent as set forth in the most current issue of the Georgia Courts Directory published by the Administrative Office of the Courts.

(d) A written acknowledgment of service from the Respondent and/or his or her counsel shall constitute conclusive proof of service and eliminate the need to utilize any other form of service.

(e) Upon receipt of the verified petition for emergency relief, the Clerk of the Supreme Court shall immediately file the same; assign the matter a docket number; and notify the Chief Justice that the appointment of a Special Master is appropriate. Within 10 days after the docketing of said petition, the Court shall appoint a Special Master to conduct a hearing at which the Commission shall show cause why the relief sought by the Commission should be granted pending further disciplinary proceedings.

(f) Within 10 days after receipt of the Order of Appointment, the Special Master shall conduct a hearing at such time and place as may be designated by said Special Master or as may be mutually agreed upon by the parties.

(g) Within 10 days following the completion of said hearing, the Special Master shall file a report and recommendation with the Clerk of the Supreme Court and simultaneously serve copies thereof upon the Commission and the Respondent.

(h) The Supreme Court shall give expedited consideration to the report of the Special Master and may suspend the Respondent, with or without pay, pending final disposition of the disciplinary proceedings giving rise to the petition for emergency suspension or order such other action as it deems appropriate under all the circumstances.

RULE 26 Involuntary Retirement of Judges

In addition to other methods and causes provided in these Rules, a judge of any court in this State shall be subject to involuntary retirement for a mental or physical disability which constitutes a serious and likely permanent interference with the performance of the duties of office on the following terms and conditions:
(a) Upon receiving a complaint or otherwise receiving information indicating that a judge has been judicially declared incompetent; voluntarily committed by reason of incompetency or disability by a final judicial order after a judicial hearing; or may have a mental or physical disability that seriously impairs or interferes with the performance of the duties of office which is or is likely to become permanent, and after determining that said condition adversely affects the administration of the office of the disabled judge and the rights and interests of the public, the Commission shall, without further action, enter an order requiring the judge to show cause, within 10 days after service of said order, why said disabled judge should not be temporarily transferred to a disability inactive status pending the final disposition of the matter. A copy of said order shall be immediately served by hand delivery upon the judge, his or her guardian, or the director of the institution in which any such judge may be confined or otherwise receiving treatment.

Unless subsequently extended by consent, any such order shall automatically expire 90 calendar days after service upon the disabled judge, and during such time, said disabled judge shall continue to receive the compensation normally paid for such office.

(b) Simultaneously with the service of said order, the Commission shall request the judge to submit, within 10 days, all pertinent medical and other records to the Commission and shall designate one or more qualified medical, psychiatric or psychological experts to examine the disabled judge prior to any hearing on the matter. Said experts may or may not be agreed upon by the Commission and the disabled judge, but in any event, the written reports of all such experts shall be provided to the Commission and to the disabled judge as soon as medically feasible, and in any event, not less than 20 days prior to any hearing on the matter. The cost of any such examinations shall be borne solely by the Commission.

(c) The failure or refusal of a judge to submit the requested medical records or to submit to an independent medical examination, unless due to circumstances beyond the judge's control, shall preclude the judge from submitting reports of medical examinations done on his or her behalf, and the Commission may consider such failure or refusal as evidence that the judge has a disability.

(d) In the event the disabled judge shall desire independent medical examinations by experts other than those designated by the Commission, said judge shall have the absolute right to have such examinations conducted, provided, however, that any such examination shall be at the sole expense of the disabled judge and, provided further, that written reports of such examinations are provided to the Commission as soon as medically feasible and, in any event, not less than 20 days prior to any hearing on the matter.

(e) After receipt and review of the written reports of any and all such examinations and prior to any hearing on the matter, the Commission and the disabled judge may agree upon a proposed stipulated disposition of the matter. Said proposed stipulated disposition, which shall contain, as appropriate, (i) findings of fact, conclusions of law and recommended final disposition; (ii) copies of the original complaint or other material giving rise to the complaint; and (iii) all written reports of examinations received and reviewed by the
Commission, shall be immediately filed with the Supreme Court for approval, rejection or modification. In such filing, the disabled judge shall not be identified, but the matter shall be captioned: "Stipulated Disposition Concerning Judge No.__________.

(f) The final decision on such stipulated disposition shall be made by the Supreme Court as soon as practicable, but in any event, not later than thirty (30) days after the matter is docketed in said Court, and the Court shall forthwith enter an appropriate order.

(g) In the event the proposed stipulated disposition is rejected and/or modified or revised in any substantial and material way, the disabled judge may, within ten (10) days of the receipt of the order of the Court, notify the Commission that he or she is withdrawing his or her agreement to the same, and said proposed stipulated disposition cannot thereafter be used against said disabled judge in any subsequent proceedings, nor shall the same be available for public inspection.

(h) If any such matter is not resolved by stipulated disposition, all such subsequent proceedings shall be conducted in the same manner as disciplinary proceedings, except:

   (1) All such proceedings shall be and remain confidential until the final order of the Supreme Court;

   (2) The Commission may appoint and compensate, if necessary, a lawyer to represent the disabled judge if the judge is without representation;

   (3) If, after a formal hearing, the Commission concludes that the judge is incapacitated to continue to hold judicial office by reason of either physical or mental disability, it shall not be empowered to recommend any disciplinary action against said judge, but rather shall be limited to recommending a suspension from office, either temporary or permanent, on such terms and conditions as may appear just and proper under the circumstances, until such time as an appropriate petition for reinstatement to active status has been filed by the disabled judge and granted by the Supreme Court.

   (4) For the duration of any suspension under this subparagraph, the Governor shall appoint a replacement judge who shall serve until the disabled judge is reinstated to active status or until the expiration of the disabled judge's term of office, whichever first occurs.

RULE 27 Special Committee on Judicial Election Campaign Intervention

(a) In every year in which a general election is held in this State and at such other times as the Commission may deem appropriate, the Chair shall name three (3) members to a Special Committee on Judicial Election Campaign Intervention ("Special Committee") whose responsibility shall be to deal expeditiously with allegations of ethical misconduct in campaigns for judicial office. The membership of such committee shall consist of the senior member of each of the three (3) categories of Commission membership if available, and if not, the next most senior member from that category. The Commission Director shall also serve as an ex-officio member. The objective of such committee shall be to alleviate unethical and unfair campaign practices in judicial elections, and to that end, the Special Committee shall have the following authority:
(b) Upon receipt of a complaint or otherwise receiving information facially indicating a violation by a judicial candidate of any provision of Canon 7 during the course of a campaign for judicial office, the Director shall immediately forward a copy of the same by facsimile and U.S. Mail to the Special Committee members and said Committee shall:

(1) seek, from the complainant and/or subject of the complaint, such further information on the allegation of the complaint as it deems necessary;
(2) conduct such additional investigations as the Committee may deem necessary;
(3) determine whether the allegations of the complaint warrant speedy intervention; if no intervention is needed, dismiss the complaint and so notify the complaining party;
(4) if further investigation is deemed necessary, request confidential written responses from the subject of the complaint and the complaining party on the following schedule:
   (A) within 3 business days of receiving such a request from the Committee, a written response from the subject of the complaint;
   (B) the Committee will share the subject’s written response with the complaining party on a confidential basis, who shall be requested to provide a written response within 3 business days; and
   (C) the Committee will share the complaining party’s response with the subject of the complaint, who then shall be requested to submit a written rebuttal within 1 business day.

In the event a complaint is filed within two (2) weeks before a judicial election, or if circumstances otherwise dictate, the Committee may accelerate the above schedule or eliminate the need for steps (B) and (C) as the Committee deems necessary. Each of the above papers must be served on the Committee only, and will be kept confidential except as described above. The identity of the complaining party will remain confidential until the Committee’s decision is communicated to the parties unless that confidentiality is waived by the complaining party. Any party breaching the confidentiality of the above process shall be subject to a Public Statement as set forth in this Rule.

(5) if it is determined after the papers from the parties are reviewed that the allegations do warrant intervention, the Committee is authorized:
   (A) to immediately release to the complaining party and the person and/or organization complained against, a non-confidential “Public Statement” setting out violations believed to exist; and/or
   (B) to refer the matter to the full Commission for such action as may be appropriate under the applicable rules.

(6) if it is determined after the papers from the parties are reviewed that the allegations do not warrant intervention, the Committee shall dismiss the complaint and so notify the complaining party and the subject of the complaint

(c) All proceedings under this Rule shall be informal and nonadversarial, and the Special Committee shall act on all complaints within ten (10) days of receipt, either in person; by facsimile; by U.S. Mail; or by teleconference.
(d) Except as hereinabove specifically authorized, the proceedings of the Special Committee shall remain confidential as provided in Rule 20, and in no event, shall the Committee have the authority to institute disciplinary action against any candidate for judicial office, which power is specifically reserved to the full Commission under applicable rules.

**RULE 28 Recusal of Commission Members**

Commission Members shall recuse themselves in any proceeding in which their impartiality might reasonably be questioned, including, but not limited to instances where:

(a) the member is a party, or witness, or has a personal familial or financial relationship or interest involving the matter, any party or witness;

(b) the member is an attorney or party in any matter pending before the respondent;

(c) the member has personal knowledge or information which could interfere with that member impartially considering such matter;

(d) the member, as a judge similarly situated, would be required to recuse under the Code of Judicial Conduct; or

(e) the member believes that, for any reason, that member cannot render a fair and impartial decision.

If the propriety of a member’s participation is raised, the issue shall be decided by a majority of the members present and voting. Temporary appointments to replace disqualified members, when necessary, shall be made in the same manner as authorized in Rule 1(d).
Chapter 2
JURISDICTION, VENUE, PROCEEDINGS, AND APPEALS

The Revised
HANDBOOK FOR PROBATE JUDGES OF GEORGIA 2010
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CHAPTER 2

JURISDICTION, VENUE, PROCEDURES AND APPEALS

PREAMBLE TO CHAPTER 2 (Please Read)

In this Chapter, the issues of jurisdiction, venue, procedures and appeals will be addressed generally. Matters of jurisdiction, venue, procedures and appeals will be more fully discussed in each subsequent Chapters of this Handbook as applicable to the various subject matters of each Chapter. The reader/user should keep in mind that the criminal jurisdiction of the probate courts is not covered in this Handbook. This Chapter introduces these subjects and briefly explains their applicability in general to the probate courts. Reference should always also be made to the Chapters which deal with the specific types of procedures in the probate courts.

References in this Handbook are, unless otherwise noted, to the Revised Probate Code of 1998 and to the revised Title 29, which became effective on July 1, 2005.

1. JURISDICTION

1.1 Jurisdiction in General

In order for any court to entertain an issue for decision by the court, the court must first have both (1) subject matter jurisdiction and (2) personal or in rem jurisdiction. As it sounds, subject matter jurisdiction involves the court’s authority to decide the issue (subject) before the court. In Georgia, the superior courts are the courts of general jurisdiction; they have subject matter jurisdiction over every legal issue which is not specifically reserved to some other court or tribunal. Probate courts are courts of limited jurisdiction, meaning that they have subject matter jurisdiction only as to legal matters and proceedings specifically granted to them. The subject matter jurisdiction of the probate courts is discussed more fully in Section 1.2 below.

Personal jurisdiction is the authority of a court over persons; that is, the authority to order a person to do or not to do something related to the subject matter jurisdiction of the

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2 Ga. Const. Art. 6, Sec. 4, ¶1; O.C.G.A. §15-6-8.
Personal jurisdiction may be waived, that is, a person may consent to or acquiesce in jurisdiction over the person; however, subject matter jurisdiction must exist in the court before which a matter is brought and may not be waived by the parties. “In rem” jurisdiction is jurisdiction over property or things (real, personal, and/or intangible). Courts might have jurisdiction over property or things located within their jurisdictional territory, even though they may not have personal jurisdiction over the owner(s) and parties in interest. Georgia courts have personal jurisdiction over non-residents in certain matters, specifically including ownership, use, or possession of real property located in Georgia. Hence, the probate courts have jurisdiction over the property of non-domiciliary persons owning property in the county. The jurisdictional territory of probate courts is generally within the county only, even though the proper orders of a probate court will be given effect across the state. Personal and in rem jurisdiction primarily impact the venue in which matters may be decided by a court and are discussed more fully in Section 2, below.

In order to hear or try a matter, a court must have both subject matter jurisdiction and personal or in rem jurisdiction. Personal jurisdiction may be waived. Subject matter jurisdiction may NOT be waived.

1.2 Basic Jurisdiction in Probate Courts

There are several Titles in the Georgia Code which confer the majority of the statutory subject-matter jurisdiction upon the probate court, including:

- Title 53, Trusts and Administration of Estates (Chapters 3 through 9 of this Handbook);
- Title 15, Courts, particularly Chapter 9 (Probate Courts);
- Title 29, Guardianships and Conservatorships (Chapters 10 and 11 of this Handbook); and
- Title 37, Mental Health (Chapter 11 of this Handbook).

In addition, probate courts are given jurisdiction concerning a number of miscellaneous proceedings or matters under Georgia law, which are found in numerous

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3 Id.
5 Id.
6 O.C.G.A. §9-10-91.
sections throughout the Code. This chapter provides detail on both the essential jurisdiction of the probate courts and the many other duties prescribed under the Code.

The basic statute concerning probate court jurisdiction provides that probate courts have authority, unless otherwise provided by law, to exercise original, exclusive and general jurisdiction over the following subject matters:

1. The probate of wills;
2. The granting of letters testamentary and of administration, and the repeal or revocation of such letters;
3. All controversies in relation to the right of executorship or administration;
4. The sale and disposition of property belonging to, and the distribution of, estates of deceased persons;
5. The appointment and removal of guardians of minors, conservators of minors, guardians and conservators of incapacitated adults and persons who are incompetent because of mental illness or mental retardation;\(^7\)
6. All controversies as to the right of guardianship and conservatorship, except that the probate court shall not be an appropriate court to take action under Code Section 19-7-4 (dealing with the loss of parental custody);
7. The auditing and passing of returns of all executors, administrators, and guardians of property, conservators, and guardians;
8. The discharge of former sureties and the requiring of new sureties from administrators and guardians;
9. All matters as may be conferred on them by Chapter 3 of Title 37 concerning mental illness;
10. All other matters and things as appertain or relate to estates of deceased persons, and to persons who are incompetent because of mental illness or mental retardation;\(^8\) and

\(^7\) Note that the word “incompetent” is no longer used in the adult guardianship and conservatorship laws in Title 29.
\(^8\) Although the term “mental retardation” is still used in this Code Section, Chapter 4 of Title 37 deals with all persons who are considered “developmentally disabled.”
\(^9\) The term “mental retardation” has been replaced by the term “developmental disability” in most of the Georgia Code. This provision was apparently overlooked.
11. All matters as may be conferred on them by the Constitution and laws.\(^\text{10}\)

[\textbf{NOTE:} With respect to item 9 above, it appears that Chapters 4 and 7 of Title 37, concerning developmental disabilities and substance abuse respectively, should also have been included, since, in each of those Chapters, “court” is also defined as the probate court with regard to persons 17 years of age or older.\(^\text{11}\)]

\textit{Original jurisdiction} means jurisdiction in the first instance, that is, jurisdiction to take cognizance of an issue.\(^\text{12}\) This means the court in which a matter must originate. \textit{Exclusive jurisdiction} is the power which a court exercises over an action to the exclusion of all other courts, the forum in which an action must be commenced because no other forum has jurisdiction to hear and decide the matter.\(^\text{13}\) \textit{General jurisdiction} is that jurisdiction which extends to all controversies that may be brought before a court.\(^\text{14}\)

As to these areas in which the probate courts have been given exclusive, original subject matter jurisdiction, the authority has been increasingly interpreted by the appellate courts as being quite broad\(^\text{15}\) but not without limitation.

For example, it is generally accepted that the phrase "all other matters" does not confer any additional broad areas of jurisdiction, such as the power to adjudicate creditors’ claims against estates or conflicting claims to title to property.\(^\text{16}\) If this were not so, the statutes conferring enhanced jurisdiction upon certain probate courts, discussed in Section 1.5 below, would not have been necessary. Also note that item 10 above is limited by the entire subsection's introductory phrase, "unless otherwise provided by law." It is also worth noting that exclusive jurisdiction over cases respecting title to land and over equity cases is vested by the Georgia Constitution in the superior courts.\(^\text{17}\)

The basic statute concerning probate court jurisdiction further provides that in addition to the jurisdiction described above, and unless otherwise provided by law, probate courts have the power to carry out the following duties to the extent assigned by specific laws:

1. Perform county governmental administration duties;

\(^{10}\) O.C.G.A. §15-9-30(a).
\(^{11}\) O.C.G.A. §§37-4-2(5)(a) and 37-7-1(7)(a).
\(^{13}\) Id.
\(^{14}\) Id.
\(^{17}\) Ga. Const. Art. 6, Sec. 4, ¶1.
2. Perform duties relating to elections;
3. Fill vacancies in public offices by appointment;
4. Administer oaths to public officers;\(^{18}\)
5. Accept, file, approve, and record bonds of public officers;\(^{19}\)
6. Register and permit certain enterprises;
7. Issue marriage licenses;
8. Hear traffic cases;
9. Receive pleas of guilty and impose sentences in cases of violations of game and fish laws;
10. Hold criminal commitment hearings; and
11. Perform such other judicial and ministerial functions as may be provided by law.\(^{20}\)

### 1.3 Additional, Concurrent Jurisdiction

In addition, notwithstanding any local or other law conferring jurisdiction on any other tribunal, judges of the probate courts have jurisdiction, concurrent with any such other tribunals, in all cases in their counties involving:

1. Removal of obstructions from roads as provided in Code Section 44-9-59(a);\(^{21}\)
2. Violations of the Game and Fish Code as to Title 27;\(^{22}\)
3. Violations of the requirements to observe the rules and regulations of parks, historic sites and recreational areas as provided in Code Section 12-3-10;\(^{23}\)
4. Violations of the Georgia Boat Safety Act, Ch. 7 of Title 52;\(^{24}\)
5. Violations of Misdemeanor Drug and Alcohol Offenses (for those courts having jurisdiction over misdemeanor traffic offenses) for violations under Code Sections 16-13-2, 16-13-30 and 3-3-23;\(^{25}\) and
6. Violations involving certain cases of litter under various code sections.\(^{26}\)

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\(^{18}\) O.C.G.A. §15-9-33.
\(^{19}\) O.C.G.A. §15-9-30.2.
\(^{20}\) O.C.G.A. §15-9-30(b).
\(^{21}\) O.C.G.A. §15-9-30.2.
\(^{22}\) O.C.G.A. §15-9-30.2.
\(^{23}\) O.C.G.A. §15-9-30.4.
\(^{24}\) O.C.G.A. §15-9-30.5.
\(^{26}\) O.C.G.A. §15-9-30.7.
1.4 Jurisdiction Concerning Decedents’ Estates

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

1. A resident at the time of his death of the county where the application is made; or

2. A nonresident of the state, with property in the county where the application is made or with a bona fide cause of action against some person therein. 27

If a nonresident decedent has property or a cause of action in more than one county, Letters of Administration upon the estate may be granted in any county in which property or a cause of action is located, but the judge of the probate court first granting Letters acquires exclusive jurisdiction. 28 So long as the cause of action is located in the Georgia county, it is not necessary that the defendant be a Georgia resident. 29 Where the only asset of a decedent is a policy of automobile liability insurance, this constitutes an asset of the estate which will justify the appointment of an administrator, 30 including when the policy was issued by a nonresident insurance company having an agent and place of business in the county of the residence of an alleged creditor. 31

1.5 Expanded Jurisdiction in Certain Probate Courts

In all probate courts governed by Article 6 of Chapter 9 of Title 15 (referred to in this Handbook as “Article 6 Probate Courts”), 32 additional jurisdiction has been granted which is concurrent with the superior courts. 33 The additional, concurrent jurisdiction is with regard to proceedings for:

1. Declaratory judgments involving fiduciaries pursuant to Code Sections 9-4-4 through 9-4-6;

2. Tax motivated estate planning dispositions of minors’ and wards’ property pursuant to Code Sections 29-3-36 and 29-5-36;

32 See also Chapter 1.
3. Approval of settlement agreements pursuant to Code Section 53-3-22 of the Pre-1998 Probate Code, if applicable, or Code Section 53-5-25 of the Revised Probate Code of 1998;

4. Appointment of a new trustee to replace trustee pursuant to code 53-12-70;

5. Acceptance of the resignation of a trustee upon written request of the beneficiaries pursuant to Code Section 53-12-175;

6. Acceptance of the resignation of a trustee upon petition of the trustee pursuant to Code Section 53-12-175;

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

8. Conversion to a unitrust and related matters pursuant to Code Section 53-12-1221; and

9. Adjudication of petitions for direction or construction of a will pursuant to Code Section 23-2-92.34

As of July 1, 2009, there are 15 Article 6 Probate Courts in the following counties: Bibb, Chatham, Cherokee, Clarke, Clayton, Cobb, DeKalb, Dougherty, Forsyth, Fulton, Gwinnett, Hall, Henry, Muscogee, and Richmond.

2. **VENUE**

Venue deals with which court in what location is the proper place for deciding issues.35 Venue is generally based first upon the court having personal jurisdiction over one or more parties to a matter in need of resolution. Matching subject matter jurisdiction and personal jurisdiction will determine in which court or courts venue properly lies. In the probate courts, venue for matters within the subject matter jurisdiction of the courts is usually based on the person about whom proceedings are filed, as explained below.

2.1 **Decedents’ Estates**

For the estates of persons domiciled in Georgia at the time of death, venue lies in the

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34 Id.
35 Venue is defined as the particular county or other geographical area in which a court with jurisdiction may hear and determine a case. Black’s, supra.
probate court of the county of domicile of the decedent, as to all matters within the subject matter jurisdiction of the probate court.\(^{36}\)

For the estates of persons who were domiciled in some foreign country or some state other than Georgia, venue lies in any probate court in any county in which the decedent owned an interest in property (real, personal, and/or intangible) in the county.\(^{37}\)

Once a Georgia probate court assumes jurisdiction over the estate of a decedent, unless the matter is transferred to another probate court of proper venue (or the proceeding is dismissed for improper venue), it retains jurisdiction over the estate, the personal representatives of the estate, and, when applicable, the heirs, beneficiaries, and other parties having an interest in the estate, as to all matters within the subject matter jurisdiction of the probate courts.\(^{38}\)

The personal representative of the estate of a decedent who died domiciled outside Georgia becomes subject to the jurisdiction of the courts of this state by receiving money or taking delivery of personal property of the estate. Further, the personal representative of such an estate is subject to the jurisdiction of the courts of this state to the same extent that the decedent was so subject immediately prior to death. If the matter involving the personal representative is something within the subject matter jurisdiction of a probate court, venue will lie in the probate court of the county in which the receipt or delivery occurred or in which the decedent would have been subject to the jurisdiction of the court prior to death (e.g., the decedent was a personal representative, guardian, or conservator appointed by a Georgia probate court, prior to the death).\(^{39}\)

See Chapters 3 through 9 for the various matters concerning the estates of decedents and missing persons over which the probate courts have subject matter jurisdiction.

2.2 Guardianship/Conservatorship Proceedings

2.2.1 Minors

For temporary guardianships of minors, venue lies in the probate court of the county in which the petitioner who seeks temporary guardianship and has physical custody of the


\(^{39}\) O.C.G.A. §53-5-45.
minor is domiciled. If the petitioner is not a domiciliary of Georgia, venue lies in the probate
court of the county in which the minor is found.\textsuperscript{40}

For permanent guardianships of minors, venue lies in the probate court of the county
in which either (1) the minor is found or (2) the proposed permanent guardian is domiciled.\textsuperscript{41}

For conservatorships of minors, venue lies in the probate court of the county in which
either (1) the minor is found or (2) the proposed conservator is domiciled.\textsuperscript{42}

\subsection*{2.2.2 Adult Guardianship and Conservatorship}

For both guardianships and conservatorships of adults, venue lies in the probate court
of the county in which either (1) the proposed ward is domiciled or (2) the proposed ward is
found, except that the court in the county in which the proposed ward is found will not have
jurisdiction if it appears that the proposed ward was brought into the county for the sole
purpose of filing the petition in that county.\textsuperscript{43}

\subsection*{2.3 Miscellaneous}

Venue in other civil matters which might come before the probate courts would
include, but not necessarily be limited to, the following matters:

\begin{enumerate}
\item Proceedings to remove an obstruction from a road: the county in which the
obstructed part of the road lies;\textsuperscript{44}
\item Proceeding for the habilitation of a developmentally disabled person: in the
county of domicile of the person or where the person is found;\textsuperscript{45}
\item Application for delayed birth certificate or for a court-ordered change to a
birth certificate: county of domicile of the person whose birth certificate is the
subject;\textsuperscript{46}
\item Proceedings for involuntary inpatient or outpatient treatment: county where
the treatment facility is located, regarding proceedings for involuntary
\end{enumerate}

\begin{footnotes}
\item\textsuperscript{40} O.C.G.A. §29-2-5.
\item\textsuperscript{41} O.C.G.A. §29-2-14.
\item\textsuperscript{42} O.C.G.A. §29-3-6.
\item\textsuperscript{43} O.C.G.A. §§29-4-10 and 29-5-10.
\item\textsuperscript{44} O.C.G.A. §15-9-30.1.
\item\textsuperscript{45} O.C.G.A. §37-4-40.
\item\textsuperscript{46} O.C.G.A. §§31-10-12 and 31-10-23.
\end{footnotes}
inpatient treatment, or, if the patient is discharged before outpatient treatment is ordered, in the county in which the patient is located;

5. Proceeding for the sterilization of a developmentally disabled female: presumably, the county of the person’s domicile;

6. A petition for exemptions: county of debtor’s residence;

7. Establishing lost evidence of indebtedness: county of residence of the debtor;

8. Petition for writ of habeas corpus: county of detention;

9. Petition under Georgia’s Transfer to Minors Act: county of minor’s residence; if minor is non-resident, county of custodian’s residence or place of business or where the custodial property is located;

10. Petition for confiscation of condemned gasoline pumps: county where subject pumps are located; and, among others,

11. Petition to change county boundary line: must be filed in both counties involved.

3. PROCEDURES IN PROBATE COURTS

3.1 Petitions, Standard Forms and Uniform Rules

The jurisdiction of the probate court is generally invoked by the filing of a petition seeking some form of relief (judgment) from the court. With regard to decedents’ estates, the estates of missing persons, and minor and adult guardianship and conservatorship matters, the court’s initial jurisdiction is usually invoked by the filing of a standard form petition. However, not every petition which might initially invoke a probate court’s jurisdiction has a corresponding standard form, and the use of an existing standard form is not required in order to invoke the jurisdiction.

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47 O.C.G.A. §§31-3-81 and 37-7-81.
48 O.C.G.A. §§37-3-91 and 37-7-91.
49 If the disabled person is a minor, the domicile will be that of the parent(s) having custody or that of any other legal custodian; if the disabled person has had a guardian appointed, the domicile of the person is the same as the domicile of the guardian or as determined by the guardian. See O.C.G.A. §§19-2-4 and 29-4-23(a)(1).
51 O.C.G.A. §24-8-21.
52 O.C.G.A. §9-14-3.
53 O.C.G.A. §44-5-111(4).
54 O.C.G.A. §10-1-159.
55 O.C.G.A. §36-3-1.
Pursuant to authority granted in the Georgia Constitution, Uniform Probate Court Rules ("UCPR") have been adopted by the Supreme Court of Georgia with the advice and consent of the Council of Probate Court Judges. Appendix A to these Uniform Rules contains special procedures applicable to Article 6 Probate Courts. These Uniform Rules apply in all probate courts as to the matters covered therein.

Pursuant to UPCR 1.2 (C), individual probate courts are permitted to promulgate rules which relate only to internal procedure and do not affect the rights of any party substantially or materially. Such rules are called “Internal Operating Procedures” and are intended to relate to case management, administration, and operation of the court or govern programs which relate to case management, administration, and operations of the court. Internal Operating Procedures do not require the approval of the Supreme Court. However, by order dated April 27, 2009, the Supreme Court has directed that all internal operating procedures, local rules and experimental rules shall sunset (no longer be effective) as of December 31, 2010. Until that date, attorneys and others should inquire in each probate court in which matters may be filed whether the court has Internal Operation Procedures which apply in that court.

Pursuant to Code Section 15-9-90 and UPCR 21, a number of statewide standard forms, known as Georgia Probate Court Standard Forms ("GPCSFs") concerning various probate court matters have been adopted. The UCPR allows the use of word processing and computer technology. No forms or rules require the filing party to mark or identify any changes in the forms unless they are material. Any altered form must be accompanied by the certificate of the attorney stating that the form, as altered, complies with the standard form in every material respect except for the identified additions or deletions, and that the form, as altered, complies with the statutory requirements relating to the matter which is submitted. Changes in forms that are grammatical, changes in gender, changes from singular to plural, omission of optional or alternative language, and the inclusion of variable information such as names and addresses are not be deemed material; however, the format and sequence of the

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56 Ga. Const. art. VI, §IX, ¶I.
57 UPCR 1.2 (C).
58 UPCR 21 indicates that the certificate is to be signed by “the attorney.” There is no expressed provision which would allow a pro se petitioner to use an altered form and include a certificate signed by the petitioner. However, there is nothing which prohibits a pro se petitioner from taking advantage of the requirement under subsection (E) that the rules be construed to allow and facilitate the use of technology such as word processing.
forms must be preserved as far as practical.  

All judges of the probate courts, their clerks, and all attorneys practicing in probate courts should be thoroughly familiar with these rules and forms. The most current version of a standard form should always be used. The forms are available in each probate court (required) and at www.gaprobate.org.

Proceedings in the probate court are brought by written application or petition stating the ground of the application and the order sought. Unless otherwise provided by law, notice of the application or petition will generally be required to be given to interested parties, based upon the type of proceeding. Chapter 11 of Title 53 contains the requirements of notice and the method of service as to all proceedings under Title 53, unless otherwise provided with regard to a specific proceeding. Chapter 9 of Title 29 contains the requirements of notice and the method of service as to all proceedings under Title 29, unless otherwise provided with regard to a specific proceeding. See Section 3.2 below.

Pleadings in the court are amendable at all times and in every particular, except that if a pretrial order has been entered, a party may amend his pleading only by leave of court or by written consent of the adverse party. Hence, an amendment to a caveat offered on the day of trial will not be timely when there has been no pretrial order entered. On the other hand a caveat which failed to set forth sufficient grounds but was timely filed may still be amended after the final date for objections when the caveat filed puts the other party on notice that the relief requested is contested.

3.2 Notice

Almost every proceeding brought in probate court will require that a citation be issued by the court and that notice (a copy of the citation) be served upon certain interested parties. The citation is to be addressed to all persons required to be served or entitled to notice.

59 UPCR 21.
60 O.C.G.A. §15-9-86.
65 O.C.G.A. §15-9-86.
Code Section 15-9-86 referenced above indicates that a “notice of the time of hearing” must be served. However, at least with respect to 11 specified proceedings, the law also provides that, instead of stating the time of the hearing, the notice may state the deadline by which objections must be filed and state that if no responses are filed the petition will be granted. Given that provision and the similar provisions set forth in Code Section 53-11-9, it would appear that the requirement that the time of the hearing is not obligatory whenever the citation clearly states the deadline by which objections must be filed.

There are standard notice provisions which will apply to every proceeding covered in Chapters 1 – 10 of Title 53, except when otherwise specifically provided in Title 53 or in Chapter 11 of Title 9 or Chapter 9 of Title 15. Likewise, there are standard notice provisions which will apply to every proceeding covered in Chapters 1 – 8 of Title 29, again, except when otherwise specifically provided in Title 29 or in Chapter11 of Title 9 or Chapter 9 of Title 15. In both Titles, there is a provision that if all interested persons have acknowledged service and assented to the granting of the petition, no citation need be issued.

The citation, when required, must state that any objection must be made in writing and must state the date by which objections must be filed. The citation must also state whether a hearing will be held on a specified date or will be scheduled for a date later than the deadline for objections. The citation may also state that if no objections are filed the petition may be granted without a hearing.

### 3.3 Service

#### 3.3.1 Decedents’ Estates Generally

In general, a standard scheme of service of the citation (notice) is set forth in Chapter 11 of Title 53 which provides that:

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66 O.C.G.A. §15-9-86.1. Nine of the proceedings specified are in Title 29 and were specified before Title 29 was completely rewritten and revised in 2004. The two proceedings in Title 53 specified are a petition for year’s support and a petition to determine heirs. See the respective Chapters of this Handbook as to those proceedings.

67 O.C.G.A. §53-11-1.

68 O.C.G.A. §29-9-1.


70 Id.

71 O.C.G.A. §53-11-9(b) indicates that “citation” and “notice” have the same meaning unless the context otherwise requires.
1. Interested parties who reside in Georgia must be served personally, that is, by personal delivery of the citation by an authorized person made only directly to the person;\textsuperscript{72}

2. Interested persons who reside outside the state of Georgia at a known address must be served by mailing a copy of the citation by certified or registered mail, return receipt requested, or by statutory overnight delivery;\textsuperscript{73}

3. Interested persons who are known but whose whereabouts or address are unknown, after reasonable diligence on the part of the petitioner to locate them, must be served by publication of the citation in the legal organ of the county once each week for four consecutive weeks;\textsuperscript{74} and

4. Interested persons who are unborn or are minors or incapacitated adults and interested persons whose identity is unknown must be represented in the proceeding by a guardian upon whom service will be made.\textsuperscript{75}

With regard to service upon residents of the state, the Code provides an alternative to personal service by an authorized person. Instead, if requested in the petition, a Georgia resident may be served by certified or registered mail, return receipt requested, or by statutory overnight delivery, with delivery in any method being restricted to the addressee only. However, the return receipt must be received back by the court before the deadline set forth in the citation for the filing of objections and it must have been signed by the addressee only not less than ten days before the deadline; otherwise, the service is ineffective and the person must otherwise be served.\textsuperscript{76}

As used in subparagraph 4. above, “ guardian” means either (1) a guardian-ad-litem appointed by the court to represent the person in the proceeding or (2) a natural guardian, testamentary guardian, or a duly appointed conservator or guardian permitted by the court to represent the person because there is no conflict of interest between the guardian and the person represented.\textsuperscript{77}

Notwithstanding the above provisions, another Code Section provides that in any

\textsuperscript{72} O.C.G.A. §53-11-3.
\textsuperscript{73} O.C.G.A. §53-11-4(c).
\textsuperscript{74} O.C.G.A. §53-11-4(b).
\textsuperscript{75} O.C.G.A. §53-11-2(b).
\textsuperscript{76} O.C.G.A. §53-11-3(e).
\textsuperscript{77} O.C.G.A. §53-11-2(a).
action before the probate court in which the service of a minor or an incapacitated adult is required, such service may be made by:

1. Sending by the probate court of a copy of the document to be served to the minor or incapacitated adult by certified mail or statutory overnight delivery, and;

2. Serving the legal guardian or guardian ad litem of such minor or incapacitated adult if such legal guardian or guardian ad litem:
   a. Acknowledges receipt of such service, and
   b. Certifies that he or she has delivered a copy of the document so served to the minor or incapacitated adult.78

These provisions pre-date the effective date of the Revised Probate Code of 1998 and Code Section 53-11-3(d) states that persons who are not *sui juris* may be served in accordance with Chapter 11 or as provided in Code Section 15-9-17. Given the permissive nature of service in this manner, the method above may not be used often in practice in proceedings under Title 53. However, this method clearly remains a viable available alternative to the provisions of Chapter 11 of Title 53 regarding service upon persons who are not *sui juris*.79

Persons who are in the military service may be served by any commissioned officer who will make a return or certificate of service evidencing the fact of service.80

Furthermore, the judge of the probate court is authorized to direct (order) any additional service or notice as the judge may determine to be proper in the interest of due process and reasonable opportunity of any party or interest to be heard.81

The Civil Practice Act provides that the methods of service provided in Code Section 9-11-4 may be used as alternative methods of service in proceedings in the probate courts and in any other special statutory proceedings and may be used with, after, or independently of the method of service specifically provided for in any such proceeding, and that such service will be sufficient when made in accordance with the statutes relating particularly to

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78 O.C.G.A. §15-9-17.
79 O.C.G.A. §53-11-3(d).
80 O.C.G.A. §53-11-3(c). It would appear that personal service by a commissioned officer would be necessary with regard to any service member who is a domiciliary of Georgia but is stationed outside Georgia. If the service member is a domiciliary of another state, it would appear that service could be made by certified or registered mail or by statutory overnight delivery when an address is known for the service member. Service by a commissioned officer would provide an alternative method.
81 O.C.G.A. §53-11-5.
the proceeding or in accordance with Code Section 9-11-4.82

3.3.2 Guardianship and Conservatorship Cases Generally

Similarly, a standard scheme of service of the citation (notice) is set forth in Chapter 9 of Title 29 which provides that:

1. Interested parties who reside in Georgia must be served personally, that is, by personal delivery of the citation by an authorized person made only directly to the person;84

2. Interested persons who reside outside the state of Georgia at a known address must be served by mailing a copy of the petition and citation by first class mail;85

3. Interested persons who are known but whose whereabouts or address are unknown, after reasonable diligence on the part of the petitioner to locate them, must be served by publication of the citation in the legal organ of the county once each week for four consecutive weeks;86 and

4. Interested persons who are unborn or are minors or incapacitated adults and interested persons whose identity is unknown must be represented in the proceeding by a guardian upon whom service will be made.87

With regard to service upon residents of the state, the Code provides an alternative to personal service by an authorized person. Instead, if requested in the petition, a Georgia resident may be served by certified or registered mail, return receipt requested, or by statutory overnight delivery, with delivery in any method being restricted to the addressee only. However, the return receipt must be received back by the court before the deadline set forth in the citation for the filing of objections and it must have been signed by the addressee only not less than ten days before the deadline; otherwise, the service is ineffective and the person must otherwise be served.88

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82 O.C.G.A. §9-11-4(k).
83 O.C.G.A. §29-9-12 likewise indicates that “citation” and “notice” have the same meaning unless the context otherwise requires.
84 O.C.G.A. §29-9-4(a) and (b).
85 O.C.G.A. §29-9-5(c).
86 O.C.G.A. §29-9-5(b).
87 O.C.G.A. §29-9-2(b).
88 O.C.G.A. §29-9-4(e).
As used in subparagraph 4. above, “guardian” means either a guardian-ad-litem appointed by the court to represent the person in the proceeding or a natural guardian, testamentary guardian, or a duly appointed conservator or guardian permitted by the court to represent the person because there is no conflict of interest between the guardian and the person represented.\(^89\)

Notwithstanding the above provisions, another Code Section provides that in any action before the probate court in which the service of a minor or an incapacitated adult is required, such service may be made by:

1. Sending by the probate court of a copy of the document to be served to the minor or incapacitated adult by certified mail or statutory overnight delivery, and;
2. Serving the legal guardian or guardian ad litem of such minor or incapacitated adult if such legal guardian or guardian ad litem:
   a. Acknowledges receipt of such service, and
   b. Certifies that he/she has delivered a copy of the document so served to the minor or incapacitated adult.\(^90\)

These provisions pre-date the complete revision of Title 29 in 2004 and Code Section 29-9-4(d) states that persons who are not \textit{sui juris} may be served in accordance with Chapter 11 or as provided in Code Section 15-9-17. Given the permissive nature of service in this manner, the method above may not be used often in practice in proceedings under Title 29. However, this method clearly remains a viable available alternative to the provisions of Chapter 11 of Title 53 regarding service upon persons who are not \textit{sui juris}.\(^91\)

The judge of the probate court is also authorized under this Chapter to direct (order) any additional service or notice as the judge may determine to be proper in the interest of due process and reasonable opportunity of any party or interest to be heard.\(^92\)

As in the case in decedents’ estate, persons who are in the military service may be served in Title 29 proceedings by any commissioned officer who will make a return or certificate of service evidencing the fact of service.\(^93\)

\(^{89}\) O.C.G.A. §29-9-2(b).
\(^{90}\) O.C.G.A. §15-9-17.
\(^{91}\) O.C.G.A. §29-9-4(d).
\(^{92}\) O.C.G.A. §53-11-5.
\(^{93}\) O.C.G.A. §29-9-4(c). It would appear that personal service by a commissioned officer would be necessary with regard to any service member who is a domiciliary of Georgia but is stationed outside Georgia. If the
The Civil Practice Act provides that the methods of service provided in Code Section 9-11-4 may be used as alternative methods of service in proceedings in the probate courts and in any other special statutory proceedings and may be used with, after, or independently of the method of service specifically provided for in any such proceeding, and that such service will be sufficient when made in accordance with the statutes relating particularly to the proceeding or in accordance with Code Section 9-11-4.94

3.4 Acknowledgements of Service

In most proceedings in the probate courts, any person who is sui juris and who is required to be served with a citation, notice, rule nisi, or other pleading or order may acknowledge service, thereby waiving the requirement of formal service.

The Civil Practice Act permits waivers of service of process generally in all civil proceedings in Georgia courts.95 Although not yet used often in probate courts, the Civil Practice Act permits the sending of a request for waiver of summons to any “defendant”96 in a civil proceeding. Upon a failure of a defendant within the United States to comply with the request for waiver within the time stated, which must be not less than 30 days nor more than 60 days, the costs of the service of process are chargeable against the defendant.97

In both of the primary Titles which govern proceedings in the probate courts, Title 29 and Title 53, specific provisions are made for acknowledgments of service by or on behalf of persons who are to be notified or served.98 In addition to acknowledging service or notice, any interested party may consent to the granting of the relief requested or to the entry of the order sought.99

If a person to whom notice is required is not sui juris, a guardian-ad-litem appointed or permitted to serve may acknowledge service and assent to the granting of the relief requested for the person represented.100 Regardless of age, a person in the military service

94 O.C.G.A. §9-11-4(k).
95 O.C.G.A. §§9-10-73 and 9-11-4(d).
96 “Defendant” is not defined but is presumably intended to refer to anyone against whom relief is sought.
97 O.C.G.A. §9-11-4(d).
98 O.C.G.A. §§29-9-8(a) and 53-11-6(a).
99 O.C.G.A. §§29-9-8(b) and 53-1-6(b).
100 O.C.G.A. §§29-9-2(b) and 53-11-2(b).
may acknowledge service and assent to the granting of the relief requested.\textsuperscript{101}

The appearance of a party in court, other than for the purpose of challenging personal or subject matter jurisdiction or the sufficiency of service of process is a waiver of formal service of process and is the equivalent of an acknowledgement of service.\textsuperscript{102}

3.5 Objections (Caveats)

All objections or caveats to any proceeding or order must be made in writing and must set forth the grounds for the objection.\textsuperscript{103}

3.5.1 Decedents’ Estates

With regard to decedents’ estates and the estates of missing persons, the deadline for filing objections is, unless otherwise provided with regard to a specific proceeding, governed by Chapter 11 of Title 53 and is based on the method by which notice was served. The date on or before which any objection must be filed:\textsuperscript{104}

1. With regard to interested parties who reside in Georgia and were served personally shall be not less than ten (10) days after the date the person is so served;

2. With regard to interested persons who reside outside the state of Georgia at known addresses and who were served by certified or registered mail, return receipt requested, or by statutory overnight delivery shall be not less than
   a. Thirteen (13) days from the date of mailing if the person resides in the continental United States;\textsuperscript{105} or
   b. Thirty (30) days after mailing if the person resides outside the continental United States;
   c. Except that, with regard to either of the above, if the return receipt is received back by the court within the 13 days or the 30 days, as applicable, the deadline shall be not less than ten (10) days from the date shown on the receipt as the

\textsuperscript{101} O.C.G.A. §§29-9-8(c) and 53-11-6(c).


\textsuperscript{103} O.C.G.A. §15-9-88.

\textsuperscript{104} O.C.G.A. §53-11-10.

\textsuperscript{105} The “continental United States” is the 48 contiguous (adjacent) states and the District of Columbia. Alaska, Hawaii and the United States territories are not a part of the continental United States.
actual date of delivery. [Perhaps this provision bears some explanation by way of examples. If certified mail has been sent to a resident of the continental US on June 1. On June 10, the return receipt is received showing actual delivery on June 4. The deadline then is June 14, ten days from the date of receipt. If the return receipt is received after the deadline set forth in the citation, the original deadline remains applicable regardless of the date of actual receipt. Similarly, if notice has been sent by certified mail to someone outside the continental US on June 1 and the receipt is received back showing actual delivery on June 16, the deadline then is June 26. If the receipt is returned after the deadline set forth, the stated deadline applies.]

3. With regard to interested persons who are known but whose whereabouts or address are unknown who were served by publication shall be no sooner than the first day of the week following the last insertion of the published notice; and

4. With regard to interested persons who are unborn or unknown or are minors or incapacitated adults who have been represented in the proceeding by a guardian upon whom service will be made shall be not less than ten (10) days after he guardian is served or acknowledges service.

The judge of the probate court may extend the time to respond with respect to any proceeding as the judge may determine to be proper in the interests of due process and reasonable opportunity for a party or interest to be heard.

3.5.2 Guardianship and Conservatorship Cases

It would appear that Code Section 29-9-13 is misnamed, which makes it difficult to find the subject matter of deadlines for filing objections in matters under Title 29. The Code Section is entitled “Satisfaction of requirements for authentication or exemplification.” However, the Code Section clearly addresses deadlines for objection.

106 Presumably, the first day which is not a legal holiday is intended here. In most cases, this will be a Monday. However, if that Monday is a legal holiday, the “first day of the week” should be considered to be Tuesday.

107 It would appear that it is expected that the “guardian” would be a resident of Georgia who would be personally served. However, if the court were to permit a natural guardian or other guardian then serving to represent the minor or incapacitated adult and the guardian is a non-resident of Georgia, the provisions for service on a non-resident may apply.

With regard to guardianship and conservatorship, the deadline for filing objections is, unless otherwise provided with regard to a specific proceeding, governed by Chapter 9 of Title 29 and is based on the method by which notice was served. The date on or before which any objection must be filed:\footnote{109 O.C.G.A. §29-9-13.}

1. With regard to interested parties who reside in Georgia and were served personally shall be not less than ten (10) days after the date the person is so served;

2. With regard to interested persons who reside outside the state of Georgia at known addresses and who were served by certified or registered mail, return receipt requested, or by statutory overnight delivery\footnote{110 Note, however, that most specific proceedings under Title 29 require notice to those who reside outside Georgia by \emph{first-class mail}. It would seem, however, that these deadline periods might be deemed applicable to those specific proceedings if there is not a deadline also set forth in the provisions of those specific proceedings.} shall be not less than
   a. Fourteen (14) days from the date of mailing if the person resides in the United States;\footnote{111 Note that this 14-day deadline in Title 29 differs, for no obvious reason, from the 13-day deadline which applies under Title 53.} or
   b. Thirty (30) days after mailing if the person resides outside the United States;\footnote{112 Note that, in Title 29, there is no distinction between living in the continental U.S. and living in any non-continental state or territory, as is the case in Title 53. There appears to be no obvious reason for this difference.}
   c. Except that, with regard to either a. or b. above, if the return receipt is received back by the court within the 14 days or the 30 days, as applicable, the deadline shall be not less than ten (10) days from the date shown on the receipt as the actual date of delivery. \footnote{113 Presumably, the first day which is not a legal holiday is intended here. In most cases, this will be a Monday. However, if that Monday is a legal holiday, the “first day of the week” should be considered to be Tuesday.} [See explanation at Section 3.5.1(2)(c) above.]

3. With regard to interested persons who are known but whose whereabouts or address are unknown who were served by publication shall be no sooner than the first day of the week\footnote{113} following the last insertion of the published notice; and

4. With regard to interested persons who are unborn or unknown or are minors or incapacitated adults who have been represented in the proceeding by a
guardian upon whom service will be made shall be not less than ten (10) days after he guardian is served or acknowledges service.\textsuperscript{114}

Since most original proceedings under Title 29 require notice only to persons whose whereabouts are known,\textsuperscript{115} the issue of publication and a deadline might seldom arise.

The judge of the probate court may extend the time to respond with respect to any proceeding as the judge may determine to be proper in the interests of due process and reasonable opportunity for a party or interest to be heard.\textsuperscript{116}

\subsection*{3.6 Miscellaneous Proceedings}

The specific notice and service requirements for the other miscellaneous proceedings which might be filed in the probate courts will be covered in the specific Chapters or Sections which address those proceedings.

\subsection*{3.7 Terms of Court; Days of Operation}

Sessions of the probate court are required to be held in each county beginning on the first Monday of January, April, July, and October; hence, there now are quarterly terms of court in the probate courts. When the first Monday falls on a legal holiday, the term begins on the next succeeding day.\textsuperscript{117} It is customary to commence the new term at 10:00 A.M. It is good practice to enter an order opening each new term of court and closing the prior term. There are no proceedings under the 1998 revisions to Title 53 which require the matter to be heard at the next term or later.

The office of the judge of the probate court is required to be open for the transaction of business at all times except Sundays, and one other day of the judge's choosing each week.\textsuperscript{118} Thus the court in most, if not all, counties is closed on Saturdays.

\addcontentsline{toc}{section}{References}
\textsuperscript{114} It would appear that it is expected that the “guardian” would be a resident of Georgia who would be personally served. However, if the court were to permit a natural guardian or other guardian then serving to represent the minor or incapacitated adult in a proceeding and that guardian is a non-resident of Georgia, the provisions for service on a non-resident probably would apply.
\textsuperscript{115} O.C.G.A. §§29-2-17(b)(7) and (c), 29-3-8(b)(5) and (c), 29-4-10(b)(7) and 29-4-11(c)(3), and 29-5-10(b)(7) and 29-5-11(c)(3).
\textsuperscript{116} O.C.G.A. §29-9-7.
\textsuperscript{117} O.C.G.A. §15-9-82.
\textsuperscript{118} O.C.G.A. §15-9-83.
4. **HEARINGS AND TRIALS**

4.1 **Uncontested Matters**

4.1.1 **Decedents’ Estates**

Unless and until a caveat has been timely filed by a party with standing to contest the proceeding, the proceeding is uncontested, and the order granting requested relief may be entered at any time following the expiration of the time for filing objections.\(^{119}\) The judge of the probate court may decide that, as a routine practice or for any particular types of proceeding or for any specific proceeding, a hearing will be held by the court even if the matter is uncontested. This is permissible since the granting of an order in a proceeding is within the discretion of the court,\(^{120}\) with one exception: the judge of the probate court is required to grant a petition for year’s support if no objection is filed.\(^{121}\)

There is no provision under Chapter 9 of Title 15 which requires the judge of the probate court to grant a petition without a hearing or which entitles a petitioner to an order granting the relief requested in a proceeding without a hearing.

The primary benefit of a hearing in uncontested matters is the opportunity for the court to assure that all notice requirements have been met. The court can determine, from the testimony, whether a diligent effort has been made by the petitioner or the petitioner’s attorney to locate those heirs, beneficiaries, or other interested parties about whom it is alleged that their whereabouts are unknown. The court can determine further whether all heirs have, indeed, been listed and that heirs of equal standing have not been inadvertently omitted. The court can, when appropriate, ascertain the correctness of the estimated value on an intestate estate and set the bond in an appropriate amount. Lastly, the court can determine by testimony that there is no reason why the petition should not be granted (such as in cases of a later will or codicil).

Alternatively, the judge of the probate court may decide that routine and uncontested petitions may be granted without a hearing. Attorneys should ascertain from the particular court the requirements of a hearing and the necessity of attendance of the attorney at a hearing. The judge of the probate court may also decide that, when a petition is filed, a clerk

\(^{119}\) O.C.G.A. §15-9-86(d).

\(^{120}\) O.C.G.A. §53-11-9(a), “the petition may be granted without a hearing.”

\(^{121}\) O.C.G.A. §53-3-7(a).
of the court may administer the oath of office to the nominated personal representative and accept the petition for filing, to be reviewed and granted, if appropriate, by the judge at a later time.

Whether a hearing is held by the court, or the court permits clerks to accept a petition for filing and administer the oath of office to the nominated personal representative(s), a determination should be made, preferably by sworn testimony of a petitioner before the judge or clerk that:

1. The decedent died domiciled in the county or was domiciled outside Georgia but owns property in the county;
2. All heirs (and, if applicable, all beneficiaries under any other will offered for probate anywhere in Georgia) have been properly named and that a diligent effort has been made to locate each such heir (beneficiary);
3. Proper service has been perfected on all heirs (and, if applicable, beneficiaries); and
4. If intestacy is alleged:
   a. The petitioner has no knowledge of the existence of a purported will of the deceased, and
   b. The estimated values of the estate set forth in the petition are correct, if bond will be required.
5. If testacy is alleged:
   a. The purported will and any codicil(s) was/were duly executed and witnessed in accordance with Georgia law and that proper proof(s) has/have been filed;
   b. The purported will, with any codicil(s), is the last known document purporting to be a will or codicil of the decedent;
   c. The purported will and/or any codicil(s) was/were not revoked, expressly or impliedly, during the lifetime of the decedent;
   d. If a copy of the will and/or any codicil(s) is/are being offered for probate, the original(s) has/have not been located and that there is no reason to believe that the document(s) was/were destroyed by the decedent with an intent to revoke; and
6. The nominated personal representative(s) are prepared to qualify as such or, if applicable, that proper cause is shown why any nominated executor(s) of a higher
priority has/have not or cannot serve (such as a declination to serve, proof of death of the first nominated executor(s), etc.).

The attorney representing the petitioner at an uncontested probate hearing should have the petitioner testify under oath, before the court or a clerk, to all facts which make out the *prima facie* case for entitlement to an order granting the petition. If the petitioner is appearing *pro se*, the judge of the probate court or the clerk should elicit sworn testimony from the petitioner which will make out the *prima facie* case.

At the uncontested hearing, if appropriate under the evidence, the judge may sign the final order granting the petition and administer the oath office to the nominated personal representative(s) ready to qualify. Appropriate Letters (Testamentary, of Administration, etc.) may then be issued by the judge if all personal representatives(s) have qualified, including the posting of any bond required. Letters should never be issued until the bond, when required, has been posted.

If the testimony is taken by a clerk, the clerk may administer the oath to the nominated personal representatives(s) ready to qualify and advise him/her/them that appropriate Letters will be issued only after the final order has been signed by the judge.

In either such case, the judge or the clerk may want to provide to the qualifying personal representatives(s) a copy of the *Handbook to Guide Personal Representatives*, especially if the personal representatives(s) is/are not represented by an attorney. If the personal representatives(s) has/have not been relieved of the reporting requirements, the reporting requirements should be explained to the personal representatives(s) and the forms for the Inventory and Returns should be given to the personal representative(s). If the personal representatives(s) has/have been relieved of reporting, it should be made clear that the service of the personal representative(s) is still governed by Georgia law and that heirs, beneficiaries or other interested parties may still call upon the personal representatives(s) to account for the manner in which the estate is being or has been administered.

### 4.1.2 Guardianship/Conservatorship Cases

It is interesting to note that Title 29 contains confusingly different requirements as to the holding of a hearing in the various proceedings covered by the Title. Hearings are required, that is, the Code states that a hearing *shall* be held: in permanent guardianships of
minors and in guardianship and conservatorship cases involving adults. A hearing is also required in a temporary guardianship of a minor if a natural guardian files an objection to the proposed temporary guardian or if a parent who is not the natural guardian files an objection to the granting of the guardianship or to the proposed temporary guardian. However, a hearing is discretionary, that is, the Code states that a hearing may be held, on a petition for the appointment of a conservator for a minor.

Therefore, even though a proceeding under Title 29 may be “uncontested,” in that no one is objecting to the granting of the petition, a hearing is required in certain cases, and the court must make certain findings, sometimes by clear and convincing evidence, before granting the petition. Furthermore, in adult guardianship and conservatorship cases, the Code requires that the hearing be held in a courtroom, unless not practical under the circumstances, and that the hearing be recorded in some manner. If the hearing is held somewhere other than a courtroom, the hearing still must be recorded. Therefore, even an uncontested proceeding where a hearing is required will (and should) be conducted with some formality.

Given the significant responsibilities incumbent upon a conservator for a minor and the statutory requirement that the court appoint as conservator the person who will serve the best interest of the minor, it would seem contrary to good practice to appoint and qualify a conservator for a minor without a hearing. Blanket authority is given to the judge of the probate court, on the court’s own motion, to order a hearing “on any matter related to a conservatorship or guardianship even if no objection is filed.” However, the Code does not mandate a hearing, and a court may decide not to hold a hearing.

With regard to temporary guardianships of minors, the Code mandates that the petition be granted under certain circumstances “without further notice or hearing.” Those are: when both parents or the sole living parent consent(s) in writing to the appointment; or, when no parent who is entitled to and has been given notice files an objection to the

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123 O.C.G.A. §§29-4-12(c) and 29-5-12(c).
124 O.C.G.A. §29-2-6(e).
125 O.C.G.A. §29-3-9.
126 O.C.G.A. §§29-4-12(d) and 29-5-12(d).
127 O.C.G.A. §29-3-7(a).
petition. It is unclear whether the blanket authority of Code Section 29-9-14 overrides the mandate of these sections.

Nonetheless, a judge of the probate court may have questions about the accuracy and completeness of the information stated in the petition, most particularly with regard to the identity and location of the parents of the minor. Given that the matter involves the physical custody of and powers over a minor child equivalent to that of a parent, even if the blanket authority of Code Section 29-9-14 does not apply, it would seem within the inherent power of the judge of the probate court to order the holding of a hearing in any particular case or as a routine in all such cases. If such a hearing is held in an uncontested matter, the attorney for the petitioner or the judge of the probate court if the petitioner does not have an attorney should elicit from the petitioner sworn testimony proving all facts which the Code requires be included in the petition.

Notwithstanding the foregoing about the possibility of a hearing in the probate court, in both circumstances, the judge of the probate court may refer the petition to the juvenile court, which shall, after notice and a hearing, determine whether the temporary guardianship is in the best interest of the minor. This might certainly be the better practice in any case in which the judge of the probate court has concerns that the best interests of the minor have not been fully considered or may not be adequately protected.

4.2 Contested Matters

In conducting a contested hearing on any petition, application or motion, the judge of the probate court is exercising a judicial function.

At the hearing, the attorney representing the petitioner or the petitioner, if pro se, should make a brief introduction by stating: (1) the type of proceeding before the court (2) the essential facts of the verified petition, including those facts which give the court jurisdiction; and (3) the type of notice given, the recipients of notice, and the caveator’s name or names. All witnesses who will testify in person should be properly sworn by a bailiff, the judge of the probate court, or the clerk.

129 O.C.G.A. §29-2-6(a) and (c).
130 O.C.G.A. §29-2-5(c).
131 O.C.G.A. §29-2-6(f).
132 O.C.G.A. §24-9-60.
may administer the oath to witnesses, if all witnesses are given the oath at the same time, in order to avoid any appearance of favoritism, it would be the better practice for the judge, clerk or bailiff to administer the oath to all. Conversely, each witness or any witness who might not have been present when an oath was administered to all witnesses may take the oath at the time of testifying, in which case, it would be proper for the attorney who first questions the witness to administer the oath. If any party is self-represented (pro se) and a witness called by that party was not earlier administered the oath, the judge should administer the oath to the witness.

The judge should inquire whether either party requests sequestration of the witnesses. Application of the rule of sequestration is within the sound discretion of the court.

4.3 Jury Trials in Article 6 Probate Courts

In Article 6 Probate Courts, parties to "civil cases" have the right to a jury trial. A party must demand a jury trial in writing within 30 days after the filing of the first pleading of the party or within 15 days after the filing of the first pleading of an opposing party, whichever is later. Failure to assert the right to a jury trial is deemed a waiver of that right. In cases in which there is a jury, factual issues are determined by the jury as in cases in the superior court. A party to a "civil case" in such probate courts also has a right of appeal to either the Supreme Court or the Court of Appeals, whichever is appropriate. The general rules of appellate practice applicable to cases appealed from the superior court govern appeals from such probate courts.

The above Code provisions allowing jury trials in certain probate courts and direct appeals from such probate courts apply to all "cases" filed on or after July 1, 1986. The Georgia Supreme Court has held that if any pleading was filed concerning a decedent's estate prior to the effective date, any appeal relating to that estate would be de novo to the superior

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136 O.C.G.A. §15-9-121(a).
137 O.C.G.A. §15-9-121(b).
139 O.C.G.A. §15-9-123(b).
court, whether or not the appeal relates to a pleading filed prior to the effective date.\footnote{Walker v. Yarus, 258 Ga. 346 (1988).} In effect, the Supreme Court construed "case" to mean the entire estate in this context.

\subsection*{4.4 Burdens of Proof}

In general, the petitioner has the burden of establishing a \textit{prima facie} case, that is, to prove all of the essential elements necessary to show entitlement to the relief requested.\footnote{O.C.G.A. §24-4-1.}

The caveator also has the burden of proving affirmatively all matters raised by him which are not matters for which the petitioner is required to make out a \textit{prima facie} case.\footnote{Id.}

Unless otherwise provided, a party which has the burden of proof in a civil case must prove the facts necessary by a preponderance of the evidence.\footnote{O.C.G.A. §24-4-3.} However, there are certain proceedings in which a petitioner is required to prove the facts supporting the granting of the petition by clear and convincing evidence.\footnote{For example, in adult guardianship/conservatorship cases.} Unless the caveator has admitted a \textit{prima facie} case prior to trial, the petitioner has the right to make the first opening statement and, after opening statements, to first present evidence to make out the \textit{prima facie} case. If a \textit{prima facie} case is made by the petitioner, the caveator then presents evidence to make out the allegations of the caveat or to rebut the evidence presented by the petitioner. After the caveator presents all the evidence for that side, the petitioner has the opportunity to present rebuttal evidence. The general rules of evidence apply.\footnote{O.C.G.A. §9-10-186.}

Ordinarily, the petitioner is entitled to open and close the arguments. However, if the caveator has admitted the \textit{prima facie} case or introduces no evidence, the caveator is entitled to open and conclude the arguments.\footnote{Id.; Skelton v. Skelton, 251 Ga. 632 (1983).}

\subsection*{4.5 Evidence}

Evidence is the subject of an entire Title under our Code, Title 24. The subject is much too broad for any comprehensive discussion in this Handbook. In about 2004, each judge of the probate court was given a copy of a treatise on evidence: \textit{Georgia Rules of Evidence}, Second Edition, by Professor Paul S. Milich of the Georgia State University...
School of Law.\textsuperscript{147} Many judges may also have the Courtroom Handbook on the same topic subsequently written by Prof. Milich and published by Thompson-West.

Whether it is Prof. Milich’s treatise or some other recognized authority, such as\textit{Agnor’s Georgia Evidence},\textsuperscript{148} every judge of the probate court should purchase and rely on a resource which will complement the Code on the subject of evidence. The discussion which follows simply highlights the major evidentiary rules and issues which regularly arise in trials in the probate courts.

4.5.1 Evidence in General

The object of every trial in a civil matter is the discovery of the truth, and the rules of evidence are designed for that purpose.\textsuperscript{149} The rules of evidence are generally covered in Title 24 of the Code and apply in all courts and in all proceedings in the courts, except as otherwise provided.\textsuperscript{150} There are certain matters which may be asserted and accepted without further proof, that is, the court may take judicial notice of these matters.\textsuperscript{151}

\textbf{Judicial notice} may be taken of:

1. The existence and territorial extent of states and their forms of government;
2. Symbols of nationality;
3. The laws of nations;
4. Laws and resolutions of the General Assembly and the journals of each branch thereof as published by authority;
5. The laws of the United States and of the several states thereof as published by authority;
6. General customs of merchants;
7. The admiralty and maritime courts of the world and their seals;
8. The political constitution and history of our government as well as the local divisions of our own state;
9. The seals of the several departments of the government of the United States

\textsuperscript{149} O.C.G.A. §24-1-2.
\textsuperscript{150} O.C.G.A. §24-1-3.
\textsuperscript{151} O.C.G.A. §24-1-4.
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and of the several states of the Union; and

10. All similar matters of public knowledge.

The party wishing the court to take judicial notice must make a request for it. This might be made in a pleading, when it relates to a matter being pled, or might be raised at trial, especially if the issue is first raised at trial. If a judge intends to take judicial notice of a fact, the judge must announce the intention and afford the parties an opportunity to show why it should not be taken.

Relevance and Materiality

In order to be admissible, evidence must be relevant, that is, it must relate to the questions being presented and bear upon them directly or indirectly. Evidence must also be material, that is, that it bear directly or indirectly on an issue which is material to the case being tried. An issue of fact is “material” if it is important, more or less necessary, and goes to the merits of the issue. Finally, in order to be admissible, evidence must be probative, that is, that it tends to prove the matter asserted.

Character

Generally, the character of a party and the conduct of a party in other instances are irrelevant, and, therefore, inadmissible, unless the nature of the action involves the character of the party.

Hearsay

Hearsay evidence is generally admitted only when necessary and within recognized exceptions to the hearsay rule. Hearsay evidence is defined as "that which does not derive its value solely from the credit of the witness but rests mainly on the veracity and competency of other persons." The essential purpose of the hearsay rule is that a witness should not be permitted to testify to the truth of a fact when the witness’ foundation for it being true comes from some other person or source. The primary reason for that testimony not being admissible is that the original person or source cannot be examined or cross-examined, nor can the credibility of the original person or source be assessed. This might best be understood by an example.

155 O.C.G.A. §24-3-1(a).
**Hearsay Example:** In the trial of a case, it is necessary to prove that John was the driver of a car involved in an accident. A witness on the stand is asked who was driving the car. The witness’ answer is "Barbara told me that John was driving the car." That is hearsay because the witness does not know whether John actually drove the car; the witness’ believe that John was the driver, no matter how sincere, comes only from a statement made by another person, Barbara. Unless Barbara is in court, she cannot be asked how she knows that John drove the car. The judge or jury is being asked to accept and adopt the witness’ believe that Barbara's statement was true - John drove the car. To understand the reason why the witness should not be allowed to use Barbara's statement as the truth, simply supposed that Barbara didn't herself actually see John driving; she "discovered" it from some other person or source.

Hearsay evidence might not be obvious. Even if a witness does not expressly repeat something said out of court, if it is clear that the testimony is not based on the personal knowledge of the witness, it is still, implicitly, hearsay.\(^{156}\) Hearsay may also be non-verbal, that is, it may be in writing or be based upon an action or gesture of the out of court declarant.\(^{157}\)

It is often said that the exceptions to the hearsay rule outnumber all other rules of evidence. Indeed, Georgia recognizes not less than seventeen exceptions to the hearsay rule.\(^{158}\) Most of the exceptions depend upon some reason why the out of court statement has inherent reliability and trustworthiness.

Further, the simple fact that a witness testifies to an out of court statement does not make it hearsay. It is the purpose for which the statement is offered that will determine its admissibility as not being hearsay. If the evidence is presented, not for the purpose of proving the truth of what was said, but instead for the purpose of explaining its effect on the hearer, it is not hearsay. For example, take the statement, “she called and told me mother was dying.” If the witness intends to prove that mother was dying, it is hearsay. If, on the other hand, the witness repeats the statement for the purpose of showing why she went to mother’s home, it is not hearsay.\(^{159}\) Therefore, whenever an objection is made to an out of court statement being given by a witness, the judge of the probate court should first

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\(^{156}\) Georgia Rules of Evidence, supra, at §16.6.

\(^{157}\) Id.

\(^{158}\) Chapter 3 of Title 24 of the Code.

\(^{159}\) Georgia Rules of Evidence, supra, at §17.5.
determine the purpose for which the statement is being presented.

Best Evidence Rule

The best evidence rule generally requires that the best proof is always to be preferred, and something less than the best proof will be accepted only within recognized exceptions. In Georgia, the rule applies only to writings (documents, things written).\footnote{Georgia Rules of Evidence, supra, at §8.1.} When a party wishes to prove the contents of a writing, the writing itself must be produced in court, or the party must account for why it cannot be produced. When a party needs to produce a writing in order to prove the contents of the writing, oral testimony from a witness having knowledge of the contents of the writing will not be permitted unless the party first accounts for why the writing itself cannot be produced after due diligence (reasonable attempts to locate the document and the use of legal means to compel its production). Whether a party has exercised due diligence such as will relieve the party from producing the document is a matter left to the sound discretion of the judge.\footnote{Id at §8.2.}

Again, the original of the writing generally must be produced unless it cannot be produced. However, there is an exception for copies which have been made in the regular course of business and for certified copies of public records.\footnote{Id at §8.3.}

Georgia’s Electronic Records and Signatures Act\footnote{O.C.G.A. §10-12-1 et seq.} provides that electronic records are to be treated as “writings” for purposes of the rules of evidence. Therefore, a witness may not testify to the contents of an electronic record, such as an email, without producing the “original,” that is a printed copy of the original record/message.\footnote{Id.}

A party must object to any failure of another party to comply with the best evidence rule, and the failure to object will be deemed a waiver.\footnote{Id at §8.1.}

Medical Records

Quite often, in the trial of matters in the probate courts, medical records concerning a decedent, minor, proposed ward, or patient in mental health or substance abuse treatment will be offered into evidence. The first issue with regard to such records is the authentication of the records, that is proof that the copies presented in evidence do come from the original
records and that the original records are those which are made in the ordinary course of business. In that regard, Georgia has a special statute for authentication and use of medical records. It provides that “medical records or reproductions thereof, when duly certified by their custodians, need not be identified at the trial and may be used in any manner in which records identified at the trial by the custodian could be used.”

The second issue, after the records have been authenticated, is the admissibility of the contents of the records. Observations and reports of information, done in the regular course of the duties of the persons recording those matters, are admissible. These would include such things as test results, blood pressure, urine output, the administration of medications pursuant to orders, etc. However, opinions, conclusions and diagnoses are inadmissible without the testimony of the persons making or rendering the opinions, conclusions and diagnoses. These would include such things as diagnosis of an illness, disease or condition, opinions on the patient’s mental or physical condition, conclusions made from the results of tests, etc.

The redaction of the records to remove inadmissible material is particularly important when a matter is tried before a jury. When the matter is tried before the judge alone, it will often be stipulated that the entire records may be admitted with the assurance and expectation that the inadmissible portions will be ignored by the judge. When that is done, it is important for the judge to avoid making factual determinations on the inadmissible hearsay portions of those records. If a judge of the probate court is uncomfortable with separating the admissible from the inadmissible, it would be the better practice to ask that only a redacted copy be presented to the court.

**Demonstrative Evidence**

Demonstrative or illustrative evidence is something created to depict, demonstrate or illustrate the real evidence not brought into court. Things such as photographs, diagrams, models, computer animations, videos, and reenactments are all demonstrative evidence. The photo of a house, the diagram of an intersection, the model of a building, etc. are intended to provide something in court which is substantially similar to the real evidence, which would require going to the house, the intersection, the building, etc.

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166 O.C.G.A. §24-7-8(b).
167 Georgia Rules of Evidence, supra, at §19.16.
A witness with knowledge about the real evidence must, before testifying by use of the demonstrative evidence, establish that the demonstrative evidence substantially and fairly depicts that which it represents (demonstrates).\textsuperscript{168}

**Lay Opinions**

Lay persons (ordinary witnesses who do not possess some expertise in the subject matter being testified about) are permitted to give descriptive opinions which are based on the witness’ personal knowledge (and not on hearsay), provided: the witness testifies to the factual basis for the opinion; the opinion is of a matter an ordinary person might form an opinion about (that is, that it does not require special training, education, or expertise); and the opinion is not about the ultimate issue to be determined by the trier of fact (jury or judge). Lay witnesses are generally permitted to give opinions, based on actual knowledge, on such things as the value of an item, time, distance, speed, personal conditions (such as the person was “tired,” “sleepy,” “drunk,” etc) and on the sanity or mental condition of another.\textsuperscript{169} Most particularly with regard to a probate court issue, witnesses to a will have been permitted to give their opinion on whether the testator was of sound mind at the time of execution of the will.\textsuperscript{170}

**Expert Opinion**

The Georgia Code provides that the “opinions of experts on any question of science, skill, trade, or like questions shall always be admissible; and such opinions may be given on facts as proved by other witnesses.”\textsuperscript{171} Expert witnesses will often appear in the trials of matters in the probate courts. The opinion of an expert also must not go to the ultimate question to be determined by the trier of fact (jury or judge). Expert testimony is not admissible simply because it is expert testimony. To be admissible, expert testimony must:

- be relevant;
- add information which the judge or jury could not draw from the facts because of a lack of training or experience;
- be based on principles, techniques, or methods that have proven reliability;
- be given by a witness qualified by background and training in the skills, methods,

\textsuperscript{168} Id at §10.1.
\textsuperscript{169} Georgia Rules of Evidence, supra, at §15.2.
\textsuperscript{171} O.C.G.A. §24-9-67.
techniques, etc. used to forming an opinion; and

- be based on facts relied upon by the witness in forming an opinion which are made clear and match up to the relevant facts of the case.\textsuperscript{172}

### 4.6 Constitutional Challenges

The Supreme Court has ruled that statutes may not be declared unconstitutional without a “proper attack” being made and not based upon oral arguments at trial. This apparently means that a pleading or motion must be filed which distinctly raises the issue of the constitutionality of certain statutes, such that the opposing parties will be put on notice of the challenge.\textsuperscript{173}

### 4.7 Dismissal by the Court

#### 4.7.1 Dismissal for Want of Jurisdiction

As stated in Section 1.1 above, a court must have both subject matter and personal jurisdiction in order to hear, try, and render judgment on a matter. A motion may be filed seeking dismissal for want of subject matter or personal jurisdiction.\textsuperscript{174} Jurisdiction to grant the relief sought is a matter which should be decided at the outset, since jurisdiction either exists or does not exist without regard to the merits of the case.\textsuperscript{175} While personal jurisdiction may be waived, subject matter jurisdiction cannot.\textsuperscript{176} Because subject matter jurisdiction is a matter in abatement (authority to proceed to hear the matter), it must be decided by a motion under Code Section 9-11-12(b) rather than by a motion for summary judgment.\textsuperscript{177} Lack of jurisdiction over the person may be raised in defensive pleadings or by motion.\textsuperscript{178} Even after a default judgment has been entered,\textsuperscript{179} a judgment granted without jurisdiction may be attacked in the court of rendition or in any other court of competent jurisdiction under Code Section 9-11-60.\textsuperscript{180}

\textsuperscript{172} Georgia Rules of Evidence, supra, §§15.3 through 15.13.

\textsuperscript{173} In the Interest of J.R.R., 281 Ga. 662 (2007).

\textsuperscript{174} O.C.G.A. §9-11-12(b).


\textsuperscript{176} See Section 1.1 above.

\textsuperscript{177} First Christ Holiness Church, Inc. v. Owens Temple First Christ Holiness Church, Inc., 282 Ga. 883 (2008).


\textsuperscript{180} See Section 5.4.2 below.
4.7.2 Dismissal for Lack of Prosecution

Code Section 9-11-41(b) permits dismissal of an action for failure of the plaintiff (petitioner) to prosecute the matter or to comply with the Civil Practice Act or any order of court. The Section contemplates a motion for dismissal filed by the defendant. In most probate court proceedings, there is no defendant, acknowledgments of service are often filed, and no response or objection is filed after notice. Therefore, unless the petitioner pursues the matter, by seeking a hearing, the entry of an order, or the issuance of Letters, the matter might stand without any action being taken, sometimes including non-payment of the costs of court. In such a case, the judge of the probate court should be authorized to issue an order notifying the petitioner that the matter will be dismissed for want of prosecution, unless the matter is pursued and/or the costs paid or the petitioner shows just cause why the matter has not been concluded. Service and notice would, of course, be required and a reasonable amount of time (not less than ten days) given. Upon a failure of the petitioner to comply with that order, it is the author’s opinion that the matter may be dismissed by the Court for want of prosecution. There is no standard form for such a notice. See Appendix A2-XX for a Sample Notice.

The Code Section also applies to any counterclaim, cross-claim, or third-party claim,\footnote{O.C.G.A. §9-11-12(c).} which, presumably, would include a caveat or objection to a proceeding in probate court.

All dismissals for want of prosecution hereunder are without prejudice and is no an adjudication of the merits unless so specified in the court’s order.\footnote{O.C.G.A. §9-11-12(b).}

The Section also provides that “any action in which no written order has been taken for a period of five years shall automatically stand dismissed, with costs to be taxed against the party plaintiff (petitioner).\footnote{O.C.G.A. §9-11-12(e).} An order of continuance is deemed an “order” for these purposes. Any action so dismissed may renewed (re-filed) within six months following the dismissal,\footnote{Id.} provided all costs of the first action have been paid in full.\footnote{O.C.G.A. §9-11-12(d).} A renewal action
filed within six months stands on the same footing with regard to any statute of limitations as did the original proceeding, that is, if the first proceeding was filed within the statute, the renewal proceeding is also considered within the statute. 186

4.7.3 Dismissal for Dormancy

In addition to the above provision, a separate Code Section also provides that any action or proceeding filed in any of the courts of this state in which no written order is taken shall automatically stand dismissed with costs to be taxed against the party plaintiff (petitioner). 187 Dismissal under this Section is automatic, mandatory, occurs by operation of law, and no order of dismissal is required. 188 The right of renewal and effect on the statute of limitations is the same as in Section 4.8.2 above.

4.8 Dismissal and Renewal by Party

An action may be voluntarily dismissed by the plaintiff (petitioner), or the party filing a counterclaim, cross claim, or third-party claim, by filing a written notice of dismissal before the first witness is sworn upon the trial of the matter or by the filing of a written stipulation of dismissal signed by all parties who have appeared in the action. 189 The action may be recommenced or renewed within the original statute of limitations period or within six months after the dismissal, whichever is later. 190

The first dismissal is without prejudice; however, the second dismissal operates as an adjudication upon the merits (with prejudice, the same as if the matter had been tried and the ruling was against the party dismissing). 191

5. JUDGMENTS

A judgment is any final order, decree, or ruling which may be appealed. 192 Whether an order is final and appealable is judged by the order’s function and substance, rather than

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186 O.C.G.A. §9-11-12(e).
187 O.C.G.A. §9-2-60.
189 O.C.G.A. §9-11-12(a).
190 O.C.G.A. §9-2-61.
191 O.C.G.A. §9-11-12(a)(3).
192 O.C.G.A. §9-11-54.
any “magic language” (including use of the word “final”).

5.1 Default Judgments

Notwithstanding any other provisions of the Civil Practice Act, in any case before the probate court in which notice is required to be given to interested parties by any method of service, if a caveat, consent, or other responsive pleading has not been filed within the time required, the case automatically becomes in default. The petitioner, at any time thereafter, is entitled to move for (request) judgment by default, in open court or in chambers. However, at any time before final judgment, the court in its discretion, upon payment of costs, may allow the default to open for providential cause preventing the filing of required pleadings or for excusable neglect or where the judge, from all the facts, determines that a proper case has been made for the default to open, on terms to be fixed by the court. In order for the default to be opened, the required showing must be made under oath, set up a meritorious objection, offer to plead instanter (immediately), and announce ready to proceed with the hearing in the matter. From the point of view of the petitioner, this puts a premium on having the order granting the petition signed as soon as possible, so that the default period closes.

The court may require a default certificate (GPCSF 52) from the party seeking entry of the default judgment if the court desires. However, there is no standard form for use by a party who is in default and is seeking to open the default and respond to the petition.

Under the Civil Practice Act, during the first 15 days after a matter becomes in default (the day after the date on or before which objections must be filed), the default may be opened as a matter of right upon the payment of the costs. This has been held to apply to matters in the probate courts. After the expiration of that first 15 days, opening the default is a matter of discretion with the court based on providential cause for the failure to file a timely objection or response.

5.2 Judgments after Hearings or Trials

After presentation of evidence and closing arguments has been completed, the judge

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194 O.C.G.A. §15-9-47.
197 O.C.G.A. §§9-11-55(b) and 15-9-47.
of the probate court is to render a decision on the issues which were tried. The decision is made in the form of a written judgment. A judgment is given legal effect only when reduced to writing, signed by the judge, and filed (stamped or marked) by the judge or clerk.\footnote{O.C.G.A. §9-11-58(b).}

Unless otherwise required with regard to specific proceedings, a judgment need not contain separately stated findings of facts and conclusions of law unless, prior to the rendering of the judgment, a request (written or oral) is made by a party. A written request may also be made within 20 days after the filing of the judgment.\footnote{O.C.G.A. §9-11-52.} The failure to timely request the statement of facts and conclusions of law will waive any right to object to court’s not including findings of fact and conclusions of law on appeal.\footnote{Huggins v. Powell, 293 Ga. App. 436 (2008) – denial of administrator’s petition for leave to recover and sell estate property.} There are some statutes, particularly those dealing with what must be included in final orders in certain guardianship and conservatorship cases, which essentially require a statement of facts and conclusions of law in the final order.\footnote{See Chapters 10 and 11.}

The statement of facts is a recitation of the facts of the case as found by the judge from the evidence. That is, after considering the evidence, the judge of the probate court makes a determination of the facts which have been proved by one party or another by the standard (preponderance of the evidence or by clear and convincing proof) applicable to the proceeding. Findings of fact are not intended to be a brief of all evidence and need be made only on issues necessary to the disposition of the matter upon which judgment is rendered.\footnote{Seigel v. General Parts Corp., 165 Ga. App. 339 (1983).} Examples of findings of fact are: the decedent was a resident of this county; the decedent was married and had three children, one of whom predeceased him and is survived by two children; the decedent was of sound mind on the date that a purported will was signed; the decedent was not subjected to undue influence; a proposed ward is incapacitated by reason of Alzheimer’s Disease; a minor was injured in an event and will receive monetary damages; etc.

Conclusions of law are the result of applying the applicable law to the facts which have been found. Examples of conclusions of law, when applied to the facts, are: the court has jurisdiction over the decedent’s estate; the decedent’s heirs are his wife, two children,
and two grandchildren; the decedent had sufficient testamentary capacity to make the will; the proposed ward must have a guardian or conservator appointed; the minor must have a conservator appointed; etc.

The judgment of the court results from the combination of the findings of fact and conclusions of law. Using the examples above, a judgment might be that the will be admitted to probate and that the executor(s) be permitted to qualify, or that the nominated guardian and conservator are appointed for the incapacitated adult, or that the parent of the minor is appointed as conservator for the minor.

A judgment is the disposition of or decision on an issue presented to the court for determination. It is not just the final order made in original proceedings; it is the decision rendered on any subsequent pleadings or motions. For example, the court’s ruling on a motion for attorney’s fees is a judgment rendered on that issue. Unless otherwise provided by law, findings of fact and conclusions of law are not required in rulings on motions.\footnote{203}{O.C.G.A. §9-11-52(b).}

\section{5.3 Judgment on Jury Verdicts}

When a matter is tried before a jury in an Article 6 Probate Court, the findings of fact are made by the jury, hence the phrase “trier of fact.” In such a case, the jury renders its verdict declaring the facts of the case as decided by the jury. The judgment adopts the verdict and provides the necessary orders to make the verdict the judgment of the court, unless a motion for judgment notwithstanding the verdict (“j.n.o.v.”) is granted.

\section{5.4 Relief from Judgments}

A judgment void on its face may be attacked in any court by any person. In all other instances, judgments are subject to attack only by a direct proceeding (in the original court) brought for that purpose.\footnote{204}{O.C.G.A. §9-11-60(a).} There are two methods of such a direct attack: a motion for a new trial or a motion to set aside the judgment. Judgments may be attacked by these motions only in the court which rendered the original judgment.\footnote{205}{O.C.G.A. §9-11-60(b).} The use of a complaint in equity to set aside a judgment is prohibited.\footnote{206}{O.C.G.A. §9-11-60(e).}
5.4.1 Motion for New Trial

Motions for new trial may be filed only in Article 6 Probate Courts and are not proper when filed in other probate courts.\(^\text{207}\) A motion for new trial must be predicated upon some intrinsic defect which does not appear upon the face of the record or pleadings,\(^\text{208}\) and a new trial is granted only where errors occurred which might have affected the findings of the trier of fact, whether the trier of fact was a judge or jury.\(^\text{209}\) The judge of the probate court may, however, grant, in his/her discretion, a motion for new trial when the evidence has been conflicting but should not grant a verdict j.n.o.v when the evidence does not clearly support a finding contrary to the verdict of the jury.\(^\text{210}\)

A motion for new trial which has been improperly filed in a non-Article 6 Probate Court will not extend the time for the filing of an appeal of the original order.\(^\text{211}\)

5.4.2 Motion to Set Aside

A motion to set aside a judgment may be based upon\(^\text{212}\):

1. Lack of jurisdiction over the person or subject matter;
2. Fraud, accident, or mistake or the acts of the adverse party unmixed with the negligence or fault of the movant; or
3. Nonamendable defect which appears upon the face of the record or pleadings. In order to show such a defect, it is not sufficient that the complaint or other pleading fails to state a claim upon which relief can be granted, but the pleadings must affirmatively show no claim in fact existed.

Reasonable notice must be afforded to the parties on all motions. Motions to set aside judgments may be served by any means by which an original complaint may be legally served if it cannot be legally served as any other motion. A judgment void because of lack of jurisdiction of the person or subject matter may be attacked at any time. Motions for new

\(^{207}\) O.C.G.A. §5-5-1.

\(^{208}\) O.C.G.A. §9-11-60(c).


\(^{212}\) O.C.G.A. §§9-11-60(d) – (h).
trial, when permissible, must be brought within the time prescribed by law.\footnote{\ref{footnote:213}} In all other instances, all motions to set aside judgments must be brought within three years from entry of the judgment.

Generally, judgments and orders may not be set aside or modified without just cause. In setting aside or modifying judgments and orders, the court must consider whether rights have vested and whether or not innocent parties would be injured by setting aside or modifying the order. Any ruling by the Supreme Court or the Court of Appeals in a case is binding in all subsequent proceedings in that case in the lower court and in the Supreme Court or the Court of Appeals as the case may be.

\section*{5.4.3 Clerical Errors}

Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders.\footnote{\ref{footnote:214}}

\section*{5.4.4 Set Aside by Court during Term}

In addition to the above rules, a trial court has the inherent authority to set aside its judgment in the same term in which it was rendered.\footnote{\ref{footnote:215}} The judgment is considered to be still in the breast of the trial court during the term in which it was entered, and in successive terms of court if excepted to during the initial term and regularly continued thereafter.\footnote{\ref{footnote:216}} Once the term of court ends, a judgment cannot be set aside unless it is absolutely void, without notice and a hearing being afforded to the opposite party.\footnote{\ref{footnote:217}} Now that the probate court operates on quarterly terms of court of three months each,\footnote{\ref{footnote:218}} this ability may prove more useful than when the terms of court were just one-month long.

\footnotesize
\begin{itemize}
\item \footnote{\ref{footnote:213}} Generally within 30 days after entry of the judgment. O.C.G.A. §5-5-40.
\item \footnote{\ref{footnote:214}} O.C.G.A. §9-11-60(g).
\item \footnote{\ref{footnote:217}} Adams Drive Ltd. V. All-Rite Trades, Inc., 136 Ga. App. 703 (1975).
\item \footnote{\ref{footnote:218}} O.C.G.A. §15-9-82.
\end{itemize}
6. ASSESSMENT OF ATTORNEY FEES AND EXPENSES

6.1 In General

An attorney’s right to fees is generally a matter of contract between the attorney and the client. Where there is no contract, an attorney may recover for services actually rendered. However, assessing attorneys’ fees and awarding them from someone other than the attorney’s client is another matter.

As a general rule, attorney’s fees and other expenses of litigation may not be awarded to a litigant against an opposing party except when specifically authorized by contract or by statute.

6.2 Specific Proceedings

In certain specific proceedings in the probate courts, provision is made for attorney’s fees to be collectable from and assessed to the estates of decedents, wards and minors.

6.2.1 Decedents’ Estates

A nominated executor who petitions to have the will of a decedent probated is entitled to recover from the estate the expenses incurred in offering the will for probate, including reasonable attorney’s fees. This is true whether or not the petitioner was successful, provided the petitioner proceeded in good faith. The judge of the probate court determines whether the petitioner proceeded in good faith. Good faith is determined on the circumstances of each case. However, a finding of fraud or undue influence in the procurement of the will being offered indicates a lack of good faith and bars recovery. Yet, the Supreme Court has held that, when a will has been unsuccessfully challenged on a claim that it was the result of undue influence, the “extraordinary expenses,” including attorney’s fees, may be chargeable against the inheritance of the unsuccessful challenger, even though the will provided that the benefit to the challenger “shall not be reduced by any expenses of administration.”  

An award of attorney’s fees may be made in favor of a successful caveator. Such fees

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are to be in a “reasonable amount,” and the court and the estate will not be bound by any contingency fee agreement signed by the caveators with the attorney.\textsuperscript{225}

An order awarding fees and expenses is appealable.\textsuperscript{226}

While there is no similar statute providing for the payment of attorney’s fees from an intestate estate, attorneys’ fees are included in the “expenses of administration,”\textsuperscript{227} which are a priority debt of the estate.\textsuperscript{228} Since the estate cannot be administered until a personal representative is appointed, this would include the fees and expenses for appointment.

Furthermore, while serving, personal representatives are authorized to employ attorneys as may be reasonably needed for the estate, and the fees and expenses would be payable from the estate.\textsuperscript{229} Either the personal representative or the attorney may seek an order fixing the fees and expenses from the judge of the probate court.\textsuperscript{230} This provision is permissive, that is, an order is not required; however, it may be the better practice to seek an order approving or setting the fees, by petition or motion with notice to interested parties, in any estate in which the parties or proceedings have been contentious, when the personal representative is not an heir or beneficiary, or when the fees exceed what might ordinarily be expected in a similar case because of special circumstances.

If a personal representative has been found to have committed a significant breach of fiduciary duty and is removed from office on account thereof, the personal representative may not recover any attorneys’ fees from the estate for the defense of the removal action.\textsuperscript{231} However, if an action is taken against the personal representative which fails to prove any mismanagement of the estate or grounds for removal, the personal representative and the surety, if applicable, may recover their attorneys’ fees and expenses for defending the action.\textsuperscript{232}

An interested party who files an action for the removal of the personal representative and proves sufficient grounds for the removal of the personal representative should be allowed to recover from the estate attorney’s fees and expenses if the action benefitted the

\textsuperscript{226} O.C.G.A. §53-5-26.
\textsuperscript{228} O.C.G.A. §53-6-61.
\textsuperscript{229} O.C.G.A. §53-7-6(4).
\textsuperscript{230} Id.
\textsuperscript{231} In re Estate of Garmon, 254 Ga. App. 84 (2002).
estate as a whole.\textsuperscript{233} On the other hand, no attorney’s fees may be awarded under Code section 53-12-193(a)(4) in an action against the personal representative without a finding of breach of trust.\textsuperscript{234}

6.2.2 Adult Guardianship and Conservatorship Proceedings

With regard to adult guardianship/conservatorship proceedings, there is a specific provision concerning payment of the “expenses of any hearing.”\textsuperscript{235} That phrase is not defined in the Code. However, the language of those Code Sections is exactly the same as former Code Section 29-5-13(a), under which the appellate courts have held that “the expenses of any hearing” refers only to the costs of the proceeding and not to the “expenses of litigation,” which would include attorneys’ fees.\textsuperscript{236}

There is a statute which provides that an attorney or guardian-ad-litem who is appointed by the court shall be awarded reasonable fees commensurate with the tasks performed and time devoted to the proceeding, including any appeals.\textsuperscript{237} Interestingly, this Code Section does not say from whom such fees are to be awarded, nor does it address whether a distinction is to be made between a successful petition and an unsuccessful petition. In fact, it was upon a similar provision in the former Code\textsuperscript{238} that the Court of Appeals based, in part, its ruling in the Olliff case, emphasizing both that the provision applies only to appointed counsel and that the General Assembly could have but did not authorize payment to employed counsel.\textsuperscript{239}

The foregoing notwithstanding, it is the opinion of the author that, when a guardianship or conservatorship is found to have been necessary and in the best interest of the ward, the expenses of litigation which brought about that result should not be borne by the petitioners if the ward has sufficient assets to cover those expenses. The Olliff case involved an attempt by a proposed ward who was successful in defeating the proceedings to recover from the unsuccessful petitioners the fees of her employed (not appointed) counsel.

\textsuperscript{233} O.C.G.A. §53-7-55(4) “Issue such other order as in the court’s judgment is appropriate under the circumstances of the case.” See also Estes v. Collum, 91 Ga. App. 186 (1954).
\textsuperscript{235} O.C.G.A. §§29-4-17 and 29-5-17.
\textsuperscript{237} O.C.G.A. §29-9-15.
\textsuperscript{238} Former Code Section 29-5-13(e).
\textsuperscript{239} In re Olliff, supra.
To cast upon the petitioners their expenses of litigation even if the petition is successful will surely dissuade interested persons, especially those who may not be closely related to the proposed ward, from seeking the court’s protection of vulnerable adults. Furthermore, if a proposed ward who employs counsel is determined to be incapacitated, the validity of the contract of employment may be suspect. Nonetheless, an attorney acting in good faith should be entitled to the reasonable value of the legal services rendered, even if the contract of employment is of questionable validity.\textsuperscript{240}

The judge of the probate court is given fairly broad authority, when a guardianship or conservatorship is granted, to fashion an order which addresses the best interest of the ward in accordance with the circumstances.\textsuperscript{241} Where the ward has sufficient funds to support an award of the expenses of litigation of the petitioner(s), whose efforts arguably resulted in the protection of the ward, as well as those of the ward’s attorney and the guardian-ad-litem, if any, it would seem both proper and within the court’s authority to allow recovery by the petitioner(s) of those expenses of litigation. As of July 1, 2009, the author is not aware of any appellate court ruling in Georgia to the contrary.

While serving as such, a conservator impliedly is authorized to employ counsel, first by being entitled to recover reasonable expenses incurred in the administration of the estate, including those of “employing counsel.”\textsuperscript{242} In addition, conservators are authorized, if not obligated, to “provide for the … welfare of the ward”\textsuperscript{243} and “to enter into contracts for labor or services,”\textsuperscript{244} and both conservators and guardians are authorized to “bring, defend, or participate in legal, equitable, and administrative proceedings … on behalf of the ward.”\textsuperscript{245} A guardian has the duty, if “necessary, to petition to have a conservator appointed for the ward,” and a conservator has the duty, if “necessary, to petition to have a guardian appointed for the ward.”\textsuperscript{246} Surely that obligation or authority impliedly carries with it the authority to employ an attorney and pay the reasonable fees of same from the estate of the ward.

\textsuperscript{240} O.C.G.A. §15-19-11.
\textsuperscript{241} O.C.G.A. §§29-4-13 and 29-5-13.
\textsuperscript{242} O.C.G.A. §29-5-51.
\textsuperscript{243} O.C.G.A. §29-5-22(b)(5).
\textsuperscript{244} O.C.G.A. §29-5-23(a)(2).
\textsuperscript{245} O.C.G.A. §§29-5-23(a)(6) and 29-4-23(a)(3).
\textsuperscript{246} O.C.G.A. §§29-4-22(b)(3) and 29-5-22(b)(3).
6.2.3 Minor Guardianship and Conservatorship Proceedings

With regard to guardianship/conservatorship proceedings of minors, there are no equivalent provisions for the payment of “the expenses of any hearing.” The provision for the payment of reasonable fees to the appointed attorney and/or guardian-ad-litem applies equally to proceedings concerning minors. While it might generally be accepted that minors in need of a guardian only, whether temporary or permanent, likely would not be possessed of a separate estate, by its very nature, the proceedings for the appointment of a conservator should indicate that a separate estate is to be received. If the minor’s estate is sufficient to pay the expenses of litigation necessary to secure the appointment of the conservator, especially of the ability of the parent(s) to pay the same is limited or there is no parent in life having the obligation to support the minor, it would seem within the court’s broad authority in fashioning the order of appointment to authorize the reimbursement or payment of those expenses, including attorney’s fees.

While serving as such, a conservator impliedly is authorized to employ counsel, first by being entitled to recover reasonable expenses incurred in the administration of the estate, including those of “employing counsel.” In addition, conservators are authorized, if not obligated, to “provide for the … welfare of the minor” and “to enter into contracts for labor or services,” and both conservators and guardians are authorized to “bring, defend, or participate in legal, equitable, and administrative proceedings … on behalf of the minor.” A guardian has the duty, if “necessary, to petition to have a conservator appointed for the minor,” and a conservator has the duty, if “necessary, to petition to have a guardian appointed for the minor.” Surely that obligation or authority impliedly carries with it the authority to employ an attorney and pay the reasonable fees of same from any estate of the minor.

6.3 Frivolous Pleadings

In any civil action in the probate court, reasonable and necessary attorney's fees and

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247 O.C.G.A. §29-9-1.
248 O.C.G.A. §29-3-10(a)(5) – the same broad authority as exists in the adult proceedings.
249 O.C.G.A. §29-3-51.
250 O.C.G.A. §29-3-21(b)(5).
251 O.C.G.A. §29-3-22(a)(2).
252 O.C.G.A. §§29-3-22(a)(3) and 29-2-22(a)(3).
253 O.C.G.A. §§29-3-2(b)(3) and 29-2-21(a)(6).
expenses of litigation must be awarded to any party against whom another party has asserted a claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position. Attorney's fees and expenses so awarded must be assessed against the party asserting such claim, defense, or other position, or against that party's attorney, or against both in such manner as is just.\textsuperscript{254}

The judge of the probate court may assess reasonable and necessary attorney's fees and expenses of litigation in any civil action if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under the Civil Practice Act. "Lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious.\textsuperscript{255}

No attorney or party may be assessed attorney's fees as to any claim or defense which the court determines was asserted by the attorney or party in a good faith attempt to establish a new theory of law in Georgia if such new theory of law is based on some recognized precedential or persuasive authority.\textsuperscript{256} Attorney’s fees and expenses of litigation awarded under the above Code provisions may not exceed amounts which are reasonable and necessary. Attorney’s fees and expenses of litigation incurred in obtaining an order of court pursuant to the above Code provisions may also be assessed by the court and included in its order.\textsuperscript{257}

Attorney's fees and expenses under these Code provisions may be requested by motion at any time during the course of the action but not later than 45 days after the final disposition of the action.\textsuperscript{258} The award of attorney's fees or expenses is determined by the court without a jury and is made by an order of court which is enforceable as a money judgment.\textsuperscript{259}

\begin{footnotesize}
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\item \textsuperscript{254} O.C.G.A. §9-15-14(a).
\item \textsuperscript{255} O.C.G.A. §9-15-14(b).
\item \textsuperscript{256} O.C.G.A. §9-11-14(c).
\item \textsuperscript{257} O.C.G.A. §9-11-14(d).
\item \textsuperscript{258} O.C.G.A. §9-15-14(e).
\item \textsuperscript{259} O.C.G.A. §9-11-14(f).
\end{itemize}
\end{footnotesize}
7. CONTEMPT PROCEEDINGS

7.1 Contempt Defined

Broadly defined, “contempt of court” is “the disregard for or disobedience of the order or command of the court (or the) interruption of the proceedings” before the court. An interruption of the proceedings usually involves disorderly behavior or insolent language, either in the court’s (judge’s) presence or near to it, so as to disturb the proceedings or impair due respect for the authority, justice or dignity of the court. An essential element of this type of contempt is that the conduct creates imminent or actual interference with the court’s ability to administer justice.

The Code contains a provision defining certain acts as being contemptuous:

1. Misbehavior of any person(s) in the presence of the courts or so near thereto as to obstruct the administration of justice;
2. Misbehavior of any of the officers of the courts in their official transactions;
3. Disobedience or resistance of by any officer of the courts, party, juror, witness, or other person(s) to any lawful writ, process, order, rule, decree, or command of the courts;
4. Violation of subsection (a) of Code Section 34-1-3, relating to prohibited conduct of employers with respect to employees who are required to attend judicial proceedings; or
5. Violation of a court order relating to televising, videotaping or filming of judicial proceedings.

7.2 Civil and Criminal Contempt Distinguished

Contempt may be either civil or criminal contempt.

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260 Appreciation is expressed to the Institute for Continuing Judicial Education and to Executive Director Richard D. Reaves, Esq., for the use of materials concerning the topic of Contempt of Court prepared by Mr. Reaves and by Hon. Robert Rodatus, Judge of the Juvenile Court of Gwinnett County, and Chuck Olson, Esq., General Counsel, Prosecuting Attorneys’ Council. Those materials were invaluable in the preparation of this Section.
Civil contempt proceedings are remedial (to remedy), that is, intended to compel obedience to a court order to do or to refrain from doing an act, usually for the benefit of a complaining party.\textsuperscript{264} The orders, directions or instructions of the court to a party must be clear enough to inform the person what he/she has been ordered to do.\textsuperscript{265} The burden of establishing the contempt is on the party asserting it,\textsuperscript{266} and the standard of proof is a preponderance of the evidence.\textsuperscript{267} Typically, the sanction imposed is a fine or incarceration only until the contemnor (person held in contempt) complies with the original order. Confinement to jail until the contemnor complies is solely within the sound discretion of the judge.\textsuperscript{268} The court may, instead, impose a set fine for each day that the contemnor fails to comply with the original order.\textsuperscript{269} It is said, in these cases, that the contemnor “has the keys to the jail.” Fulfilling the court-ordered condition releases the contemnor for the burden of the sanction.\textsuperscript{270}

Criminal contempt, on the other hand, is punitive; it punishes a person for an affront to the integrity or dignity of the court or its orders and proceedings. Here, the typical sanction is unconditional and is usually a fine or jail; no action on the part of the contemnor will prevent or change the punishment.\textsuperscript{271} Criminal contempt is a crime in the usual sense, and the standard of proof is beyond a reasonable doubt.\textsuperscript{272} Criminal contempt may be either direct or indirect.

Direct contempt is disrespectful or disruptive conduct committed in the presence of the court or so near thereto as to obstruct the administration of justice. Direct contempt is dealt with summarily, that is, without a special or separate hearing. Authority to summarily deal with contumacious\textsuperscript{273} conduct is derived from the court’s inherent authority to maintain courtroom decorum and order.\textsuperscript{274} Nonetheless, an abbreviated form of notice is required

\begin{itemize}
\item \textsuperscript{264} In re Earle, 248 Ga. App. 355 (2001).
\item \textsuperscript{265} In re Harris, 299 Ga. App. 216 (2009).
\item \textsuperscript{266} Martin V. Waters, 151 Ga. App. 149 (1979).
\item \textsuperscript{268} Flint v. Johnson, 229 Ga. 188 (1972).
\item \textsuperscript{269} Minor v. Minor, 257 Ga. 706 (1987).
\item \textsuperscript{270} Ensley v. Ensley 239 Ga. 860 (1977).
\item \textsuperscript{272} O.C.G.A. §16-1-4; In re Jefferson, 283 Ga. 216 (2008); Cousins v. Macedonia Baptist Church of Atlanta, 283 Ga. 570 (2008).
\item \textsuperscript{274} In re Shafer, 216 Ga. App. 725 (1995).
\end{itemize}
before the court may take action for the direct contempt. As a practical matter, this amounts to a verbal recounting of the conduct the court perceived as offensive and as interfering with justice, along with a challenge to show cause why the conduct should not be held contemptuous, giving the offender, then, an opportunity to present evidence or argument relevant to guilt or innocence or in mitigation of punishment.\textsuperscript{275} Again, the standard of proof is beyond a reasonable doubt, and the contempt finding must be supported on the record in order to be upheld on appeal.\textsuperscript{276}

Indirect contempt (also known as constructive contempt) is offensive or disrespectful conduct committed outside the actual presence of the court (judge) but which interferes with or obstructs the administration of justice. Indirect contempt does not have to be something directed at the judge. Like direct contempt, it can involve anything which interferes with the court’s authority or the administration of justice: threats to or harassment of witnesses\textsuperscript{277} or publication of a book, news release, letter to the editor, or newspaper article which is highly critical of a judge or court while a case is pending or which threatens the impartial administration of justice.\textsuperscript{278} However, there must be a clear and present danger to the orderly administration of justice.\textsuperscript{279}

Indirect contempt must be handled differently than direct contempt. Due process will require that a separate notice (citation) be given and a separate hearing held.\textsuperscript{280} The notice must be in writing, contain allegations of contumacious conduct, with an opportunity of the accused party to be heard at a time and place specified in the notice.\textsuperscript{281}

The question then becomes whether a prosecutor should be brought in to prosecute the indirect contempt allegation. If the judge is going to become a necessary witness,\textsuperscript{282} the matter can’t be proved from a transcript,\textsuperscript{283} or if the judge of the probate court is particularly and personally offended\textsuperscript{284} a prosecutor should be brought in, and another judge should be

\begin{itemize}
\item \textsuperscript{275}Martin v. Waters, 151 Ga. App. 149 (1979).
\item \textsuperscript{276}In re Spruell, 200 Ga. App. 218 (1991).
\item \textsuperscript{277}Herring v. State, 165 Ga. 254 (1927).
\item \textsuperscript{278}In re Fite, 11 Ga. App. 665 (1912); Cobb v. State, 59 Ga. App. 695 (1939).
\item \textsuperscript{281}Martin v. Waters, 151 Ga. App. 149 (1979).
\item \textsuperscript{282}In re Burger, 264 Ga. App. 92 (2003).
\item \textsuperscript{283}In re Scheib, 283 Ga. App. 328 (2007).
\end{itemize}
asked to hear the case.285

7.3 Authority of Probate Judge to Punish for Contempt

The judge of the probate court has the power to enforce obedience to all lawful orders of the court by attachment for contempt under the same rules as are provided for other courts. The judge of the probate court may issue rules and attachments for contempt offered the court or its process (committed to the court’s authority) by any representative or other person, and may punish the person in contempt by a fine as high as $500.00 or imprisonment not exceeding 20 days, or both.286

The courts have ruled that the legislative authority over contempt proceedings is limited to prescribing the punishment for contempt, after conviction287 and that the limitations apply only to punishment for criminal contempt.288

The use of contempt sanctions by a judge of the probate court will most often involve the failure or refusal of a guardian, conservator, or personal representative to file required returns or reports, to comply with orders to render an accounting, or to surrender the estate to a successor. This will also generally follow the original issuance of a citation to show cause why the person has not complied, followed by an order of expressed direction to file the reports or returns, render the accounting, or surrender the property.

It must be noted, however, that contempt is not an available remedy to enforce the payment of a money judgment in absence of statutory authority.289 Therefore, when a citation has been issued against a guardian, conservator, or personal representative and the court has entered a judgment assessing against the person and the surety, if applicable, an amount of money found by the court to be a shortage, enforcement of that money judgment may not be done through contempt proceedings. Collection action, as in the case of any other money judgment, must be taken, which may include levy and attachment against property of the person.290 In the Backus case, the Court of Appeals rejected an argument that the enforcement in the case (failure to pay funds the probate court had found had been

286 O.C.G.A. §15-9-34.
misappropriated from a custodial account) was analogous to contempt proceedings to enforce child support, by pointing out that contempt proceedings are specifically authorized by statute. In that case, it would appear that a judge of the probate court may enforce a final settlement, even if it involves only a money judgment, by means of contempt.\footnote{O.C.G.A. §53-7-63.}

Any personal representative or surety who has removed himself beyond the limits of this state or has absconded or concealed himself may be cited to appear before the judge of the probate court on matters relating to the performance of the duties or involving the probate court. Service of the citation may be perfected by publication for four weeks and, if such person's last address is known, by mailing; the manner of service and compliance with giving notice must be certified in the proceedings.\footnote{O.C.G.A. §15-9-35.}

### 7.4 Contempt by Parties or Persons

Parties unaccustomed to court proceedings should be given an opportunity to correct inappropriate conduct. Best practice would call for a clear warning to a party in a proceeding risking punishment for contempt. When the party is represented by counsel, the attorney should be directed to admonish the client to prevent a contempt finding. The same need for a warning would apply to any other persons in the courtroom who are not parties. The judge of the probate court should provide ample warning by means of a clear statement describing the actions which are objectionable and warn the party or person of the punishment which may be imposed if the party or person is found in contempt.\footnote{In re Vicotrine, 230 Ga. App. 209 (1998).}

### 7.5 Conduct by Attorneys

While an attorney has a professional responsibility to zealously represent a client, an attorney is not free to act as he/she chooses and is not exempt from contempt sanctions. The primary, recent case dealing with inappropriate conduct by an attorney is \textit{In re Jefferson}.\footnote{In re Jefferson, 283 Ga. 216 (2007).} In that case, an attorney’s contempt conviction was upheld as to statements which impugned, disparaged, and attacked he impartiality of the court and thereby undermined its authority, respect, and dignity. However, the Supreme Court held that contempt may be found only
where the attorney “knows or reasonably should be aware in view of the circumstances, especially in the heat of controversy, that he (she) is exceeding the outermost limits of his proper role and hindering rather than facilitating justice. While stating that doubts should be resolved in favor of vigorous advocacy, the court recognized the authority of a court to maintain decorum and dignity in the court. The court indicated that a clear warning should be given on the record that the conduct is considered by the court to be “over the line.”

An attorney owes a professional obligation to every court to act with due respect to the authority of the court. There is no exception when the judge of the court is a non-attorney. An attorney owes the same level of respect, dignity and proper conduct to a non-attorney judge as is owed to an attorney judge.

8. APPEALS

8.1 De Novo Appeals to Superior Court

Except in Article 6 Probate Courts, appeals in cases which are appealable from the probate courts are taken to the superior courts. Some matters are not appealable at all, such as an order appointing a temporary administrator or probating a will in common form. An appeal to the superior court is a de novo (new) investigation or trial, bringing up the whole record from the court below, and all competent evidence is admissible in the de novo trial, whether or not introduced in the probate court. The phrase "bringing up the whole record" essentially means that the probate court transmits certified copies of all relevant pleadings to the superior court. Uniform Probate Court Rule 9.3 provides:

The record which is transmitted to the superior court in connection with any de novo appeal from the probate court shall include certified copies of all documents which will be recorded in the official record books of the probate court. In addition, a certified copy of any alleged will which is denied probate will be transmitted even though it will not be recorded on the probate court records. No exhibits, transcript of hearing, depositions, interrogatories, notices to produce documents, or any other

295 Georgia Rules of Professional Conduct, Preamble; A Lawyer’s Creed and the Aspirational Statement of Professionalism, Rule 9-101; Georgia State Bar Handbook.
296 O.C.G.A. §5-3-2.
297 O.C.G.A. §53-6-30.
298 Abercrombie v. Hair, 185 Ga. 728 (1938).
299 O.C.G.A. §5-3-29.
materials which reflect the evidence presented in the probate court shall be transmitted to the superior court in connection with a de novo appeal. Instead, any such materials in the possession of the court (other than documents required by law to be kept on file with the probate court) shall be returned to the attorney (or party) who presented them, if the probate court is requested to do so or does so on its own motion, and the attorney (or party) may then present them at the superior court hearing if desired.

If there is a transcript of the probate court proceedings, it may be used to impeach witnesses in the de novo trial if they make inconsistent statements. However, no mention may be made to the trier of fact in superior court of the result in the probate court.300

A de novo appeal results in "a new trial in which only the matter presented to the court below can be relitigated." Even a pretrial order in the superior court cannot expand the authority of the superior court to investigate issues which have not been raised in the probate court. Nonetheless, any issue involved in the matter being tried may be brought up in the superior court, whether or not raised in the probate court.301 For example, if a petition to for letters of administration is appealed, the only issues which may be tried in the superior court is the determination whether the decedent died testate or intestate and, if intestate, who should be appointed as administrator. Any evidence relevant to that determination may be admitted in the superior court, whether or not it was presented in the probate court. But, while hearing that appeal, the superior court may not entertain a request for leave to sell because that would expand the issues beyond what was tried in the probate court.

A party to an issue decided by the probate court may not condition compliance with the order of the probate court upon another party’s waiving the right of appeal, when such was not a part of the order below.302

Unlike an appeal taken from Article 6 Probate Courts (as well as other trial courts) to the Court of Appeals or Supreme Court, where the ruling of the trial court is reviewed as a matter of law and is upheld, reversed, or remanded, a de novo appeal to the superior court is not and should not be considered a review of the correctness of the decision of the judge of the probate court. A decision in the superior court which differs from that in the probate

court is not a determination that the decision in the probate court was in error. In the new trial in superior court, there is a different trier of fact (whether a jury or the superior court judge) and an entirely new presentation of evidence which may or may not differ significantly from the evidence presented in the probate court.

A decision in the superior court may or may not be the same as that in the probate court, but it is not, in any real sense, a decision which “upholds” or “reverses” the decision of the judge of the probate court.

The Constitution of Georgia, as it stood prior to 1983, contained a provision that matters within the exclusive original jurisdiction of the probate court, such as will contests, could be appealed to the superior court without a hearing or decision by the probate court if all parties consented. The Constitution of 1983 contains no such provision, and it is not specifically authorized by the Official Code of Georgia. However, since the appeal results in a de novo investigation, that is a new trial not bound by the evidence presented below, it is the action which is appealed, not the judgment. Therefore, for purposes of judicial economy, it would seem proper for all parties to consent to an appeal, especially where a jury trial is desired, without the time, expense and delay of a trial in the probate court. If there is doubt about the ability to do that, the parties could always consent to the entry of a consent judgment in the probate court, which would then be appealed.

8.2 Erroneous Appeals to Appellate Courts from Non-Article 6 Probate Courts

The discussion in Section 8.1 above notwithstanding, in at least one case, In re Estate of Sands-Kadel, the appellate courts have accepted a direct appeal from a non-Article 6 Probate Court. In that case, the appeal was filed in the Supreme Court, which transferred it to the Court of Appeals, which issued an opinion affirming the probate court. Neither appellate court mentioned the fact that the appeal was improper. In fact, the Court of Appeals referenced a Code Section in Article 6 of Chapter 9 of Title 53 in its opinion. Therefore, it would seem possible that future appeals erroneously filed in the appellate courts might be accepted and ruled upon.

8.3 Appeals from Article 6 Courts

An appeal from an Article 6 Probate Court in a civil case is taken to the Court of Appeals or the Supreme Court, as applicable to the subject matter of the appeal, in the same manner as are appeals from the superior courts. The appeal addresses issues only of law, and there is no de novo trial, although the appeals of certain matters may result in a de novo review of the record in the probate court. The appeal will result in an opinion (ruling) from the appellate court which will uphold or reverse, in whole or part, the ruling of the probate court and/or will remand the case back to the probate court with instructions on further proceedings. The opinion of the appellate court is returned to the probate court by means of the remittitur.

Taken literally, this provision would only apply to a “civil case” as it is defined in Article 6, meaning that it must be something within the “original, exclusive or general subject matter jurisdiction of the probate court” and be a civil matter for which there would be the right to a trial by jury in the superior court in a de novo appeal. The judges of the Article 6 Probate Courts are not prohibited from exercising the criminal jurisdiction extended under Chapter 9 of Title 15 and, like all other probate courts, have concurrent jurisdiction with the state and superior courts as to those matters. Therefore, an appeal taken from a criminal matter decided by a judge of an Article 6 Probate Court would lie in the superior court, as in any non-Article 6 Probate Court.

8.4 Supersedeas

The filing of a Notice of Appeal will act, in every case, to suspend or supersede the judgment or order being appealed. That is to say that, pending the outcome, dismissal or withdrawal of the appeal, the effect and provisions of the judgment or order are suspended as though the judgment or order had not been made and entered. The judgment or order is not vacated by the filing of the appeal. This rule is the same both with regard to de novo appeals to superior courts and appeals from Article 6 Probate Courts to the appellate courts.

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305 O.C.G.A. §15-9-123.
306 See Section 1.3 above.
307 O.C.G.A. §5-3-7.
308 O.C.G.A. §5-6-46.
8.5 **Standing to Appeal**

An appeal from the probate court may be pursued only by a party to the proceeding. For example, an appeal filed by the mother of a deceased to a grant of year’s support to the spouse was dismissed because the mother did not have standing in that she was not a party “plaintiff or defendant” in the probate court. Certain proceedings may be appealable only by certain persons by statute. For example, appeals of adult guardianship/conservatorship proceedings may be filed only by the ward (individually or by the ward’s attorney, guardian, conservator, or representative) and/or the petitioner.

9. **ALTERNATIVE DISPUTE RESOLUTION**

9.1 **In General**

The idea of a manner in which legal disputes might be settled by the opposing parties has been around for many, many years. However, in recent times, more formality has been given to the process. On September 26, 1990, the Georgia Commission on Alternative Dispute Resolution (“ADR”) was created by the Supreme Court of Georgia and the State Bar of Georgia. On January 27, 1992, the Alternative Dispute Resolution Rules were adopted and were amended on January 8, 1993, creating a permanent Commission and the Georgia Office of Dispute Resolution, both under the auspices of the Georgia Supreme Court. In 1993, the Georgia Legislature created by statute Chapter 23 of Title 15 of the Code, which, among other things authorizes the ADR add-on to court costs.

By statute, there is created in each county a “Board of Trustees of the (county name) County Fund for the Administration of Alternative Dispute Resolution Programs.” The judge of the probate court is a member of such Board. However, the implementation of an ADR program is permissive, rather than mandatory. The amount of the add-on to the costs in civil cases, up to $7.50 per action or case, is set by the chief judge of the superior court of the county. All court-connected, court-annexed, and court-referred alternative dispute resolution programs should be registered with Office of Dispute Resolution and comply with the Rules.

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313 Id.
promulgated by the Commission and adopted by the Supreme Court. 314

The term “alternative dispute resolution” (ADR), according to the Rules, refers to any method other than litigation for the resolution of disputes. The following definitions are contained in the Rules (with some paraphrasing):

**Neutral** refers to an impartial person who facilitates discussions and dispute resolution between disputants in mediation, case evaluation or early neutral evaluation, and arbitration, or who presides over a summary jury trial or mini trial. Mediators, case evaluators, and arbitrators are all “neutrals.”

**Mediation** is a process in which a neutral facilitates settlement discussions between parties. The neutral has no authority to make a decision or impose a settlement upon the parties. The neutral attempts to focus the attention of the parties upon their needs and interests rather than upon rights and positions. Although in court-annexed or court-referred mediation programs the parties may be ordered to attend a medication session, any settlement is entirely voluntary. In the absence of settlement, the parties lose none of their rights to a jury trial.

**Arbitration** differs from mediation in that an arbitrator or arbitration panel renders a decision after hearing an abbreviated version of the evidence. Arbitration is a form of adjudication, whereas mediation is not.

**Case Evaluation and Early Neutral Evaluation** is a process in which a lawyer with expertise in the subject matter of the litigation acts as a neutral evaluator of the case. Each side presents a summary of its legal theories and evidence. The evaluator assesses the strength of each side’s case and assists the parties in narrowing the legal and factual issues in the case. This conference occurs early in the discovery process and is designed to streamline discovery and other pretrial aspects of the case. The early neutral evaluation may also provide a basis for settlement discussions.

**Multi-door Courthouse** is a concept rather than a process, based on the premise that the justice system should make a wide range of dispute resolution processes available to disputants. In practice, skilled intake workers direct disputants to the most appropriate process or series of processes, considering such factors as the relationship of the parties, the

314 The complete Rules may be accessed at the Web site of the Office of Dispute resolution at www.godr.org/resolution_rules.html.
amount in controversy, anticipated length of trial, number of parties, and type of relief sought. All of the ADR processes would be available at a multi-door courthouse.

**Summary Jury Trial** is a non-binding, abbreviated trial by mock jurors chosen from the jury pool, with a judge or magistrate presiding. Principals with authority to settle attend. The advisory jury verdict is intended to provide the starting point for settlement negotiations.

**Mini Trial** is one similar to the summary jury trial but is presided over by a neutral. Attorneys present their best case to principals authorized to settle. Generally, the neutral announces no decision; the parties commence settlement negotiations; the neutral might be asked how the neutral believes a court would decide the case.

**Settlement Week** is an assigned time at the courthouse when there is a moratorium on litigation. Mediators are present, and appropriate cases are selected by the court to be submitted to a mediator. This often will involve volunteer mediators.

In any judicial circuit where there is an established ADR program, a judge of the probate court wishing to order parties to mediation should coordinate the order with the program director. Most programs have a preferred court order form. See Appendix A2-1 for a sample order. Where there is no formal program, the judge may still order mediation. All court-ordered mediations must be done by a neutral duly registered with the Georgia Office of Dispute Resolution. The list of registered neutrals is available on their Web site at [www.godr.org/web/guest/findneutral](http://www.godr.org/web/guest/findneutral).

A judge of the probate court may order any specific case to mediation by signing a specific order in the case. Judges wishing to do so may enter a standing order referring certain types of cases to mediation (e.g., all contested adult guardianships, all contested will probate cases, etc.). While parties may be ordered to attend a mediation session, they may not be ordered to participate. Mediations are confidential, and facts and statements made at a mediation session are not admissible in court. The mediator will report to the court only that settlement was or was not reached, except that the mediator may advise the court of a party’s refusal to participate in good faith.

There appears to be no reason why a judge of the probate court in a county which does not have a formal program could not order mediation when there is a registered neutral available in the county or willing to come to the county; it is doubtful that parties could be ordered to attend mediation outside the county.
APPENDIX TO CHAPTER 2
JURISDICTION, VENUE, PROCEDURES AND APPEALS

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Important Notice

Several sample orders and forms have been included in this Appendix. These sample orders and
forms have not been officially sanctioned by the Georgia Council of Probate Court
Judges. They have, unless otherwise noted, been prepared by the author. They are provided
solely as samples. They should be modified or adapted to the specific court for the specific
purpose, with any unnecessary material being deleted and any additional material being
added.

William J. Self, II
APPENDIX A2-1

IN THE PROBATE COURT OF _________________________ COUNTY
STATE OF GEORGIA

IN RE: : DOCKET NO. ________________

, : 

Decedent : 

ORDER FOR MEDIATION

Re: Petition

The Court hereby directs and encourages the parties above to seek an equitable settlement of the issues in dispute in this matter. If an agreement is reached, the Court is to be notified immediately.

If no agreement has been reached within fifteen (15) days of the date of this Order, however, the parties are hereby ordered to attend together and to participate in good faith in at least one mediation session with a mediator chosen (from the official list maintained by the ADR Program for the Judicial Circuit) (by the parties from among the mediators duly registered with the Georgia Office of Dispute Resolution). Mediation is a process which focuses on the parties themselves, and the Court strongly encourages the parties to carefully review the mediator list and to personally select a mediator. All parties must agree upon the chosen mediator and select a date for mediation within thirty (30) days of receipt by the attorneys for the petitioners of this Order. If the parties do not select a mediator within the time frame directed, one will be selected and appointed by the program director. The fees of the chosen or appointed mediator, as published in the Mediator List, shall be borne by [FEES]. [ATTORNEY AT LAW], as attorney for [PARTY] shall be responsible for completely filling out the mediation referral forms and scheduling the mediation session. All parties are responsible for compliance with the general mediation rules.

Each party must report to the Court the terms of any settlement reached. If no settlement is reached or if the Court has not received notification of the outcome of mediation within ninety (90) days of the date hereof, the matter will be scheduled by the Clerk for final trial.

Copies of this Order for Mediation shall be mailed to the office of the ADR Program for the ________ Judicial Circuit, to each petitioner’s attorney, to the guardian-ad-litem, if any, and to the Estate’s attorney.

SO ORDERED, on [DATE].

____________________________________
Judge, Probate Court of ________ County
CERTIFICATE OF MAILING

This is to certify that copies of the within and foregoing order were this date mailed by first-class, postage prepaid mail to the following named persons at the addresses shown:

Date: ________________

(Deputy) CLERK, Probate Court
APPENDIX A2-2

IN THE PROBATE COURT OF ____________ COUNTY
STATE OF GEORGIA

IN RE: : Docket No: :

NOTICE OF INTENT TO DISMISS
ACTION FOR WANT OF PROSECUTION

Take notice that the Petition for ___________________ filed in the above-styled matter by ________________________, on ______________ will be DISMISSED by the Court on _______________, for want of prosecution by the said petitioner UNLESS prior to that date the matter is otherwise brought before the Court for disposition or further hearing.

By direction of Hon. ________________________, Judge, this ___ day of _____________. 20__.

______________________________
(Dep.) CLERK, Probate Court

CERTIFICATE OF MAILING

This is to certify that copies of the within and foregoing document were this date mailed by first-class, postage prepaid mail to the following named persons at the addresses shown:

Date: ________________________.

__________________________
(Dep.) CLERK, Probate Court
IN THE PROBATE COURT OF ____________ COUNTY
STATE OF GEORGIA

ORDER OF COURT

The within and foregoing Notice having been served by first class mail upon ________________________, petitioner(s), and

It appearing to the Court that no response has been made to the Notice and that no further hearing, action or disposition has been made of the pending proceeding,

IT IS, THEREUPON, ORDERED that the Petition for _________________ filed in the above-styled matter by ________________________, on _________________ be, and the same is hereby, DISMISSED by the Court for want of prosecution, without prejudice.

IT IS FURTHER ORDERED that all costs for such proceeding are hereby taxed against the applicant/petitioner.

SO ORDERED, on [DATE].

____________________________________
Judge, Probate Court of ________ County

Certificate of Mailing

I certify I have mailed a Copy of the Order of Court dismissing for lack of prosecution to:

This ___ day of _____________, 20____.

____________________________________
(Dep.) CLERK, Probate Court
Chapter 3
PROBATE OF WILLS

The Revised
HANDBOOK FOR PROBATE JUDGES OF GEORGIA
2010
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CHAPTER 3
PROBATE OF WILLS

1. JURISDICTION IN WILL PROBATE PROCEEDINGS

1.1 Jurisdiction in General

The probate court has exclusive, original jurisdiction to probate the will of a decedent who died domiciled in the county or who died a non-resident of the state of Georgia owning property in the county. As explained in Ch. 2, Section 1.2, “exclusive” jurisdiction means that no court other than the probate court has jurisdiction over the subject matter, and “original” means that the proceeding must originate in a probate court. The superior courts and the appellate courts only obtain jurisdiction when a will probate proceeding is appealed from the probate court in which it originated. The superior court is required to transfer to probate court an original proceeding involving an issue within the exclusive jurisdiction of the probate court.

A petition to probate a will, whether in common or solemn form, is the process through which a document purporting to be the will of a decedent is proved to be the lawful Last Will and Testament of a deceased person. In fact, the word “probate” derives from the Latin word “probatio,” meaning proof. When a will has been “proved,” it is ordered “admitted to record” and is, thereby “probated.” An alleged or purported will has no legal effect, is not binding on the testator or on the heirs of a decedent, and cannot be enforced through legal action unless and until it has been probated.

Through the probate process, the probate court determines whether a person leaving an estate died testate (with a will) or intestate (without a will). The Latin phrase “devisavit vel non,” means, loosely translated, “will or no will.” The petition to probate a will brings that question before the probate court. The only matters under consideration at this inquiry are:

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1 O.C.G.A. §53-5-1(a).
1. Whether the decedent died a domiciliary of the county, or died a non-domiciliary of the state owning property in the county;⁵
2. Whether the will was valid when it was executed;⁶ and
3. Whether the will was revoked by the decedent before death⁷.

Since the estate of a Georgia domiciliary passes by operation of law to his or her heirs upon death, the probate process requires that notice be given to the heirs, whose interests are potentially adversely affected, that a writing purporting to be a will is being offered for probate. The decedent’s heirs are, therefore, interested parties, and an heir may file an objection to the probate of the will. The objection, called a caveat (from the Latin word for “warning” or “caution”), must be made in writing, be timely filed, and allege lawful grounds of objection. See Section 5.7 below on Caveats and Objections.

An interested party might not have an objection to the validity of the will but may want to file an objection to the appointment and service of the named executor(s). The objection would still be referred to as a caveat, because it does object to some of the relief requested in the probate petition. See Section 6. below for further information concerning the appointment of executors.

1.2 Domicile of Testator

1.2.1 Testator Generally

The person who has executed a will is known as the “testator.” The testator’s will must be probated in the county where the testator was domiciled at the date of death.⁸ Domicile and residence are not synonymous under Georgia law. An individual may have more than one residence but can have only one domicile. While "residence" may refer to where a person is living, "domicile” refers to one’s permanent place of abode.⁹ A competent adult’s domicile is the place where the family of the individual permanently resides, or, if an individual has no family or the family does not reside in this state, the place where the

⁵ See Section 1.2 below.
⁶ See Section 2. below.
⁷ See Section 3. below.
⁸ O.C.G.A. §53-5-1(b).
individual generally resides. There must be both actual residence and the intent to remain in order to establish domicile.

With respect to domicile, there are special rules for testators under guardianship, minors, transients, and adults who die in nursing homes or similar facilities.

1.2.2 Testator under Guardianship

If a guardian has been legally appointed for an adult, the adult has the same domicile as the guardian, unless otherwise provided in the order of appointment. Under Georgia law, unless the order of the court which creates the guardianship specifies that the ward retains the power to change his domicile, the appointment of a guardian removes that power from the ward. However, a guardian may not change the domicile of the ward by changing his/her own domicile so as to affect the rights of inheritance of third persons.

1.2.3 Domicile of Residents of Certain Care Facilities

If the testator was domiciled in a nursing home or similar such facility at the time of death, there is a rebuttable presumption that the testator’s domicile is the county in which he/she was domiciled immediately prior to entering the facility. The presumption may be rebutted if it is determined by the court that the county in which the facility is located is the county that the testator considered (or would have considered, absent impaired mental faculties) to be his/her domicile at death. However, if an adult under guardianship dies in a nursing home or similar facility, it appears that Code Section 19-2-5 would control over Code Section 53-5-1(c), that is, that the adult’s domicile is that of the guardian’s by law. Thus, the domicile of the testator under guardianship will be that of the guardian, which may or may not be the county in which the facility is located.

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10 O.C.G.A. §19-2-1(a).
14 O.C.G.A. §53-5-1(c).
15 O.C.G.A. §19-2-5.
16 O.C.G.A. §29-4-21(a)(5).
17 O.C.G.A. §19-2-6(b).
18 Id.
1.2.4  **Domicile of Minors**

A minor’s domicile is, under Georgia law, the same as the minor’s parents if the parents are married and living together. If the parents are divorced or separated or if one parent is not domiciled in the same county as the other, the minor’s domicile is the same as that of the custodial parent.\(^{19}\) The domicile of a minor who was born out of wedlock is that of the mother.\(^{20}\)

Where a minor’s parents have voluntarily relinquished custody to a third person or have been deprived of custody by court order, the minor’s domicile is that of the person having legal custody of the minor. If there is no legal custodian, the minor’s domicile is that of his/her guardian if the guardian is domiciled in Georgia. If there is neither a legal custodian or a guardian of the minor, the minor’s domicile is determined in the same manner as that of an adult.\(^{21}\)

1.2.5  **Domicile of Transients and Persons with Multiple Residences in Georgia**

It is possible that probate proceedings may be filed in connection with a person who did not maintain a regular place of domicile or who appears to have maintained more than one domicile.

If a person resides indifferently at two or more places in Georgia, that person has the privilege of electing which of such places shall be his/her domicile. If the election has been made known generally among those with whom the person transacts business in Georgia, the place chosen is the person’s domicile. If no such election has been made or if an election is made but is not generally known among those with whom he/she transacts business in Georgia, any one of the places in which the person resides may be treated as that person’s domicile.\(^{22}\)

Transient persons who frequently change residence and who have no family permanently residing at one place in Georgia are deemed to be domiciled at such place as they temporarily occupy at the time of an event about which domicile must be determined.\(^{23}\)

\(^{19}\) O.C.G.A. §19-2-4(a).
\(^{20}\) Id.
\(^{21}\) O.C.G.A. §19-2-4(b).
\(^{22}\) O.C.G.A. §19-2-2(a).
\(^{23}\) O.C.G.A. §19-2-2(b)
This likely means that the domicile of vagrants or homeless persons, for purposes of the administration of the estate of the person, would be the county in which the person spent most of his/her time or the county of the place of death, unless family members of the person show domicile to be in some other county based on facts such as where the person’s mail was usually sent, where the person last voted, where the person usually banks (if applicable), etc. If the person receives Social Security or veteran’s benefits, the applications for those benefits may disclose the place of domicile, and the location to which such benefits are sent most recently sent prior to death may evidence that person’s intended domicile.

1.2.6  **Domicile in a County Other than Where Petition is Filed**

Occasionally, a petition for probate and the original will are filed in one county, and it is later discovered that the decedent was actually domiciled in another county. Since the Code requires that a petition to probate be brought in the county of domicile of the decedent, probate in the first county would be void. In such a case, the judge in the county where the petition was filed is authorized to and should transfer the petition to the probate court in the county of domicile of the decedent if the petition is still pending. The Uniform Probate Court Rules contain the specific procedure to be followed. If the filing attorney prefers, and no other party objects, instead of following the transfer procedure the attorney could dismiss the petition, sign a receipt for the original will and file a new petition in the proper court. If the petition was filed pro se, the better practice might be for the court to mail the original will to the other county in some manner which would provide receipt of delivery.

The transfer rule applies only to a "timely" motion to transfer, made in a "pending" action. If the petition for probate has already been granted in the wrong county, the transfer rule cannot be used to transfer the estate to the correct county. The executor or some other interested party should file a motion to set aside the probate proceedings, after which the attorney may withdraw the original will from the first court, give a receipt to the first court, and then file the will and a petition to probate in the correct county. If the motion is filed

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24 O.C.G.A. §53-5-1(b).
26 Uniform Probate Court Rule 16.
during the same term of court in which the probate was granted, it may be granted instanter\textsuperscript{27}; otherwise, the provisions of O.C.G.A. §9-11-60, included the notice requirements, must be complied with.

2. BASIC REQUIREMENTS FOR VALID WILL

The second essential element for determination in will probate proceedings is that the will have been valid when executed by the testator. Therefore, what constitutes a valid will under Georgia law must be known by the judge of the probate court. In order to constitute a valid will, the writing must have been signed and witnessed in accordance with the requirements of the law by a person 14 years of age or older at a time when the person was of sound and disposing mind and memory and free of any undue influence or coercion.\textsuperscript{28}

2.1 Will Drafting Basics

While judges of the probate courts will generally not be involved in the drafting of wills, except for those attorney judges authorized to practice law, it is important to understand what is required to constitute a valid will. It may be equally important for the judge to know what does not constitute a valid will. Most attorneys feel competent to prepare simple wills for their clients. Unfortunately, not all attorneys prepare a well drafted and clearly understood will. The more complex the estate distribution plan or the more important the tax implications of an estate plan, the more important it becomes for the person to seek out the expertise of estate planning attorneys.

The law does not require that a will be prepared by an attorney. However, the preparation (drafting) of a will for another person by someone who is not a licensed attorney does constitute the practice of law without a license\textsuperscript{29} and a misdemeanor crime.\textsuperscript{30} Anyone may write his/her own will, and the use of published forms seems on the increase. As long as the document meets all the legal requirements of a will, it may be admitted to probate. Many self-written wills meet the basic requirements but are poorly written and difficult to understand. Many self-written wills do not include all of the powers which may be granted

\textsuperscript{27} See Ch. 2, Section 5.4 on Relief from Judgments.
\textsuperscript{28} O.C.G.A. §53-4-10(a).
\textsuperscript{29} O.C.G.A. §15-19-51.
\textsuperscript{30} O.C.G.A. §15-19-56.
to executors under Georgia law and do not contain waivers of the reporting requirements applicable to personal representatives.\textsuperscript{31} Likewise, many of the will forms sold in office supply stores and on the Internet meet the basic legal requirements; however, most do not sufficiently waive the reporting requirements or include all necessary powers. Many of the forms leave the drafting of the scheme of disposition to the testator, which, again, often leads to wills difficult to interpret and understand.

Simply stated, a will is the written declaration of how one wishes (instructs) that his/her property be distributed after death. The minimum requirements for a valid will are only that it (1) be in writing, (2) be signed by a competent testator or by someone at the expressed direction of the testator, and (3) be witnessed by no less than two disinterested witnesses in the presence of the testator.\textsuperscript{32} Documents which may purport to be wills but which fail to meet these minimum requirements will not qualify as valid wills.\textsuperscript{33} **There is no requirement that a testator notify anyone of the contents of his/her will.**\textsuperscript{34}

However, well-drafted wills do more than meet the minimal requirements. They might include:

1. Assurance that correct and proper names are used throughout the will, not just as to the testator but as to all persons named in the will for any purpose;
2. A statement of the family circumstances of the testator, identifying the heirs-apparent (expected heirs) or next of kin (this being more important when the testator’s next of kin are not descendents);
3. Clear expressions of the plan of distribution, clearly identifying the property being devised or bequeathed (including a legal description if necessary for clear identification) and the beneficiaries thereof in the following sequence within the will: specific devises/bequests; general devises/bequests, and a residuary clause disposing of all remaining property of the testator;

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\textsuperscript{31} See Chapter 5 on Personal Representatives and Temporary Administrators and Section 6 below on Executors.
\textsuperscript{32} O.C.G.A. §§53-4-20 and 53-4-23.
\textsuperscript{33} See Candies v. Hulsey, 229 Ga. 630 (2004) where the court ruled that a notation made in a power of attorney concerning matters of disposition after death were insufficient to constitute a will.
\textsuperscript{34} Pope v. McWilliams, 280 Ga. 741 (2006).
4. Clauses which disinherit beneficiaries who contest the will (known as *in terrorem* clause), if used, should be clearly drafted, defining what events or actions constitute a contest which will result in disinheritance and describing how the property which has been disinheritance shall be distributed;

5. A clear nomination of the executor(s) and a provision for alternate(s) to serve if necessary;

6. A clear grant of the powers which the executor(s) shall have and, if desired, a clear waiver of the reporting requirements, and;

7. An attestation clause and a self-proving affidavit.

Additionally, caution will be used to assure the proper execution (signing) of the will by the testator and the (no less than two) witnesses. Whenever possible, the names of the testator and witnesses should be typed or legibly printed under the lines on which each will sign. Ideally, to avoid problems with the manner in which the will is executed, the testator should sign first, in the presence of all witnesses (as well as the notary public for the self-proving affidavit), and the witnesses should then sign in the presence of the testator and in each other’s presence. **After the will has been signed and witnessed (i.e., a will exists), the testator and witnesses should sign, under oath and in the presence of the notary public, the self-proving affidavit.**

For a properly executed will with a self-proving affidavit, there must be not less than two witness and (plus) the notary – three persons, in addition to the testator. A notary public may not administer an oath to himself/herself nor perform a notarial act when the notary is a signatory to the document or transaction.

Knowledge of the contents of the will by the testator is required, although if the testator can read, the signature of the testator will be presumed to show such knowledge. Therefore, the testator should acknowledge to the witnesses that the document has been read and is the will of the testator. The witnesses and the notary on the self-proving affidavit

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35 [See Section 2.3 below.](#)
36 O.C.G.A. §45-17-18(c).
37 O.C.G.A. §53-4-21.
should satisfy themselves that the testator is of sound mind and memory and is acting freely and voluntarily without coercion or undue influence from anyone else.

Should there be a contest over whether the will was properly executed and signed, the witnesses may be called upon to testify about the facts surrounding the execution and the manner in which they and the testator signed the document.

Attorneys and their staff often follow a fairly precise routine in the execution of every will so that they may clearly testify about the events based on that routine even when they might not be able to recall a specific testator.

2.1.1  Bequests and Devises by Types

Testamentary gifts will be either specific, demonstrative, general, or residual gifts, defined as follows:

1. A **specific testamentary gift** directs the delivery of property particularly designated;
2. A **demonstrative testamentary gift** designates the fund or property from which the gift is to be satisfied but nevertheless is an unconditional gift of the amount or value specified;
3. A **general testamentary gift** does not direct the delivery of any particular property; and
4. A **residuary testamentary gift** includes all property of the estate that is no effectively disposed of by other provisions of the will.

For these purposes, “property” means real, personal, and/or intangible property.

2.2  Codicils and Republication

A codicil, defined in O.C.G.A. §53-1-2(4) as an “amendment to or republication of a will,” must be executed by the testator and attested by witnesses in the same manner as a will. A codicil should clearly refer to the will being amended and/or republished by the codicil. However, an error in reference to the date of the will does not automatically make

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38 O.C.G.A. §53-4-20(c).
the codicil or the will invalid, if it can be shown that the codicil was intended to apply to a will of another date, such as being appended to and enclosed with that will.\textsuperscript{39}

While it is customary, and good practice, for the codicil to clearly state the will is being republished together with the codicil, any language in the codicil which makes it clear that the will is being reaffirmed will be sufficient.\textsuperscript{40}

A will which has been republished by a codicil has the effect of making the will operate in the same manner as if it had been executed at the time of the republication, unless there a different or special intent is expressed in the codicil.\textsuperscript{41} The will and codicil together are being acknowledged, executed (signed), and witnessed as if everything were in one document.

2.3 Joint and Mutual Wills; Contract to Make a Will

A “\textit{joint will}” is one will signed by two or more testators that deals with the distribution of the property of each testator. A joint will may be probated as each testator’s will.\textsuperscript{42} “\textit{Mutual wills}” are separate wills of two or more testators that make reciprocal dispositions of each testator’s property.\textsuperscript{43} The execution of joint or mutual wills does not create a presumption of a contract not to revoke.\textsuperscript{44} \textit{After December 31, 1997, any contract that obligates an individual to make a will or a testamentary disposition, not to revoke a will or testamentary disposition, or to die intestate must be express (clearly stated) and must be in a writing that is signed by that person.}\textsuperscript{45} Joint or mutual wills may be revoked by any testator in the same manner as any other will, and the revocation by one of the testators does not revoke the will of any other testator.\textsuperscript{46}

Notwithstanding the foregoing, the Court of Appeals has upheld an oral contract to make a will involving a decedent who died in 2004. Without mentioning the change in the

\textsuperscript{40}Honeycutt v. Honeycutt, 284 Ga. 42 (2008).
\textsuperscript{42}O.C.G.A. §53-4-31(a).
\textsuperscript{43}O.C.G.A. §53-4-31(b).
\textsuperscript{44}O.C.G.A. §53-4-32.
\textsuperscript{45}O.C.G.A. §53-4-30; Hodges v. Calloway, 279 Ga. 789 (2005), holds that simply titling wills as “joint” is not a sufficient writing expressing such an obligation to cause one will to be irrevocable.
\textsuperscript{46}O.C.G.A. §53-4-33. This is a change from the Pre-1998 Probate Code, which provided that the revocation of one mutual will also acted to revoke the other mutual will. Pre-1998 Probate Code Section 53-2-51.
statute or the Hodges case, the Court of Appeals affirmed a jury verdict on a specific performance action finding that the decedent had entered into a valid and enforceable oral contract to make a will. Without specifically stating that the oral contract predated December 31, 1997, the court found that the decedent had reaffirmed an earlier oral contract from 1984 until 1993, that the decedent’s son in whose favor the jury ruled had performed his part of the oral contract, and that the oral contract was sufficient in terms of value and specificity.  

2.4 Testamentary Capacity

The issue of capacity is central to the determination of the validity of wills. The capacity necessary to make a will (testamentary capacity) is, by law, less than the capacity required to enter into a legal contract. The amount of intellect necessary to constitute testamentary capacity is that which enables a person to have a decided and rational desire regarding the disposition of his/her property. The testator must be capable, at the time of signing the will, of knowing generally what property he/she owns and who are his/her relatives of close kinship, and of expressing an intelligent scheme of disposition of his/her property. Testamentary capacity must exist at the time when the will is executed (signed and witnessed).

An insane individual generally may not make a will; however, during a lucid interval such a person may make a valid will. “Insane” includes all persons of unsound mind. A monomaniac, that is, a person suffering from an insane delusion about a single matter or subject which is not based in fact, may make a will if the will is in no way the result of or connected with the monomania. In the case of both insanity and monomania, it must be clear that the testator's wishes in the will are not adversely affected by the insanity or monomania.

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48 O.C.G.A. §53-4-11(b).
49 O.C.G.A. §53-4-11(a).
51 O.C.G.A. §1-3-3(9).
53 O.C.G.A. §53-4-11(c).
Capacity in general and testamentary capacity specifically may decline with advancement in age or progression of a dementia, other neurological diseases, and/or other causes, including physical diseases. However, “advancing age, weakness of intellect, and eccentricity of habit or thought do not deprive an individual of the power to make a will.”\textsuperscript{54} In other words, the mere fact that someone is old, has experienced a decline in intelligence, or is an eccentric in some manner does not mean that the person lacks testamentary capacity.

2.5 Proper Execution

Every will must be in writing, signed by the individual making the will or by some other individual in the testator's presence and at the testator’s express direction (that is, a testator may direct someone else to sign the will for him/her). The testator's signature may be by mark or by any name that is intended to authenticate the will as that of the testator.\textsuperscript{55} Even if the testator signs in the wrong place, the will is valid if the testator’s intent to sign the will is clear.\textsuperscript{56}

A will must be attested and subscribed in the presence of the testator by two or more competent witnesses.\textsuperscript{57} Except as noted below, the testator and witnesses should all sign contemporaneously and in the presence of each other, although it is not necessary for the testator sign first.\textsuperscript{58} However, it is no required that the testator sign in the presence of the attesting witnesses; the testator may sign first, then declare to the witnesses that the document is his/her will, and request that they witness it.\textsuperscript{59} The witnesses must sign their names in the presence of the testator;\textsuperscript{60} a subsequent acknowledgment of the signatures of witnesses will not cure the omission. While a good practice, it is not necessary that all of the witnesses sign in the presence of each other.\textsuperscript{61} A witness may sign by mark, but, unlike the testator, another individual may not sign the witness's name, even if the witness so directs.\textsuperscript{62}

\textsuperscript{54} O.C.G.A. §53-4-11(d).
\textsuperscript{55} O.C.G.A. §53-4-20(a).
\textsuperscript{56} Hickox v. Wilson, 269 Ga. 180 (1998).
\textsuperscript{57} O.C.G.A. §53-4-20(b).
\textsuperscript{60} O.C.G.A. §53-4-20(b), Lamb v. Girtman, 33 Ga. 289 (1862).
\textsuperscript{62} O.C.G.A. §53-4-20(b).
A proper attestation clause must attest to compliance with the formalities of executing a will, and, more specifically, state or certify that the testator either signed or acknowledged his/her signature in the presence of the subscribing witnesses.63

The Georgia Supreme Court continues to apply the “line of vision” test; that is, that the witnesses, when signing, must be situated where the testator is able to actually see them sign. Whether the testator actually looks at them is not the test; instead, it is that the testator could see the witnesses from where the testator was situated without having to move.64

If a witness also signs the will as a notary public, the notary public will constitute a witness if the notary signed in the presence of the testator. In other words, if there are just two witnesses, but one is a notary and signed as a notary, the fact of the capacity of being a notary does not disqualify the person from acting as a witness.65

A witness must be age 14 or over and otherwise be competent as a witness. Subsequent incompetence of a witness will not prevent the will from being probated if the witness was competent at the time of signing.66 If a subscribing witness is also named as a beneficiary under the will, the witness is competent to attest to the validity of the will, but the testamentary gift to the witness is void unless there are at least two other subscribing witnesses to the will who are not beneficiaries under the will.67 In other words, if there are at least two disinterested witnesses, the fact that a beneficiary also witnessed may be ignored. If the beneficiary-witness is one of only two witnesses, the testimony of that witness is necessary then for the will to be valid, in which case, the bequest to the beneficiary-witness is void. An individual may be a witness to a will under which his spouse is a beneficiary, but this fact may be considered in determining the credibility of the witness.68

As noted in Section 2.2 above, a codicil must be executed by the testator and attested by witnesses in the same manner as a will.

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66 O.C.G.A. §53-4-22.
67 O.C.G.A. §53-4-23(a).
68 O.C.G.A. §53-4-23(b).
2.6 Self-Proved Wills

At the time of its execution or at any subsequent time during the lifetime of the testator and the witnesses, a will or codicil may be made self-proved, that is, the testator and the witnesses execute a sworn affidavit before a notary public providing evidence of the due and proper execution and attestation of the will. The affidavit and notary’s certificate must be substantially in form and content as the statutory form set forth in the Code and are the only prerequisites of a self-proved will.\(^{69}\) For purposes of self-proving a will and for all other purposes under Title 53, any oath or affirmation or affidavit that is required to be made before a notary public may be made before any notary public or other officer who is authorized to administer oaths under the laws of the state in which the affirmation is made.\(^{70}\)

Self-proved wills or codicils may be contested, revoked, or amended by a codicil in the same manner as are wills which are not self-proved.\(^{71}\) See Section 5.2 below on Proof of Wills at the time of probate.

The use of self-proving affidavits has increased over the years since it was first allowed and is now considered to be a best practice for attorneys who draft wills for their clients. Nonetheless, some attorneys and individuals mistake the intent and use of the self-proving affidavit; it does not take the place of the attestation clause.

**There must first be a validly executed and witnessed will.** After the will has been properly signed by the testator and attested by the witnesses, the testator and witnesses execute an affidavit, under oath before a notary public, “proving” the will, that is, providing evidence that: (1) the testator declared to the witnesses that the instrument was a will or a codicil to a will, (2) that the testator had freely and voluntarily executed the will or codicil, (3) that the testator declared the document to be a will or codicil to each of the witnesses, signed the instrument, and asked each witness to serve as such, (4) that each witness had signed as such in the presence of the testator and at the testator’s request, and (5) that the testator was 14 years of age or older and of sound mind and that each witness was at least 14 years of age.\(^{72}\)

\(^{69}\) O.C.G.A. §53-4-24.
\(^{70}\) O.C.G.A. §53-11-7.
\(^{71}\) O.C.G.A. §53-4-24(c). See Sections 2.17 and 2.18 below.
\(^{72}\) O.C.G.A. §53-4-24.
2.7 Nuncupative (Oral) Wills

Prior to the 1998 revision of the Probate Code, a nuncupative will could be admitted to probate in Georgia. A nuncupative will is an oral will, expressed by the testator to witnesses when death is imminent.\(^{73}\) As of January 1, 1998, nuncupative wills are no longer recognized by Georgia law, and no supposed oral will may be established as a valid Last Will and Testament, since Georgia law now provides that a will shall be in writing.\(^{74}\)

2.8 Safekeeping of a Will

It is very important for the testator to put the original will in a safe place to protect it from loss, damage, destruction, or theft. Georgia law presumes that, if the original will cannot be located following death, the will was destroyed by the testator with the intent to revoke it. See Section 3.1.2 below. Hence, it is important that the original will not just be in a safe place but in a place known to someone other than the testator.

Attorneys may have different preferences when advising clients where the original will should be kept. Certainly, a fireproof cabinet or safe in the home would be a safe place. Some attorneys offer as a service to clients the storing of clients’ wills in a safe maintained by the attorney or law firm. A will may be deposited for safekeeping with the probate court of the county of the testator’s domicile at the time of storage; there is, however, a small fee for this service.\(^{75}\) Wills are also often placed in the safe deposit box of the testator, the nominated executor, or some relative of the testator.

There are a number of issues and concerns which should be considered by a testator when deciding where to store a will. Keeping a will at home, even if in a cabinet or safe, may expose the will to loss, theft or damage, especially if there are others who have access to the cabinet or safe. Leaving a will with an attorney for safekeeping may be efficient as long as the testator remembers where the will is located, has informed someone else the name and address of the attorney who has the will, and, if the testator moves to another state, changes attorneys or publishes a new will, the attorney is so advised and appropriate action is taken.

\(^{73}\) Pre-1998 Probate Code Section 53-2-47.
\(^{74}\) O.C.G.A. §53-4-20(a).
\(^{75}\) O.C.G.A. §15-9-38.
with the will in storage. Depositing a will with the probate court should provide adequate protection, but the same concerns expressed with regard to leaving a will with an attorney also apply when the will is deposited with a probate court. A safe deposit box is usually a good and safe place for the storage of a will, provided, again, that someone else knows that the will is stored there.

2.8.1 Access to Safe Deposit Box of Decedent

Upon the death of the testator, if there is not another person who has access to the safe deposit box, there is a simple procedure by which the judge of the probate court may issue an order for the opening and inventorying of a safe deposit of a deceased resident of the county. Upon presentation of satisfactory proof of death\(^76\), the judge of the probate court issues an order directing the financial institution(s) at which the safe deposit box(es) is/are located to open and permit an examination of the safe deposit box(es) by a person named in the order. The inspection is to be made in the presence of an officer of the financial institution. An inventory of the contents of the box is to be made and be signed by the person named in the order and the officer of the financial institution. The financial institution must keep a copy of the inventory and may file the original or a true copy with the probate court.\(^77\) Nothing is to be removed from the safe deposit box, except that the financial institution, if requested (or ordered to do so) shall deliver:

1. Any writing purporting to be a will of the decedent to the probate court;
2. Any writing purporting to be a deed to a burial plot or to give burial instructions\(^78\) to the person named in the order; and
3. Any document purporting to be an insurance policy on the life of the decedent to the beneficiary named therein.\(^79\)

There currently is no standard form for the petition and order. See Appendix A3-1 for a Sample Petition and Order.

\(^{76}\) Satisfactory proof is not defined. However, a death certificate, printed obituary, funeral contract, or a statement from a coroner or funeral director would seem sufficient, but other proof may be acceptable.

\(^{77}\) The order used by most probate courts directs the financial institution to deliver the original or a copy of the inventory to the probate court. The financial institution must comply if so ordered.

\(^{78}\) This presumably would include a preneed burial/funeral contract.

\(^{79}\) O.C.G.A. §7-1-356.
3. **REVOCATION OF WILLS**

Because a will may be changed or revoked by the testator at any time, it has no legal effect until the death of the testator. Joint or mutual wills made after December 31, 1997 may be revoked unless there is a written contract expressly restricting or precluding revocation.

The intent to revoke a will (or codicil) is necessary in order for a revocation to be effective. **A revocation may be express or implied.**

A revoked will may also be republished (and revived) by a writing executed and attested with the same formalities as are required for a will.

### 3.1 Express Revocation

An express revocation occurs when the testator by writing or action expressly annuls a will, and an express revocation takes effect immediately.

#### 3.1.1 Revocation by Subsequent Will or other Written Instrument

An express revocation may be effected by a subsequent will or other written instrument that is executed with the same formalities as are required for a will. In order for the revocation contained in a subsequent will or other written instrument to be effective, there must be the intent on the part of the testator. If it is determined that the testator lacked capacity to form the intent to revoke, the revocation will fall.

If a will has been expressly revoked by another will or other instrument and that revoking instrument is then subsequently revoked, it must be determined whether the revocation of the revoking instrument resulted in a revival or reinstatement of the original will. This depends upon whether the original will was revoked in its entirety or only in part. If the original will was revoked in its entirety, the presumption is that it remains revoked.

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80 O.C.G.A. §53-4-40.
81 O.C.G.A. §53-4-30. Under the Pre-1998 Probate Code, joint or mutual wills were also revocable by a testator except when there was a clear expression of a contrary intent either in a contract, in the terms of the will, or clearly proved from the circumstances surrounding he execution. Pre-1998 Probate Code §53-2-51.
82 O.C.G.A. §53-4-41.
83 O.C.G.A. §53-4-50.
84 O.C.G.A. §53-4-42(b).
85 O.C.G.A. §53-4-43.
86 O.C.G.A. §53-4-41.
even if the revoking instrument is itself later revoked. This presumption can be overcome and the original will reinstated by the circumstances surrounding the revocation of the revoking instrument.\textsuperscript{87}

If the original will was revoked only in part and the instrument that revoked that will is itself later revoked, the presumption is that the will is revived unless the circumstances surrounding the revocation of the revoking instrument indicate otherwise.\textsuperscript{88} In all of these cases, an examination of the circumstances surrounding the revocation of the revoking instrument must include an examination of the terms of the instrument that revoked the revoking instrument if the revoking instrument was itself revoked by a subsequent written instrument.\textsuperscript{89} It should be kept in mind also that a revoked will may always be re-validated by a republication executed and attested with the same formalities as a will.\textsuperscript{90}

### 3.1.2 Revocation by Destruction

An express revocation may also be affected by any destruction or obliteration of the will done by the testator or by another at the testator's direction with an intention of the testator to revoke.\textsuperscript{91} Further, there is a presumption under Georgia law that, if a will cannot be located after death, it was revoked by destruction by the testator during life.\textsuperscript{92} This presumption may be rebutted by a preponderance of the evidence that the will was lost, misplaced, or destroyed by someone other than the testator or accidentally by the testator without their having been an intent on the part of the testator to revoke, and that there is a true copy of the lost will.\textsuperscript{93}

Destruction of the will with the intent of revoking it, done by the testator or at the testator’s direction, results in an immediate revocation. In order to revoke, there must be an actual destruction coupled with the intent to revoke.\textsuperscript{94} If the testator lacks testamentary

\textsuperscript{87} O.C.G.A. §53-4-45(a), (b).
\textsuperscript{88} O.C.G.A. §53-4-45(c), (d).
\textsuperscript{89} O.C.G.A. §53-4-45(a), (c).
\textsuperscript{90} O.C.G.A. §§53-4-45(e) and 53-4-50.
\textsuperscript{91} O.C.G.A. §53-4-44.
\textsuperscript{92} O.C.G.A. §53-4-46.
\textsuperscript{93} Id.; Mincey v. Deckle, 283 Ga. 579 (2008); See Section 5.4 below.
\textsuperscript{94} Payne v. Payne, 213 Ga. 613 (1957).
capacity at the time of the destruction or acts while under the undue influence of others, the act of destruction will not constitute a revocation.\textsuperscript{95}

### 3.1.3 Revocation by Obliteration (Writing on the Will)

An intent to revoke is also presumed from the obliteration or cancellation of a material portion of the will after the execution of the will. This presumption, too, may be overcome by a preponderance of the evidence.\textsuperscript{96} The obliteration or cancellation must be to the original will in order to give rise to the presumption of revocation.\textsuperscript{97} When a will is found among the testator’s effects, it will be presumed that the testator made the obliterations or cancellations.\textsuperscript{98} Further, where there is no evidence that markings were made subsequent to the signing, it will be presumed that the alterations were made prior to the execution.\textsuperscript{99}

What constitutes a “material portion” is a question of law to be decided by the court.\textsuperscript{100} A will may be offered for probate on which there are strikethroughs and/or handwritten changes. If these were made after the will was originally executed, two issues arise: whether the obliterated or canceled portions are material; and, if so, whether the resulting presumption of revocation is rebutted by a preponderance of evidence that it was not the testator’s intent to revoke the will. An alteration which changes the testamentary scheme, such as marking out two of four beneficiaries, will be considered material, thereby giving rise to the rebuttable presumption of revocation.

If the canceled portion is immaterial or if the presumption is overcome, the will is probated as it originally stood without additions or deletions.

When a will upon which markings have been made is offered for probate, the burden rests first with the propounder(s); once a \textit{prima facie} case has been made, the burden shifts to the caveator(s) to prove that an actual cancellation or obliteration occurred after the execution; then, the burden shifts back to the propounder(s) to overcome the presumption of

\begin{footnotes}
\item[95] Lillard v. Owens, 281 Ga. 619 (2007). Testator tore old will in half at time of making a new will, which the jury found to be invalid for lack of testamentary capacity and undue influence.
\item[100] Carter v. First United Methodist Church, 246 Ga. 352 (1980).
\end{footnotes}
revocation by showing that no revocation was intended.\footnote{Wells v. Jackson, 265 Ga. 181 (1995).} Declarations of the testator are admissible in evidence in support of or to rebut the presumption.\footnote{Thomas v. Sands, 284 Ga. 529 (2008); King v. Bennett, 215 Ga. 345 (1959).}

3.1.4 Dependent Relative Revocation

In addition to the issues of revival of an earlier will as discussed in Section 3.1.1, the issue of whether a document or act purporting to revoke an earlier will causes the revocation if the revoking document is determined to be invalid or the event is determined to have been conditional with regard to the revocation. The issue has been called “dependent relative revocation” and “conditional revocation.”\footnote{Carter v. First United Methodist Church, 246 Ga. 352 (1980).} The inquiry before the court will be whether the revocation was intended to take effect only if the revoking document is effective or the revocation was an unconditional act such that revocation was intended whether or not the revoking document is effective or valid.

For any revocation to be effective, there must be an intent to revoke on the part of the testator.\footnote{O.C.G.A. §53-4-41.} If a purported revocation is made in an alleged will which has been refused probate for want of testamentary capacity or lack of freedom of volition, the revocation contained therein will fall also.

The doctrine of dependent relative revocation is one of presumed intent. If it is clear that the revocation or cancellation and the making of a new will were parts of one scheme, and the revocation of the old will was so related to the making of the new will as to be dependent upon it, then if the new will is not made, or if made is invalid, the old will, even though obliterated or cancelled, should be given effect if its contents can be ascertained in any legal way.\footnote{Lillard v. Owens, Id. at FN 93.} But, if the old will is independently revoked – if the act of revocation is complete and unrelated to another event, as in the case where the old will has been totally destroyed or if any other act is done which evidences an unmistakable intention to revoke, even if the old will has not been destroyed, the fact that a later will was not made or that one was made but was itself invalid will not undo an independent, valid revocation.\footnote{Carter v. First United Methodist Church, 246 Ga. 352 (1980).}

3.2 Implied Revocation

An implied revocation results from the execution of a subsequent inconsistent will that does not by its terms expressly revoke the previous will. An implied revocation takes effect only when the subsequent inconsistent will becomes effective. If the subsequent inconsistent will fails to become effective, then the implied revocation fails as being incomplete.

An implied revocation extends only so far as an inconsistency exists between testamentary instruments. Any portion of a prior instrument which can stand consistently with the testamentary scheme in a subsequent instrument shall remain unrevoked.\(^{107}\) In that case, the subsequent “will” can be considered a codicil to the prior will.

However, a subsequent will which essentially sets up a testamentary scheme which is completely inconsistent with the earlier testamentary scheme results in an implied revocation of the entire previous will.\(^{108}\)

3.3 Republication

A will which has been revoked may be revalidated by a republication done with the same formalities as an original execution, that is, that it is resigned and witnessed as though it had never before been signed.\(^{109}\) The republication, when done properly, creates a new will as of the date of the republication above, including any changes which may have been made to the “original” will at the time of or before the resigning of the document in the presence of two or more witnesses. As noted in Section 2.2 above, a will may be republished by a codicil; therefore, a codicil which identifies and relates to a previously revoked will and which states that the old will is republished by the codicil “revives” the old will.

3.4 Effect of Subsequent Marriage, Divorce, or Children

3.4.1 Marriage and Future Children

Prior to the new probate Code in 1998, the marriage or divorce of the testator or the birth to or adoption of a child by the testator, after the making of a will, automatically

\(^{107}\) O.C.G.A. §53-4-47.
\(^{109}\) O.C.G.A. §53-4-50.
revoked the will, unless the will was made in expressed contemplation of the event. However, under the new Code, the marriage of the testator or the birth to or adoption of a child by the testator, after the making of a will which is not made in expressed contemplation of the event, only partially revokes the will to the extent that the subsequent spouse and/or children will receive an intestate share of the estate; the will is otherwise carried out fully.

The Supreme Court has held that the law in effect at the time of death of the testator will control the issue of revocation.\textsuperscript{110} In other words, if a testator became divorced prior to 1998 and after having made a will but dies after 1998, the prior will is not revoked by the event of the divorce, since the law at the time of death applies to the issue of revocation.

Instead of completely revoking a will and throwing out the testator’s entire plan of disposition, the new law allows the will to remain valid and the testator’s plan carried out with the exception of the special provision made for the subsequent spouse and/or children.\textsuperscript{111} It remains unclear when the subsequent spouse must assert the claim for the intestate share before probate or after. The Supreme Court declined to rule on the issue, but, in a concurring opinion, two justices opined that it is irrelevant whether the will has been probated before the claim is asserted, since there is no issue of total revocation.\textsuperscript{112}

The share for the subsequent spouse and/or children must be paid from the net residuary remaining after all debts and expenses of administration, including taxes, have been paid. Any bequest in the will in favor of the subsequent spouse or children must be given effect and counts toward (is subtracted from) the intestate share. If the bequest equals or exceeds the intestate share, then the subsequent spouse or child receives the bequest in lieu of such intestate share.\textsuperscript{72a} If the residuary proves to be insufficient, then the testamentary gifts abate in the manner provided in paragraph (b) of Code Section 53-4-63.

With respect to a provision in contemplation of the “event” of marriage, it is not necessary that the testator identify a specific future spouse.\textsuperscript{113}

\textsuperscript{111} O.C.G.A. §53-4-48(a).
3.4.2  Class Gifts and Revocation

There are certain common provisions in wills that are presumed to evidence the contemplation of the birth or adoption of children unless their context indicates a contrary intent. If a will provides for a class of the testator's children (e.g., "all my children") and an additional child is born or adopted after the will is executed, the provision for the class is presumed to have been made in contemplation of the birth or adoption of future children and the will is not revoked by such event. Also, the mere identification in a will of children who have already been born or adopted will not defeat this presumption.114

3.4.3  Divorce, Annulment and Remarriage

If a testator is divorced or his/her marriage is annulled after execution of the will not made in expressed contemplation of that event, those provisions in the will that relate to the former spouse are construed as if the former spouse predeceased the testator without issue other than issue who are also descendents of the testator. This includes any provision naming the former spouse as executor or any other fiduciary.

The provisions of the will relating to the former spouse are reinstated, however, if the testator has remarried the same spouse and has not amended or revoked the original will.115

4.  FILING OF WILL IN PROBATE COURT

4.1  Obligation of Person in Possession of Will to File with the Court

Any person who has possession of the will of a decedent is required to file it with reasonable promptness with the probate court of the county having jurisdiction (county of domicile of a Georgia resident or county in which property is located owned by a non-resident of Georgia). The Code contains no time period within which this must be done, and, presumably, there is no penalty for a delay in a voluntary filing when no action has been taken to compel production.

Upon failure of the person in possession to file the will, upon motion, the judge of the probate court may cite the person having possession or believed to have possession to

114 O.C.G.A. §53-4-48(b).  
115 O.C.G.A. §53-4-49.
produce the will or to show cause why he/she cannot produce the will and to show cause why the person should not be held in contempt for failure to do so. Upon a showing that the person is in possession of the will and a failure of the person to file it as required, the judge may find the person to be in contempt of the court and may fine and imprison the person until the will is produced.\textsuperscript{116}

This process is usually begun by the filing of a motion with the appropriate probate court asking that the person believed to be in possession of the will be cited to either file the will or to show cause on a date certain why he/she should not be held in contempt for failure to do so. However, it becomes the burden of the person filing the motion to prove that the respondent does, in fact, possess the will; otherwise, if the respondent denies having possession and the denial is believed by the court, the court must deny the motion.

Any document which appears to have been intended as a will should be filed with the judge of the probate court. If there is any question as to its validity, there should be an accompanying statement as to the grounds of invalidity. Under no circumstances should anyone destroy what purports to be the last will of a decedent. The document should be filed with the probate court. In other words, no one, other than a judge of the probate court with jurisdiction over the matter should determine whether the writing is or is not a valid will.

\textbf{4.1.1 Filing a Will Not for Probate}

The person filing the will is not, however, required to offer it for probate. If no petition concerning the validity of the will is filed, the court should accept and file the will as having been filed “not for probate.” As a security measure, some courts record these wills with a notation that they have not been offered for probate.

\textbf{4.2 Necessity of Probate}

There is no requirement in our law that a will be probated, and there are many situations in which probate of a will would accomplish no useful purpose. The testator may have disposed of all of his/her property by deed or otherwise during lifetime, so that, at the

\textsuperscript{116} O.C.G.A. §53-5-5.
time of death, when the will would become effective, there is no property which would pass under the will. Hence, there would be no necessity for probating such a will and no legal requirement that it be probated, just that it be filed.

There may be other circumstances which make probate of the will unnecessary, such as when an award of year’s support has consumed the entire estate. However, a proceeding to dispense with administration (no administration necessary) is never available in the case of a decedent who died testate.

If the purported will is to be relied upon to pass the title to any property (real or personal), the will must be probated in order to effect a lawful transfer of title.\textsuperscript{117}

4.3 When Will is to or must be Probated

The question of when a will should be offered for probate may depend upon a variety of circumstances. Generally speaking, however, it should be offered as soon as practicable after the death of the testator.

Except as set forth below, no definite time within which a will is to be probated after the death of the testator is set forth in the statute, and the right to offer a will for probate is not barred by the lapse of time, no matter how long.\textsuperscript{118} The failure of an interested party to take steps provided by law for the filing of the will and to take necessary action towards probating it may, under certain circumstances, prevent the claim of title under a subsequently probated will (estoppel).\textsuperscript{119}

However, the 1998 revision to the Probate Code introduced a five-year statute of limitations on the probate of a will under certain circumstances. Under Code Section 53-5-3, a will may not be offered for probate later than five years from the latest of the dates on which a petition was filed for: (1) the appointment of a personal representative; or (2) an order that no administration is necessary. The theory behind this change is that the heirs and all other persons having an interest in the estate or property of the estate must have a time within which to know that a will might still be offered after having relied on the appointment of an administrator or the granting of an order declaring no administration is necessary. In

\textsuperscript{117} Foster v. Foster, 207 Ga. 519 (1951).
\textsuperscript{118} Lee v. Wainwright, 256 Ga. 478 (1986); Walden v. Mahnks, 178 Ga. 825 (1934).
\textsuperscript{119} Hadden v. Stevens, 181 Ga. 165 (1935).
either such case, the heirs will have been given notice of the proceeding, and it is presumed that they are most likely to know of the existence of a will and would have produced it.

4.4 Right to Offer for Probate

The right to offer the will for probate belongs to the executor named in the will. Presumably, if there are multiple nominated executors, any named executor may offer the will for probate. Likewise, if the first nominated executor fails to offer the will for probate within a reasonable time, the alternate nominated executor(s) should have the right to offer it for probate. The nominated executor(s) should promptly file the will and indicate an intention with respect to probate, so that if the intent is not to probate same, other interested parties may take action if they consider it necessary. If no executor is named in the will or if no nominated executor offers the will for probate with reasonable promptness, any person interested in the will may offer it for probate and apply for the appointment of an administrator with will annexed as discussed in Section 4.5 below. A beneficiary under the will or a creditor would be an interested party, but, presumably, a stranger is not entitled to bring a petition for probate.

The nominated executor cannot be compelled to offer the will for probate or to serve as executor. A nominated executor may not be forced to undertake the trust but must voluntarily assume the obligations of the office and must agree by oath to execute the terms of the will.

The nominated executor must qualify within 90 days of the time the order admitting the will to probate is entered to retain the preference given him/her by the will. An executor who has voluntarily declined his/her right to serve, either formally or by operation of law, is not precluded from qualifying to serve as executor or administrator with the will annexed at a later time.
The office of executor involves a personal trust reposed by the testator, and the office carries with it a pecuniary (monetary) interest in the commissions, which should not be taken away except for some good reason, including the failure to timely offer the will for probate or the failure to timely qualify after probate, or because of voluntary renunciation.\textsuperscript{126}

4.5 Probate by Someone Not Named as Executor

An executor is designated in the will by the testator, although no formal words are required to constitute such a designation.\textsuperscript{127} However, if the will fails to nominate an executor, the nominated executor is a minor or is otherwise incapacitated, a testate estate is unrepresented for any reason, or the executor, after qualifying, dies, resigns or becomes disqualified to serve (and there is not another name executor qualified to serve), an administrator with will annexed (\textit{cum testamento annexo} or c.t.a.) must be appointed to administer the estate.\textsuperscript{128} Therefore, if there is no executor named, or no named executor offers the will for probate within a reasonable time, or there is no named executor who is \textit{sui juris}, any interested person may offer the will for probate and seek appointment as the administrator with will annexed. An administrator with will annexed is someone who administers a testate estate as though the person had been named as executor but was not so named.

4.6 Use of Authenticated Copies of Wills Probated in Other Courts

Properly authenticated copies of wills that have been admitted to probate are admitted as primary evidence in other courts.\textsuperscript{129} The certificate or attestation of any public officer gives sufficient authenticity to any copy or transcript of any record, document, or paper on file to admit the same in evidence.\textsuperscript{130}

The certificate will usually be signed by the clerk, if there is one. If the certification is signed by the judge of the probate court, it should show that he has no clerk.\textsuperscript{131}

\textsuperscript{126} O.C.G.A. §53-6-10(b); Harp v. Pryor, 276 Ga. 478 (2003).
\textsuperscript{127} O.C.G.A. §53-6-10(a).
\textsuperscript{128} O.C.G.A. §53-6-13.
\textsuperscript{130} O.C.G.A. §24-7-20.
certification is sufficient if it shows that the judge of the probate court is ex officio clerk of his court, even though not showing affirmatively that he has no clerk.132

5. PROBATE PROCESS AND PROCEDURE

5.1 Probate Process Generally

Before a will becomes legally operative, it must be proved, or probated, in the manner required by law after the death of the testator.133 The law does not recognize or give any legal effect to a will until it has been properly proved and admitted to record, that is, is ordered recorded as the will of the decedent.134 A will is not admissible in evidence as a muniment of title (evidence of the passing or transfer of title) until probated.135 As the term "probate" is used in Georgia, it encompasses both the proof of the will and the judicial proceeding at which such proof is established, resulting in the will being “admitted to record” (ordered recorded).

There are two methods of probating a will: "common form" and "solemn form,"136 and the procedural aspects of each of these methods are discussed hereinafter. There are important differences in the effect of the two methods of probate:

**Common Form: (See Section 5.5 below.)**

- No notice is given to the heirs or other interested parties
- Can be processed immediately
- Saves the costs of service
- Cannot be appealed
- Easy and immediate authority to marshal assets, manage business, etc.
- Is not binding for four years and may be set aside
- Is not binding on minors until four years after majority
- Generally will not be relied on for the transfer of title to real property

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133 New v. Nichols, 73 Ga. 143 (1884).
134 Johnson v. Sirmans, 69 Ga. 617 (1883); Bryan v. Walton, 14 Ga. 185 (1853). But Cf., Jordan v. Cameron, 12 Ga. 267 (1852) (a will more than 50 years old, proven and recorded in the proper office, is admissible as an ancient paper or document, notwithstanding that the probate is defective, provided possession of the property has been held under and by virtue of the will).
135 Foster v. Foster, 207 Ga. 519 (1951)
• Provides limited protection to executor

Solemn Form:  (See Section 5.6 below.)
• Generally preferred method of probate
• Requires notice to all heirs
• Minor and incapacitated heirs are represented by a guardian
• Addresses contests to the will
• Provides finality and is binding on all heirs notified
• May be appealed
• Reliable transfers of title

5.2  Proof of the Will
5.2.1  Proof by Witnesses

Whether a will is offered for probate in common form or solemn form, the will must be “proved,” that is, be shown to be the lawful, valid Last Will and Testament of a decedent, who, while in life and at a time when the decedent was of sound and disposing mind and memory and acting freely and voluntarily, made and published the document in accordance with all formalities of Georgia law. Proof of the will is generally provided by the testimony of one or more witnesses to the will to those facts.

Proof of a will is most often presented either:
1. By a self-proving affidavit,
2. By written interrogatories to the witnesses [GPCSF 6], or
3. A signed proof under oath before the probate court.

However, witnesses to the will may testify and be compelled to testify by way of deposition or live testimony, as with any other witnesses.\textsuperscript{137} If the will has an attestation clause and the witnesses’ signatures are proven to be authentic, there is a presumption that the will was properly executed even if the witnesses do not remember the event or do not testify.\textsuperscript{138} A clause stating only that the testator signed the will on a date certain and does not attest to compliance with the formalities of executing a will and, more specifically, that the testator

\textsuperscript{137} See Chapter 10 of Title 24 of the Official Code of Georgia Annotated. See also the Georgia Probate Court Benchbook.  
signed or acknowledged his/her signature, does not constitute an “attestation clause” which
gives rise to the presumption. Furthermore, the presumption, if it exists, may be rebutted by
clear proof that the will was not properly executed.\textsuperscript{139}

If the probate is in common form only or if the probate is in solemn form and is
not contested (no caveat filed), the testimony of only one witness is required.\textsuperscript{140} However, if
a will was self-proved as set forth in Section 2.6 above, the execution and attestation
requirements are presumed to have been met (subject to rebuttal) without the necessity of
testimony from any of the witnesses.\textsuperscript{141} Even in contested cases, offering a properly self-
proved will is all that is initially necessary from the propounder(s) to make out a \textit{prima facie}
case.\textsuperscript{142} The propounder need not produce the witnesses, and the burden to call the witnesses
for examination or to challenge the validity of the self-proving affidavit falls upon the
caveator(s).\textsuperscript{143}

If a caveat is filed to the validity of the will which is not self-proved, the will must
be proved by the testimony of all of the witnesses in life and within the jurisdiction of the
court. Even so, the testimony of the witnesses may be provided to the court by way of
written interrogatories without the necessity of producing the witnesses in court upon the trial
of the matter.\textsuperscript{144} Again, the burden to call the witnesses for examination falls upon the
caveator(s).

Wills which were made in other states often have something similar to Georgia’s
self-proving affidavit. Our statute requires only that the affidavit be substantially in the same
form as that set forth in the statute. However, our statute requires the testimony of the
testator and the witnesses in the self-proving affidavit, and it is doubtful that an affidavit
made only by the witnesses qualifies for purposes of the presumptions stated above.
5.2.2 Securing the Testimony of Witnesses

The judge of the probate court has the same power to compel the attendance of witnesses as the superior court.\textsuperscript{145} In all civil cases,\textsuperscript{146} a subpoena for the attendance may be issued to any witness who is resident of this state, but if the witness resides outside the county of probate, the witness fee and mileage expense reimbursement must accompany the subpoena.\textsuperscript{147}

Witnesses to wills may be examined by discovery procedures under the same circumstances as other civil cases.\textsuperscript{148} When it is desired to take the testimony of a witness in accordance with this procedure, a photocopy of the will may be exhibited to the witness in lieu of the original. The testimony of a witness to whom a photocopy has been exhibited must be given the same weight as though the original will had been exhibited to the witness.\textsuperscript{149} When the requirements of the Civil Practice Act are met, the deposition of an attesting or other witness may be used in lieu of the witness being present at trial.\textsuperscript{150}

5.2.3 Proof When Witnesses are Unavailable

When the witnesses to the will are deceased, mentally or physically incapable of testifying, or otherwise inaccessible or unavailable, proof of the signature of the testator is required in the form of affidavits, depositions, or sworn statements in person by at least two credible disinterested individuals who are familiar with the signature of the testator or by other sufficient proof of the testator's signature.\textsuperscript{151} Better practice requires such proof be made in a writing or transcript recorded with the proceedings. The use of this alternative manner of proving the testator's signature does not preclude the judge of the probate court from requiring, in addition, the testimony of any available subscribing witness or proof of any other pertinent facts and circumstances deemed necessary before the will is admitted to

\textsuperscript{145}O.C.G.A. §53-5-23(a).
\textsuperscript{146}O.C.G.A. §24-10-29.
\textsuperscript{147}O.C.G.A. §24-10-24.
\textsuperscript{148}O.C.G.A. §53-5-23(a).
\textsuperscript{149}O.C.G.A. §53-5-23(b).
\textsuperscript{150}O.C.G.A. §9-11-32.
\textsuperscript{151}O.C.G.A. §53-5-24.
probate. There is no standard form for the affidavits proving the testator’s signature. See Appendix A3-2 for a Sample Affidavit.

Some questions may arise as to an interpretation of when a subscribing witness is "inaccessible." The jurisdiction of the court for the purpose of procuring the testimony of the witnesses to a will encompasses the entire state, and the mere fact that a witness is a resident of another county of the state or is temporarily absent from the state will not excuse production of his testimony. “Inaccessible" has been interpreted to mean not only that the witness is dead, or is a nonresident of the state and, hence, not subject to the process of the court, but also to include a situation in which it cannot be affirmatively established that the witness is dead or is a nonresident. If a diligent search has been made to find the witnesses, and they cannot be found but also cannot be proved to be deceased or to have moved to another state, they will be deemed “inaccessible.”

While the testimony of a nonresident subscribing witness can be taken by several means, it is not absolutely necessary to do this if the will can be proved by other legal and satisfactory evidence, such as proof of the signature of all of the subscribing parties to the instrument. However, in a contested matter, unless the amount at issue is small, one side or the other will usually take the depositions of the attesting witnesses.

The propounder may use other evidence to establish the validity of the will if subscribing witnesses are forgetful or adverse.

5.3 Offering a Copy of a Will for Probate

Whenever the original will cannot be found to probate, a copy of the will may be admitted to probate in lieu of the original. In all such cases, the presumption is that the will was revoked by the testator. This presumption must be overcome by a preponderance of the evidence, and the copy must be proved by a preponderance of the evidence to be a true copy of the original will. In addition, the procedures for probating an original will must be

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152 Id.
154 Id.
complied with. No distinction is drawn among copies that are unsigned, signed only by the testator, or fully executed with the same formality as an original will; that is to say, that case law holds that there is but one original will; even a fully executed “duplicate original” is a copy.

There can only be ONE original will; everything else is a copy, including a “duplicate original” executed with the same formalities as the original.

Nonetheless, there must be a written copy of the will in order to offer it for probate. Oral testimony as to the contents of a missing will is not acceptable in lieu of a copy. However, if the copy also includes a self-proving affidavit, the copy, as in the case of an original, can be presented as the prima facie case as to execution.

The petition to probate a copy in lieu of a missing original will must include all of the information which is required in a petition to probate an original will. Interrogatories or testimony from all available attesting witnesses is required by the statute, in order to identify the copy and establish that the will was valid initially. In addition, facts concerning the loss or destruction should be set forth in the verified petition or in accompanying affidavits. In cases where the original will simply cannot be located after the testator's death, it is often sufficient if a close family member gives an affidavit that no change of circumstances has occurred since execution of the will which would have caused the testator to revoke the will. Also, if the attorney who prepared the original will is able to give an affidavit that he/she continued to represent the testator on other legal matters, that he/she knows of no change of circumstances which would have caused the testator to revoke or change his will, and that the testator never requested the attorney to prepare a new will, this may be sufficient to overcome the presumption of revocation.

In cases where a copy is offered for probate in lieu of the original will, there are three basic types of situations with respect to the level of proof required by the court. If all heirs are known and can be located and assent to probate of the copy, the court will usually grant the petition with only a modest amount of additional evidence, since the heirs could

159 O.C.G.A. §53-4-46.
161 Id.
agree upon a division of the estate if there were no will. If there are heirs who cannot be located, then the court will need to be satisfied by affidavits that the presumption of revocation has been overcome. The third situation is where an objection is filed. In this case a hearing must be held, and the propounder must overcome the presumption of revocation by a preponderance of the evidence. Unless all interested parties consent to the probate of the copy, interrogatories or testimony of all of the witnesses is required to overcome the presumption of revocation and establish the copy of the will.

It may be a good practice for the court to adopt the policy that a copy in lieu of a lost original will may not be probated in common form. Instead, the solemn form procedure should generally be used. In view of the requirement that the presumption of revocation must be overcome by a preponderance of the evidence, it makes sense to give notice to the interested parties so that any evidence they wish to present can be considered by the court.

5.4 Probate of Out-of-State and Foreign Wills

An "out-of-state" will is the will of an individual who was domiciled at death in a state or U.S. territory other than Georgia and who owns property located in Georgia or a cause of action for which the venue lies in Georgia.

A "foreign will" is the will of an individual who dies while domiciled in a jurisdiction that is outside of the United States and who owns property or a cause of action in Georgia.\(^{164}\)

The probate of an out-of-state will in Georgia may not be necessary, in that wills probated in other states constitute muniments of title for the conveyance of real property in Georgia to the beneficiaries named in the will, as is described in more detail later in this Section.

Probate of out-of-state and foreign wills falls into three different categories:

1. Original probate of an out-of-state or foreign will that has not been admitted to probate in the state or country of the decedent's domicile;

2. Ancillary probate of an out-of-state will that has been admitted to probate by the appropriate court in the state of the domicile of the testator; and

\(^{164}\) O.C.G.A. §53-5-30.
3. Ancillary probate of a foreign will that has been admitted to probate in the appropriate court in the foreign country in which the testator was domiciled at the time of death.

In the first situation, the original probate of an out-of-state or foreign will that has not been probated anywhere, presents no difficulty if the will meets the Georgia requirements of execution. It may be offered for original probate, either in common or solemn form, subject to the same requirements of probate as wills of Georgia domiciliaries,\(^\text{165}\) in any county in which property of the decedent is located or in which lies any cause of action of which the decedent was possessed at death.\(^\text{166}\) The will must not have been offered for probate in the domiciliary jurisdiction.\(^\text{167}\) Alternatively, if the will has been offered for probate but has not been admitted to probate, there must have been no timely caveat or similar objection filed in the domiciliary jurisdiction or, if filed, such caveat would not be one that would cause the denial of probate.\(^\text{168}\) This covers the situation in which the testator owns no property in his state of domicile but does own property or a cause of action located in Georgia, or in cases in which the bulk of the estate consists of Georgia property, and perhaps for this reason, a resident of Georgia has been named as executor. This situation follows ordinary probate procedure: the original will is filed with the petition and the petition, proof, qualification and letters follow the same pattern as if the decedent had been a domiciliary of Georgia. Once the will has been admitted to probate in Georgia, its terms shall be given effect under the laws of Georgia and it will be subject to the same objections and defenses as the will of a Georgia domiciliary.\(^\text{169}\)

When an out-of-state will or a foreign will has been admitted to probate or established in the appropriate court of the state or country of the testator's domiciliary jurisdiction, it may be admitted to ancillary probate in solemn form in Georgia upon proof that it has not been offered for probate in this state in proceedings in which a caveat was filed and is pending or was sustained.\(^\text{170}\) The county of jurisdiction is any county in Georgia in

\(^{165}\) O.C.G.A. §53-5-31.
\(^{166}\) O.C.G.A. §53-5-36.
\(^{167}\) O.C.G.A. §53-5-30(1) defines the domiciliary jurisdiction as "the jurisdiction outside this state in which a nondomiciliary is domiciled at death."
\(^{168}\) O.C.G.A. §53-5-31.
\(^{169}\) O.C.G.A. §53-5-32.
\(^{170}\) O.C.G.A. §53-5-32.
which the decedent's property is located or in which lies the venue of a cause of action of which the decedent was possessed at death.\textsuperscript{171} When a will has been admitted to ancillary probate in Georgia, its validity and terms are to be given effect under the laws of the domiciliary jurisdiction.\textsuperscript{172}

There is a slight difference in the proof required for the admission to ancillary probate of an out-of-state will as opposed to that of a foreign will. An out-of-state will may be admitted to ancillary probate upon presentation of a copy of the will and a properly authenticated copy of the final probate proceedings from the court of the domiciliary state, certified in accordance with Code Section 24-7-24.\textsuperscript{173} This action in Georgia may be attacked or resisted on the same grounds as other proceedings from a court of another state of the United States.\textsuperscript{174}

For the admission to ancillary probate of a foreign will that has been probated or established under the laws of the domiciliary country, a certified copy of the will and an authenticated copy of the proceedings in such foreign court, under the seal of the court, must be received as prima facie evidence of the due execution of the will. The will may be admitted to ancillary probate in Georgia based upon such authentication, but it is subject to attack as in the case of any will offered for original probate.\textsuperscript{175}

Once an out-of-state or foreign will has been admitted to ancillary probate, an executor named in the will to serve in this state or, if there is no objection, the duly-qualified personal representative for the estate under the laws of the jurisdiction where the will was probated, is entitled to qualify as executor or administrator with the will annexed in Georgia. If this person fails to qualify within a reasonable time after the will is admitted to ancillary probate or if, upon objection, the probate court finds good cause why the person should not serve, then the court will name an administrator with the will annexed. The named person will be any person who could qualify as an administrator with the will annexed under Georgia law. In no event may a person qualify to serve as the personal representative in

\textsuperscript{171} O.C.G.A. §53-5-36.  
\textsuperscript{172} O.C.G.A. §53-5-34.  
\textsuperscript{173} O.C.G.A. §53-5-33(b).  
\textsuperscript{174} Id.  
\textsuperscript{175} O.C.G.A. §53-5-33(c).
Georgia of a will admitted to ancillary probate if that person is not otherwise qualified to act as a fiduciary in Georgia.\textsuperscript{176}

Once qualified, the ancillary personal representative is required to give notice to all creditors of the testator who are domiciled in Georgia, in the same manner as is required for decedents who die domiciled in Georgia.\textsuperscript{177} An ancillary personal representative is subject to Georgia laws governing the administration of estates. However, after notifying those persons domiciled in Georgia who have an interest in the estate, the judge of the probate court may direct the personal representative to pay only those administrative expenses and debts incurred by the ancillary personal representative and debts of Georgia creditors; make distributions only to those beneficiaries who reside in Georgia to the extent the judge finds that to be practicable and not to the detriment of the testamentary scheme; and then distribute any property remaining to the domiciliary personal representative.\textsuperscript{178}

If a decedent dies while domiciled outside Georgia, any heir, beneficiary or creditor of that decedent who has an interest in or claim to the decedent's property that is located in Georgia may petition for ancillary probate or administration\textsuperscript{179} and may apply to a court of equity (the superior courts) to have his/her interest protected. The superior court may require ancillary probate or administration, may transfer the matter to the probate court that has jurisdiction, and may order that the existing status of the property be preserved pending the granting of the ancillary probate or administration.\textsuperscript{180}

All wills that are probated or established in a state other than Georgia constitute muniments of title (documentary evidence of title) for the transfer of real property in this state to the beneficiaries mentioned in the will. The will must be admitted in evidence as a muniment of title when accompanied by properly authenticated copies of the record admitting the will to probate in the other state, certified according to Code Section 24-7-24 and the certified copy of the will has been recorded in the deed records of the clerk of the superior court of the county in which the land lies.\textsuperscript{181} It is good practice also to file in the

\begin{itemize}
\item \textsuperscript{176} O.C.G.A. §53-5-37.
\item \textsuperscript{177} O.C.G.A. §53-5-40.
\item \textsuperscript{178} O.C.G.A. §53-5-41.
\item \textsuperscript{179} Ancillary administration is discussed in \textbf{Chapter 4, Section 8}.
\item \textsuperscript{180} O.C.G.A. §53-5-44.
\item \textsuperscript{181} O.C.G.A. §53-5-35.
\end{itemize}
deed records a copy of the executor’s Letters\footnote{O.C.G.A. §53-5-43.} and an assent to devise signed by the executor, witnessed in accordance with Georgia real estate law.

5.5 **Probate in Common Form [GPCS F 4]**

5.5.1 **In General**

Proceedings to probate a will in common form are initiated by filing a verified\footnote{O.C.G.A. §53-11-8 provides that every petition filed in the probate court must be verified by the oath of the petitioner and be sworn to or affirmed before the probate court or a notary public.} petition, which must set forth the following:

8. Full name of the testator;
9. Domicile of the testator;
10. Date of death;
11. Mailing address of the petitioner;
12. Names, ages or majority status\footnote{For any heir who is age 18 or over, it is sufficient merely to indicate that the heir has reached majority.}, addresses, and relationships of all heirs;\footnote{New Georgia Probate Court Standard Forms effective July 1, 2009, require that the petitioner make an affirmative statement how the listed heirs comprise the full list of heirs of the decedent.}
13. Whether, to the knowledge of the petitioner, any other proceedings with respect to the probate of another purported will of the testator are pending in this state and, if so, the names and addresses of the propounder(s) of and the names, ages or majority status, and addresses of the beneficiaries under such other purported will;
14. If any particulars are missing, the reasons for such omissions; and
15. A prayer (request) for issuance of Letters Testamentary.\footnote{O.C.G.A. §§53-5-17(b), 53-5-21(b).}

When such a petition is presented, the will may be ordered to record upon the testimony of a single subscribing witness or a self-proving affidavit and without notice to anyone.\footnote{O.C.G.A. §53-5-17(a).} If the will is not self-proved, the testimony of the witness is usually presented by written interrogatories. If a will or codicil is self-proved, due execution is presumed without the testimony of any subscribing witness.\footnote{O.C.G.A. §53-5-17(a). See Section 2.6 above.}
The named executor(s) then take(s) an oath\textsuperscript{189} that he/she/they will faithfully carry out the provisions of the will and perform the duties required by law. Letters Testamentary are issued to duly qualified executor(s), which serve as evidence of the authority of the executor(s) to administer the estate.

Probate in common form may be taken and the order admitting the will to record may be granted by the judge of the probate court at any time.\textsuperscript{190}

\textbf{5.5.2 Effect of Common Form Probate}

Probate in common form is said to be revocable, in the sense that it may be set aside at a later date. Since no notice is given to the heirs, the probate is not immediately conclusive upon anyone interested in the estate adversely to the will. In the event that a common form probate is later set aside, the executor(s) is/are protected only in the collecting and preserving of assets and the payment of the debts of the estate. However, a purchaser from such executor(s) will be protected provided the sale was \textit{bona fide} (in good faith) and without notice to the purchaser of any defect in the will or proceedings.\textsuperscript{191}

There are a number of reasons why a will might be offered for probate only in common form, usually based upon circumstances: the need for immediate action for the protection of the estate (collection and securing of assets; payment of debts; management of ongoing business, etc.); savings in costs (there are no fees for sheriff's service or publication); or savings in time (since no notice is given, there is no waiting period). If real estate is involved in the estate, however, probate in solemn form or the passage of time may be necessary to satisfy title requirements. If some immediate action needs to be taken, a will can be probated first in common form and later in solemn form when all requirements for the latter have been met.

If all the heirs acknowledge service and consent to probate immediately, there are no significant savings in court costs or time in common form probate over solemn form.

\footnotesize{\textsuperscript{189} Section 6.9 for the oath.}\textsuperscript{\textsuperscript{190} O.C.G.A. §53-5-18.}\textsuperscript{\textsuperscript{191} O.C.G.A. §53-5-16(b).}
5.5.3 Conclusiveness

Probate in common form becomes conclusive upon all parties at interest after the expiration of four years from the time of such probate, except upon minor heirs who may require probate in solemn form and interpose a caveat within four years after reaching the age of majority. If, in such a case, probate in solemn form is refused and no prior will is admitted to probate, an intestacy is declared only as to the minor(s) and not as to others whose right to caveat has been barred by the lapse of time. That is to say that other adult and competent heirs may not take advantage of the minor’s contest of the will after majority when those heirs have been given notice as required and have had their opportunity to contest the will.

When a will has been admitted to probate in common form and the statutory period has elapsed, such probate is as effective and binding as if it had been in solemn form, except with respect to minors. Until a common form probate has been set aside or has been replaced by a solemn form probate, it is effective to establish that the decedent died testate, that the paper propounded is his last will and testament, that the testator had sufficient mental capacity, and that the document was unrevoked at the time of the probate.

5.5.4 Objections and Caveats to Common Form Probate

There is no provision of law for objecting to the probate of a will in common form. The judge of the probate court has no jurisdiction to hear such an objection, and an order granting probate in common form cannot be appealed.

Although there is no requirement of notice to heirs in common form probate, knowledge of the pendency may exist. Therefore, an objection to the qualification and service of a nominated executor may be filed. Such an objection is permitted in connection with a common form probate, and the judge of the probate court has jurisdiction to determine that issue.

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193 Brinkley v. Sanford, 99 Ga. 130 (1896); Peters v. West, 70 Ga. 343 (1883).
194 Moody v. McHan, 184 Ga. 740 (1937); Sutton v. Hancock, 118 Ga. 436 (1903).
196 In Re Estate of Moriarty, Id.
5.5.5 Appeal of Common Form Probate

There is no right to appeal of the decision of the judge of the probate court on the petition to probate a will in common form, whether the decision is to admit the will or to deny probate.\footnote{In re Lyons, 259 Ga. App. 563 (2003)}

5.5.6 Requiring Probate in Solemn Form

If an interested party wishes to file an objection to the probate of a will which is offered for probate only in common form or which has already been probated in common form, the party must file a motion asking the court to require the propounder of the will to offer it for probate in solemn form.\footnote{Johnson v. Ellis, 172 Ga. 435, 158 S.E. 39 (1931)} The party desiring to contest the will then has the opportunity to file written objections to the probate and be given a hearing on the objections. If the caveat is sustained and probate in solemn form is denied, the effect is to revoke the probate in common form and, if no other will is admitted to probate, an intestacy is declared.\footnote{Benton v. Turk, 188 Ga. 710, 4 S.E.2d 580 (1939)}

While an executor is generally under no duty to offer a purported will for probate\footnote{See Section 4.4 above.}, when the executor has probated a will in common form and has undertaken to act as executor, the executor may be cited to offer the purported will for probate in solemn form by the heirs,\footnote{Wilder v. Federal Land Bank of Columbia, 182 Ga. 551 (1936); Vance v. Crawford, 4 Ga. 445 (1848).} by one claiming an interest under the theory of virtual adoption,\footnote{Ezell v. Mobley, 160 Ga. 872 (1925).} or by the state claiming an escheat,\footnote{Osling v. State, 161 Ga. 967 (1926).} but not at the instance of a creditor.\footnote{Hooks v. Brown, 125 Ga. 122 (1906).}

When heirs who are also beneficiaries have received testamentary gifts from the executor under a common form probate, they cannot cite the executor to probate the will in solemn form without, in good faith, returning what they have received.\footnote{Medlock v. Merritt, 102 Ga. 212 (1897).}

If the will has been probated in common form and the executor(s) has/have qualified but there is pending a contested petition to probate in solemn form, the executor(s) may continue to serve. Pending the outcome of the litigation of any caveats to the will, the
executor(s) is/are authorized to carry out existing contracts of the decedent, carry on the business of the decedent, and do such acts as are necessary for the protection and preservation of the estate, provided proper orders are secured from the probate court, after due notice to all parties at interest.\textsuperscript{206}

If the motion to compel probate in solemn form has been filed before the will was probated in common form, the parties may agree to the common form probate for those purposes, in which case, the court may restrict the executor(s) from making distributions to beneficiaries under the will until the litigation is settled. An executor who is in office pending litigation of a caveat to the will is called an executor \textit{pendente lite}, and special Letters Testamentary \textit{pendente lite} may be issued which restrict the executor(s) from performing acts other than those necessary to preserve and protect the estate.

5.6 Probate in Solemn Form [GPCSF 5]

5.6.1 In General

In contrast to common form probate, solemn form probate requires and affords legal notice to the heirs of the decedent and to the beneficiaries under any other purported will for which probate proceedings are pending.

Under Georgia law, if a decedent dies intestate (without a will), the heirs of the decedent inherit the estate of the decedent.\textsuperscript{207} Since the probate of a will would potentially adversely affect the interests of the heirs in the estate (their right of inheritance), notice is given to the heirs that a purported will has been offered to the court as the lawful Last Will and Testament of the decedent. The notice requires the heirs to file any written objections (caveats) to the probate of the will within a time deadline, after which they lose the right to object. The same is true as to notice to the propounders of and beneficiaries under any other will which has been offered for probate. See Section 6.2 below.

The recitals in the verified\textsuperscript{208} petition are exactly the same for both common and solemn form probate:

1. Full name of the testator;

\textsuperscript{206} O.C.G.A. §53-7-4.
\textsuperscript{207} See Chapter 4.
\textsuperscript{208} O.C.G.A. §53-11-8 provides that every petition filed in the probate court must be verified by the oath of the petitioner and be sworn to or affirmed before the probate court or a notary public.
2. Domicile of the testator;
3. Date of death;
4. Mailing address of the petitioner;
5. Names, ages or majority status\(^{209}\), addresses, and relationships of all heirs\(^ {210}\);
6. Whether, to the knowledge of the petitioner, any other proceedings with respect to the probate of another purported will of the testator are pending in this state and, if so, the names and addresses of the propounder(s) of and the names, ages or majority status, and addresses of the beneficiaries under such other purported will;
7. If any particulars are missing, the reasons for such omissions; and
8. A prayer (request) for issuance of Letters Testamentary.\(^ {211}\)

When there has been a previous probate of the will in common form and Letters Testamentary have been issued under the common form probate, the prayers (requests) may include that the Letters Testamentary previously issued be ratified, continued, and confirmed. However, it is usually more convenient for the executor to have new Letters that show the date of probate in solemn form. There is no need for the same executor to take a new oath if it would be identical to the oath previously taken, although, when new Letters are being issued, some courts may require a new oath. The oath might also be different when a settlement agreement which modifies the terms of the will has been approved.\(^ {212}\)

### 5.6.2 Notice to Heirs and Others; Time for Filing Objections

In a proceeding to probate a will in solemn form, notice must be given to all heirs. Additionally, notice must be given to the propounders and beneficiaries under any other purported will of the testator as to which probate proceedings are pending in this state.\(^ {213}\)

Notice must be served in accordance with Chapter 11 of Title 53 as summarized below. The citation (form of the notice) must state that objections must be made in writing and shall

\(^{209}\) For any heir who is age 18 or over, it is sufficient merely to indicate that the heir has reached majority.

\(^{210}\) New Georgia Probate Court Standard Forms effective July 1, 2009, require that the petitioner make an affirmative statement how the listed heirs comprise the full list of heirs of the decedent.

\(^{211}\) O.C.G.A. §53-5-21(b).

\(^{212}\) See Section 5.8.4 on Settlement Agreements.

designate the date on or before which objections must be filed with the probate court.\textsuperscript{214} It must further state whether a hearing will be held on a certain date or will be specially scheduled for a later date. The citation may also state that if no objections are filed the petition may be granted without a hearing.\textsuperscript{215}

\begin{quote}
“Notice” and “citation” mean the same in Title 53,\textsuperscript{216} and the notice or citation in probate court is the essential equivalent to a “summons” issued in the state and superior courts. A “summons” directs (compels) someone (usually the defendant) to respond to the petition or motion. For most proceedings in probate courts, especially under Title 53, the persons to whom notice is given are instructed to file objection, if any they have; there is usually no necessity to respond if there is no objection.

The “heirs” of a decedent are those persons who would be entitled to inherit if the decedent left no will.\textsuperscript{217} Since the probate in solemn form is conclusive only upon those who have notice or who are represented by the executor\textsuperscript{218}, the judge of the probate court should, in each case, determine whether notice has been given to all proper parties. See Chapter 8 on Rules of Inheritance for determining who the heirs of a decedent are. It is the duty of the petitioner to use reasonable diligence in identifying and locating all heirs of the decedent.\textsuperscript{219} A petition may (should be) amended to add any heirs who might have been excluded in the original petition. As to all to whom notice is not given, it is as though probate had been in common form only.\textsuperscript{220}

In addition to service of the notice, the law now requires that a copy of the will be included with the service in connection with a petition for probate in solemn form.\textsuperscript{221} Heirs may acknowledge service and may assent to the probate of the will. No acknowledgment of service in a proceeding to probate a will is valid unless it is attested by a

\begin{footnotes}
\item[214] Higginbotham v. Higginbotham, 235 Ga. 784 (1999) held that a notice directing persons to appear before the court on a date certain was sufficient that such date was the deadline for filing objections.
\item[215] O.C.G.A. §53-11-9
\item[216] O.C.G.A. §53-11-9(b).
\item[218] O.C.G.A. §53-5-20; Foster v. Foster, 207 Ga. 519 (1951). See Section 5.8.5 below.
\item[220] O.C.G.A. §53-5-20.
\item[221] O.C.G.A. §53-5-22(c). Under the Pre-1998 Probate Code, it was not necessary to serve a copy of the will with the notice.
\end{footnotes}
notary public or clerk of the probate court. An attorney-in-fact under a general power of attorney would apparently have authority to acknowledge service on behalf of the principal, but any power of attorney should be reviewed by the judge for sufficient authority and should be recorded with the proceedings. A guardian-ad-litem may acknowledge service on behalf of the person(s) represented by him/her.

The filing of a caveat which does not specifically object to the sufficiency of service of notice waives any such objection, thereby becoming the equivalent of an acknowledgement of service. If all of the heirs acknowledge service of the petition and notice, assent to the granting of the petition, and there are no other proceedings pending in this state with respect to the probate of another purported will of the decedent, the will may be admitted to record on proper proof, and Letters Testamentary may issue without further delay.

5.6.3 Personal Service

All persons who are sui juris (literally, “under the law,” that is, competent adults and emancipated minors) and who are residents of this state must be personally served with copies of the petition, the purported will, and the citation at least ten days prior to the date on which a hearing on the petition is to be or may be heard. The ten-day period may be waived by any party who is sui juris. Personal service must be made by the sheriff, a deputy sheriff, a special agent for service appointed by the court, or some other officer authorized pursuant to the Georgia Civil Practice Act. If a special agent is appointed by the court, the special agent must be a citizen of the United States if service is made in this country.

If an heir or other person who is a Georgia resident is temporarily out of the state, personal service outside this state may be made in accordance with the procedure set forth in

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222 O.C.G.A. §53-11-6(a).
223 See O.C.G.A. §10-6-5.
224 See Section 6.6 below.
225 O.C.G.A. §9-11-12(h).
226 O.C.G.A. §53-5-21(b).
227 O.C.G.A. §§53-5-22(a), (c); 53-11-3.
228 O.C.G.A. §§9-11-4(c), 53-11-3(b).
229 O.C.G.A. §9-11-4(c).

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Code Section 9-11-4(f)(2), which permits personal service in another state, or Code Section 9-11-4(f)(3), which provides for service in certain foreign countries.

Where personal service is required by the Code, unless otherwise directed by the court, service may alternatively be made by registered or certified mail or statutory overnight delivery if specifically requested in the petition. The court causes a copy of the petition and citation, together with the copy of the purported will, to be sent to the each interested party with delivery restricted to the addressee only and with return receipt requested. If the return receipt is not signed by the addressee and dated at least ten days before the date set forth in the citation, service is incomplete and must be otherwise accomplished. This procedure is not used extensively, largely due to the difficulty of obtaining the return receipts in proper form and on time. Experience shows that, while restricted delivery may have been requested and paid for, too often delivery is actually signed for by someone other than the addressee and is, therefore, invalid.

5.6.4 Service by Certified Mail

All persons who are sui juris and who are residents of some other state or a foreign country whose addresses are known must be served with copies of the petition, the purported will, and the citation by certified or registered mail, or statutory overnight delivery, return receipt requested. The court record must show the persons notified and the character of the notice given. Service is completed upon the mailing, and the certificate of mailing in the standard form should contain the actual date the items were placed in the United States mail (not the date the mailings were prepared).

For persons who reside in the continental United States, the deadline for filing objections shall be not less than 13 days from the date of mailing. However, if the return receipt is received back by the court within that 13-day period, the deadline for filing
objections is 10 days from the date of actual receipt as shown on the return receipt. For example, if the notice were mailed on July 1, the date for filing objections (to be stated in the citation) cannot be earlier than July 14. If, on July 10, the court receives the return receipt indicating that the mailed notice was actually received on July 3, the deadline for filing objections for that party is 10 days from the date of actual receipt, or July 13. If, on July 13, the court receives the return receipt indicating that the mailed notice was actually received on July 10, the deadline for filing objections for that party is July 20 (10 days after receipt). If the return receipt is not received by the court within 13 days after mailing, the deadline remains as stated in the citation no matter what date of actual receipt may later be shown on a return receipt received by the court.

For persons who reside outside the continental United States, the deadline for filing objections shall be not less than 30 days from the date of mailing. However, if the return receipt is received back by the court within that 30-day period, the deadline for filing objections shall be no less than 10 days from the date of actual receipt as shown on the return receipt. For example, if the notice were mailed on July 1, the date for filing objections (to be stated in the citation) cannot be earlier than July 31. If, on July 15, the court receives the return receipt indicating that the mailed notice was actually received on July 10, the deadline for filing objections for that party is July 20 (10 days after receipt). If the return receipt is not received by the court within 30 days after mailing, the deadline remains as stated in the citation no matter what date of actual receipt may later be shown by receipt of the return receipt.

In any case in which notice has been mailed to a non-resident of Georgia at a supposed known address, if the mailed notice is returned to the court with an indication that the address is incorrect (e.g., no such street, no such number, not at this address, etc.), then service has not been complete as to each person whose mailed notice was returned, since service by mail is sufficient only as to known non-residents whose addresses are known.

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236 O.C.G.A. §53-11-4(c).
Therefore, another manner of service will be necessary. If a new known address is obtained for the person, a new citation must be issued and be mailed to the person at the new known address. If no new address is found for the person (e.g., no forwarding address, forwarding time expired, etc.), that person becomes a known heir or beneficiary with an unknown address, and service must be perfected by publication.\textsuperscript{237}

As noted earlier, the citation must designate the date on or before which objections must be filed.\textsuperscript{238} \textbf{If a date certain is stated in the citation which is later than the deadlines set forth above, the deadline actually stated in the citation becomes the date on or before which objections must be filed}. For example, if the citation also states that a hearing will be held on a date certain, which must be no earlier than the latest deadline applicable, the date of the hearing set forth in the citation becomes the deadline for objections.\textsuperscript{239}

\section*{5.6.5 Service by Publication}

When there are \textit{known heirs} (or beneficiaries under another will being offered for probate) whose addresses are unknown, they shall be served by publication of the citation once a week for four weeks in the legal organ for the county in which the proceedings are filed.\textsuperscript{240} The deadline for filing objections for anyone served by publication shall be no sooner than the first day of the week after the fourth insertion is published.\textsuperscript{241}

The published notice must be directed to the known parties to be served\textsuperscript{242} and must also set forth:

1. The name of the court;
2. The date the order for service by publication was granted;
3. The name of the decedent;
4. The fact that a petition to probate the will in solemn form has been filed; and
5. The name of the petitioner who seeks issuance of Letters Testamentary or continuance in force of Letters previously granted.\textsuperscript{243}

\begin{flushleft}
\textsuperscript{237} O.C.G.A. §53-11-4(b).
\textsuperscript{238} O.C.G.A. §53-11-9.
\textsuperscript{239} O.C.G.A. §53-11-10(b).
\textsuperscript{240} O.C.G.A. §§53-5-22(c) and 53-11-4(d).
\textsuperscript{241} O.C.G.A. §53-11-10.
\textsuperscript{242} O.C.G.A. §53-11-4(b).
\end{flushleft}
If publication will be required (i.e., there are known heirs or beneficiaries with unknown addresses), it would be a good practice to also name in the citation all known heirs or beneficiaries with supposed known addresses outside the state of Georgia. If a mailed notice is returned which indicates that what was thought to be a good address is not a correct address, notice will have already been published, naming those persons who are then known heirs or beneficiaries with unknown addresses.

Prior to July 1, 2002, heirs or beneficiaries who were unknown were to be served also by publication. The requirement of publication for unknown heirs or beneficiaries was removed in 2002, because the Code requires that unknown heirs or beneficiaries be represented by a guardian-ad-litem. See the next Section.

5.6.6 Guardians and Guardians-ad-Litem

If any person to whom notice must be given is not sui juris, is unborn, or is unknown, the petition must so specify and a “guardian” must be appointed to represent the person or persons. In this context, “guardian” means:

1. A guardian-ad-litem appointed by the court, or
2. The individual’s natural guardian, testamentary guardian or conservator, or legally appointed guardian if the court determines that such guardian has no conflict of interest and thus may represent such party. [GPCSF 16]

It is a good practice for a guardian-ad-litem appointed by the court to be an attorney.

Service upon that individual’s “guardian” constitutes service upon that individual, and no further service is required. The guardian may acknowledge service of the petition, copy of will and notice, and assent to probate without further delay, in which case, the ten-day waiting period is waived. The acknowledgment of service saves the expense of an additional fee for having the papers served by the sheriff upon the guardian. If there is reason to suspect that any of the known heirs may be minors or incompetents, or that there might be

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243 O.C.G.A. §53-5-22(c).
244 O.C.G.A. §53-1-2(14) defines an individual as "sui juris" if the individual is "age 18 or over and not suffering from any legal disability."
245 O.C.G.A. §§53-11-2, 29-3-22(a)(6), 29-5-23(a)(6).
246 O.C.G.A. §53-11-2(b).
247 Id.
unknown heirs, it is good policy to appoint a guardian for any heirs, known or unknown, who might be minors or incompetents, and thus make them parties to the proceedings and make the proceedings conclusive as to them.

The judge may limit the appointment of a guardian-ad-litem or may appoint a successor at any time for cause. If the appointment has not been limited by the court, any guardian-ad-litem who is first appointed will continue to serve with respect to the proceeding until the party represented becomes *sui juris*, a successor is appointed, or the court otherwise terminates the appointment.²⁴⁸

A guardian-ad-litem should accept the appointment in writing. There is no requirement that the acceptance be under oath. However, any acknowledgment of service assenting to the probate must be under oath.²⁴⁹

The guardian should file a written report or answer showing what actions were taken to investigate and protect the interests of the minor, incompetent, or unborn or unknown heirs. At the very least, the guardian should carefully review the pleadings and the purported will to assure that all notice requirements have been met and that the purported will was duly executed and attested and has not been revoked. The guardian should appear at any contested hearing. The form of the report of the guardian will vary, depending upon the facts developed through the investigation. For example, if the person represented takes a larger interest under the will than if there were no will, the guardian should recommend that the will be probated because it would be to the best interest of the person. On the other hand, if the person would take a greater interest if there were no will but the guardian finds no legal cause to object to the probate of the will, the guardian should so state in the written report or response.

Since waivers, acknowledgements, consents, answers, objections and other documents executed by the guardian concerning the proceeding are binding upon the party represented,²⁵⁰ the guardian's written report or response should be recorded together with the rest of the proceedings.

²⁴⁸ O.C.G.A. §53-11-2(c).
²⁵⁰ O.C.G.A. §53-11-2(b).
There is an obvious conflict between the provisions of Code Section 53-11-3(d), which provides that individuals who are not sui juris must be served as provided in Chapter 11 of Title 53 or as provided in Code Section 15-9-17. Code Section 53-11-2(b) provides that all persons not sui juris may be served by service upon their “guardian,” while Code Section 15-9-17 requires personal service upon the person represented, presumably not permitting direct service upon the guardian. Since the provisions of Chapter 11 of Title 53 were codified after the provisions of Code Section 15-9-17, it is doubtful that anyone will use Code Section 15-9-17 for Title 53 proceedings. However, if this method of service is used, GPCSF 54 should be used.

5.6.7 Service upon a Resident Avoiding Service

There could be a question as to whether the probate statute concerning four-week publication covers the situation where personal service is attempted on a resident heir whose address is known, but the heir intentionally avoids service. The Civil Practice Act ("CPA") specifically addresses this situation and provides that a 60-day publication procedure can be used, whereas the closest the probate statute itself comes is the situation where the residence is unknown. However, there is no policy reason why an heir who intentionally avoids personal service should get more notice than an heir whose residence is simply not known, and therefore the probate statute’s four-week procedure should be adequate. Further, the CPA provides that the methods of service provided in the CPA may be used as alternative methods of service in proceedings in probate courts and in any other special statutory proceedings and may be used with, after, or independently of the method of service specifically provided for in any such proceeding. The CPA provides further that, in any such proceeding, service is sufficient when made in accordance with the statutes relating to the particular proceeding or in accordance with the C.P.A. provisions.

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251 O.C.G.A. §9-11-4(e)(1).
252 O.C.G.A. §9-11-4(k).
5.6.8 **Service upon Military Personnel**

A person in military service may be served by any commissioned officer who then files a certificate of service declaring that service was made in person.\(^{253}\)

5.6.9 **Completion of Service to be Shown in the Record**

Compliance with all notice requirements must be a part of the record. That is, the name, if known, and majority status of each person served, the manner of service applicable to each person, and the fact of completion of the service (returns of service, certificates of mailing, return receipts, etc.) are to be set forth in the proceedings and be recorded with same.\(^{254}\)

5.7 **Caveats and Objections**\(^{255}\)

An heir or other interested party having standing may file an objection to the probate of a document offered as the purported will of a decedent. Other “interested parties” could include beneficiaries and/or nominated executors under another purported will of the decedent and any person who will be adversely affected by the probate of the will.\(^{256}\)

Interestingly, Chapter 5 of Title 53 does not address the manner of filing a caveat or objection to a will or the grounds upon which an objection may be made, other than to indicate that any objection must be made in writing and be filed before the deadline set forth in the citation or notice.\(^{257}\) In order to determine the grounds upon which a caveat may be filed to the probating of an alleged will, one must look to Chapter 4 of Title 15, which deals with the necessary requirements for a document to constitute a valid will under Georgia law. Of necessity, a caveat to the probate of a propounded will must set forth grounds which would show that the will is not entitled to admission to record as the lawful Last Will and Testament of the decedent.

Therefore, the basic question presented to the court in a caveat to probate is whether the document is a “will” under Georgia law. No particular form is necessary to constitute a

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\(^{253}\) O.C.G.A. §53-11-3(c).

\(^{254}\) O.C.G.A. §§53-11-3 and 53-11-4(c).

\(^{255}\) See Section 6.3 below for objections to nominated executor serving.

\(^{256}\) Lavender v. Wilkins, 237 Ga. 228 (1976).

\(^{257}\) O.C.G.A. §§53-5-22(c) and 53-11-9(a). See Section 5.7.1 above.
will, and the test whether a document is a will is the intention of the maker (that it dispose of property after death), to be gathered (determined or ascertained) from the whole instrument, read in light of the surrounding circumstances. If the intention is to convey a present interest, even though possession is postponed until after death, the instrument is not a will. If the intention is to convey an interest accruing and having effect only after death, the instrument is a will.  

Therefore, the usual grounds for objecting to the probate of a will would be one or more of the following:

1. The document is not intended to take effect at death;

2. The document is a forgery, that is, that it was not signed by the decedent or by someone else at the decedent’s direction;

3. The document was not properly witness by two or more competent witnesses;

4. At the time of execution of the document, the decedent lacked testamentary capacity by reason of: being under the age of 14; lacking a decided and rational desire as to the disposition of property; insanity or monomania which affected the decedent’s ability to make such a decided and rational desire; or that the document was not freely and voluntarily executed but was, instead, the result of fraud, misrepresentations, duress, coercion or undue influence whereby the will of another was substituted for the wishes of the maker;

5. That the will has been amended or modified by a duly executed codicil;

6. That the will was revoked by the maker during life, either by an express revocation or an implied revocation, without having been republished or revised.

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258 O.C.G.A. §53-4-3. The Pre-1998 Probate Code defined a “will” as “the legal declaration of a person’s intention regarding the disposition of his property after his death.” Pre-1998 Probate Code Section 53-2-4.

259 Id.


261 O.C.G.A. §53-4-20(b).

262 O.C.G.A. §§53-4-10, 11 and 12.

263 O.C.G.A. §53-20(c).

264 O.C.G.A. §§53-4-40 through 53-4-50.
The question sometimes arises whether the caveat must set forth details concerning the grounds of the caveat. The CPA provides that in all averments of fraud or mistake, the circumstances constituting fraud or mistake must be stated with particularity, but that malice, intent, knowledge, and any other condition of mind of a person may be averred (alleged) generally.\textsuperscript{265} Although allegations of fraud or mistake must be pled with particularity, failure to do so does not authorize automatic dismissal.\textsuperscript{266} The proper remedy for seeking more particularity is a motion for more definite statement at the pleading stage or by the rules of discovery thereafter.\textsuperscript{267} Undue influence would not have to be pled with particularity.

5.8 Conduct of Probate Hearings and Burden of Proof

5.8.1 The Uncontested Hearing

Unless and until a caveat has been timely filed by a party with standing to contest the will, the proceeding is uncontested and the order granting probate may be entered at any time following the expiration of the time for filing objections. The judge of the probate court may decide that, as a routine practice or for any particular types of proceeding or for any specific proceeding, a hearing will be held by the court even if the matter is uncontested. Since the granting of an order in a proceeding under Title 53 is within the discretion of the court, requiring a hearing is permissible.\textsuperscript{268}

There is no provision under Chapter 5 of Title 15 which requires the judge of the probate court to grant a petition to probate without a hearing or which entitles a petitioner to an order granting the relief requested in a probate proceeding without a hearing.

The primary benefit of a hearing in uncontested matters is the opportunity for the court to assure that all notice requirements have been met. The court can determine, from the testimony, whether a diligent effort has been made by the petitioner or the petitioner’s attorney to locate those heirs or beneficiaries about whom it is alleged that their whereabouts are unknown. The court can determine further whether all heirs have, indeed, been listed and

\textsuperscript{265} O.C.G.A. §53-4-3.
\textsuperscript{268} O.C.G.A. §53-11-9(a), “the petition may be granted without a hearing.”
that heirs of equal standing have not been inadvertently omitted. Lastly, the court can determine by testimony that there is no reason to believe that a later will or codicil exists or that the testator took any action to revoke the propounded will.

Alternatively, the judge of the probate court may decide that routine, uncontested probate petitions may be granted without a hearing. Attorneys should ascertain from the particular court the requirements of a hearing and the necessity of attendance of the attorney at a hearing.

The judge of the probate court may also decide that, when a petition to probate an alleged will is filed, a clerk of the court may administer the oath of office to the nominated executor(s) and accept the petition for filing, to be reviewed and granted, if appropriate, by the judge at a later time.

Whether a hearing is held by the court, or the court permits clerks to accept a petition for filing and administer the oath of office to the nominated executor(s), a determination should be made, preferably by sworn testimony of a petitioner before the judge or clerk, that:

1. The testator died domiciled in the county or was domiciled outside Georgia but owns property in the county;
2. That all heirs (and all beneficiaries under any other will offered for probate anywhere in Georgia) have been properly named and that a diligent effort has been made to locate each such heir (beneficiary);
3. That proper service has been perfected on all heirs (and, if applicable, beneficiaries);
4. That the purported will was duly executed and witnessed in accordance with Georgia law;
5. That the purported will is the last known document purporting to be a will or codicil of the decedent;
6. That the purported will was not revoked, expressly or impliedly, during the lifetime of the decedent;
7. That, if a copy of the will is being offered for probate, the original has not been located and that there is no reason to believe that it was destroyed by the decedent with an intent to revoke it; and
8. That the nominated executor(s) is/are prepared to qualify as such or that proper cause is shown why the first nominated executor(s) has/have not or cannot serve (such as a declination to serve, proof of death of the first nominated executor(s), etc.).

The attorney representing the petitioner at an uncontested probate hearing should have the petitioner testify under oath, before the court or a clerk, to all facts which make out the *prima facie* case for entitlement to an order admitting the will to probate.

At the uncontested hearing, if appropriate under the evidence, the judge may sign the final order admitting the will to probate and administer the oath office to the nominated executor(s) ready to qualify. Letters Testamentary may then be issued by the judge when all executor(s) have qualified.

If the testimony is taken by a clerk, the clerk may administer the oath to the nominated executor(s) ready to qualify, and advise him/her/them that Letters Testamentary will be issued only after the final order has been signed by the judge.

In either such case, the judge or the clerk may want to provide to the qualifying executor(s) a copy of the “Handbook to Guide Personal Representatives,” especially if the executor(s) is/are not represented by an attorney. If the executor(s) has/have not been relieved of the reporting requirements, the reporting requirements should be explained to the executor(s), who should be given the forms for the Inventory and Returns. If the executor(s) has/have been relieved of reporting, it should be made clear that the service of the executor(s) is still governed by Georgia law and that beneficiaries or other interested parties may still call upon the executor(s) to account for the manner in which the estate is being or has been administered.

5.8.2 The Contested Hearing or Trial

When a caveat has been timely filed, the matter is then considered contested, and, unless disposed of in some other manner, must be tried by the court. In all non-Article 6 Probate Courts, the hearing or trial will be non-jury, since there is no right to a trial by jury except in the Article 6 Probate Courts. For more information on burden of proof and evidence in trials, see Chapter 2, Section 4.4.
In conducting a contested hearing for the probate of a will, the judge of the probate court is exercising a judicial function, and the issue before the judge is whether the paper propounded is, or is not, the valid and lawful last will and testament of the deceased.\footnote{Peavey v. Crawford, 182 Ga. 782 (1936). There could also be an issue as to who should be allowed to qualify as executor or as administrator with will annexed.} The probate court is the only court with original and exclusive jurisdiction to determine this issue.\footnote{O.C.G.A. §§15-9-30(a)(1) and 53-5-1(a).} Neither the superior courts,\footnote{Ponce v. Underwood, 55 Ga. 601 (1876).} nor the United States courts,\footnote{Hargroves v. Redd, 43 Ga. 142 (1871).} nor courts of equity\footnote{Israel v. Wolf, 100 Ga. 339 (1897).} have any original jurisdiction over the probate of a will. As stated previously in this Chapter, the sole issues are: (1) was the decedent a domiciliary of the county, or a non-domiciliary of the state owning property in the county, at the time of the decedent’s death; (2) does/do the propounded document(s) constitute a valid will (duly executed) under Georgia law; and (3) was the will revoked by the decedent during life.

Prior to the 1998 Revised Probate Code, if all beneficiaries named in the will predeceased the testator, and the testator had left no lineal heirs, the will was not valid and could not be admitted to probate because it failed to dispose of property.\footnote{Lawson v. Hurt, 217 Ga. 827 (1962).} The new Code expands the definition of a will to include a document that declares an individual's testamentary intent regarding the disposition of his/her property or other matters.\footnote{O.C.G.A. §53-1-2(17).} Hence a will which does not effectively dispose of property but expresses the testator’s intent with regard to “other matters” (such as the nomination of executor(s), the method of payment of debts, etc.), the will can be held valid under present law.

Unless the court's jurisdiction has been expanded and the issue has been raised in proper pleadings, the judge of the probate court should refuse to determine any questions about a will other than its validity and worthiness to be admitted to probate,\footnote{Smith v. Davis, 203 Ga. 175 (1947); Finch v. Finch, 14 Ga. 36 (1853).} and should leave all questions such as the construction of the will,\footnote{Lowell v. Bouchillon, 246 Ga. 357 (1980).} title to property,\footnote{In re Estate of Adamson, 215 Ga. App. 613 (1994).} or rights of parties under the will\footnote{Peavey v. Crawford, 182 Ga. 782 (1936); Wetter v. Habersham, 60 Ga. 193 (1878).} to other proper courts.
5.8.2.1 Process of the Hearing or Trial

For a complete outline of how to conduct a contested hearing or trial, reference should be made by the judge of the probate court to the Georgia Probate Judges Benchbook.

At the hearing, the attorney representing the propounder (or the propounder, if pro se) should make a brief introduction by stating: (1) that the proceeding is for probate in solemn form; (2) essential facts of the verified petition, including those facts which give the court jurisdiction; and (3) the type of notice given, the recipients of notice, and the caveator’s name or names. All witnesses who will testify in person should be properly sworn by the bailiff, the judge of the probate court, or by the clerk if the judge has one.\(^{280}\) The judge should inquire whether either party requests sequestration of the witnesses.\(^{281}\)

The propounder has the burden of establishing a *prima facie* case, which includes showing the factum of the will (i.e., that it was properly executed), that at the time of its execution the testator apparently had sufficient mental capacity to make it, and that in making it, the testator acted freely and voluntarily. When this has been done, the burden of proof shifts to the caveator. It is then the caveator’s burden to affirmatively prove the invalidity of the purported will: the testator’s lack of capacity if that is the issue\(^{282}\); the occurrence of undue influence\(^{283}\); or other grounds. However, if the issue is forgery, the burden of proof never shifts from the propounder to the caveator.\(^{284}\)

The caveator also has the burden of proving affirmatively all matters raised by him which are not matters for which the propounder is required to make out a *prima facie* case.\(^{285}\) An example of an issue on which the caveator has the burden of proof would be an alleged revocation (when the original will is offered for probate).

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\(^{280}\) O.C.G.A. §24-9-60.

\(^{281}\) O.C.G.A. §24-9-61.


\(^{284}\) *Heard v. Lovett*, 273 Ga. 111 (2000). In the Heard case, the court stated broadly, “Because he offered the will for probate, Propounder assumed the non-shifting burden of persuasion as to the validity of that document…” The opinion also states that, as to a necessary element of Propounder’s case, the burden of persuasion does not shift. *However, the Heard case involved forgery, and the impact of the Singelman case, which is more recent, when the issue of forgery is involved is uncertain.*

If a party has the burden of proof in a will contest, that party must prevail by a preponderance of the evidence. Unless the caveator has admitted a *prima facie* case prior to trial, the propounder has the right to make the first opening statement and, after opening statements, to attempt to make out a *prima facie* case. If a *prima facie* case is made by the propounder, the caveator then presents his/her evidence. After the caveator presents all his/her evidence, the propounder has the opportunity to present rebuttal evidence.

In all trials in the probate courts, the general rules of evidence apply. Ordinarily, the propounder is entitled to open and close the argument at the end of the case. However, if the caveator admits a *prima facie* case in favor of the propounder or introduces no evidence, the caveator is entitled to open and conclude the argument. This right to open and close also applies to opening statements and to the presentation of evidence if the caveator stipulates a *prima facie* case prior to trial.

After presentation of evidence and closing arguments have been completed, the judge of the probate court should examine the proceedings to be certain that the court has jurisdiction, that all persons legally entitled to notice have been properly served, and that the interests of any minors or incompetent persons have been properly protected. Any order admitting the purported will to probate should be checked to be certain that it is consistent with the facts appearing in the record. Findings of fact do not have to be stated separately from conclusions of law, but the order must contain both. An order probating a will in solemn form should contain recitals showing:

1. Jurisdiction - death and domicile (except in cases of foreign wills).
2. Notice to all interested parties and the nature of such notice, whether by acknowledgment and consent, personal service, registered or certified mail, statutory overnight delivery, or publication.
3. Appointment of any necessary guardian.
4. The nature of the proof presented as to capacity, lack of undue influence, and proper attestation.
5. Granting the probate of the will and ordering it to record.

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288 See Section 5.6.5 above.
6. Granting Letters Testamentary to the executor or Letters of Administration with Will Annexed if appropriate.

The probate of a will by a probate court is not an adjudication of the validity of any particular devise or bequest contained in any item of the will. The superior court, exercising equity jurisdiction, has authority to declare devises and bequests void when contrary to law. Further, all issues of construction of a will which has been admitted to probate are beyond the jurisdiction of non-Article 6 Probate Courts; issues of construction are issues of equity, which must be determined in an Article 6 Probate Court or a superior court.

5.8.3 Attorneys’ Fees in Contested Hearings

Any nominated executor who files a petition offering a will for probate, in common or solemn form, is entitled to have his/her attorney's fees and expenses paid from the estate of the decedent, provided only that the person proceeded in good faith in offering the will for probate. The probate court should determine whether the person proceeded in good faith first and, then, the amount of the fees and expenses to be recovered, and its order is subject to appeal as provided in other cases.

The rationale for this is that the executor believes in good faith that the propounded will is a valid will. Therefore, this section only applies where the petitioner is the nominated executor in the will and proceeds in good faith.

Attorney's fees may be awarded, in a reasonable amount, from the estate of a decedent to the attorney for successful caveator(s). In determining the reasonable fees to be awarded, the judge of the probate court is not bound by the contract between the caveator(s) and the attorney. On the other hand, where there has been unsuccessful litigation in which a beneficiary was found to have subjected the decedent to undue influence in regard to matters other than the procurement of the will, the Supreme Court has held that a bequest to that unsuccessful litigant in the will cannot be diminished by or charged with all of the expenses of the estate’s litigation; the Court held that, even though the item containing the

\[290\] O.C.G.A. §15-9-127(9).
bequest stated that it shall not be reduced by “any expenses of litigation,” the bequest could be charged the “extraordinary expenses” of litigation involving the beneficiary’s own wrongdoing.\(^{294}\)

Attorney’s fees and expenses of litigation must be awarded against the losing party under certain conditions and may be awarded against the losing party under certain other circumstances,\(^{295}\) as discussed in Chapter 2.

### 5.8.4 Settlement Agreements

Article 6 Probate Courts,\(^{296}\) and superior courts on appeal, may approve a settlement agreement among all parties under which probate is granted or denied providing for a disposition of property contrary to the terms of the will. Any settlement agreement which provides for the sustaining of the caveat or the disposition of the property contrary to the terms of the will must be approved by the judge after a hearing, notice of which must be given as the judge directs, at which evidence is introduced and the judge finds as a matter fact that there is a bona fide contest or controversy.\(^{297}\) This would mean that parties cannot just propose a settlement agreement when there are no genuine issues as to the validity of the purported will.

To be effective, the agreement must be assented to in writing by all sui juris heirs and all sui juris beneficiaries who are affected by the settlement.\(^{298}\) In addition, all parties who are not sui juris and all unborn or unknown beneficiaries must be represented by a guardian-ad-litem. It is the duty of the guardian-ad-litem to investigate the proposed settlement and report his findings and recommendations to the court, which must take the recommendations into consideration but is not bound by them.\(^{299}\) A judgment entered in the court and based upon the settlement agreement is binding on all parties including persons not sui juris, unborn beneficiaries, and unknown persons who are represented before the court by

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\(^{294}\) Pate v. Wilson, 286 Ga. 133 (2009).
\(^{296}\) O.C.G.A. §15-9-127(3).
\(^{297}\) O.C.G.A. §53-5-25(a).
\(^{298}\) O.C.G.A. §53-5-25(b).
\(^{299}\) O.C.G.A. §53-5-25(c).

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a guardian-ad-litem but is not binding on heirs not sui juris and not properly represented before the court.

When the settlement agreement provides that the will may be probated and that the executor may qualify as such but modifies the terms of the will, the regular executor's oath and Letters may be altered to provide that the executor will carry out the will "as modified by the settlement agreement."

5.8.5 Effect of Probate in Solemn Form; Conclusiveness

Probate in solemn form is conclusive upon all parties notified and upon all beneficiaries represented by the executor. As to any heirs who were not effectively notified, the probate in solemn form is treated as if it were in common form. This would mean that it would not be binding until four years after probate or four years after a minor heir turns eighteen. Hence, an heir who was properly notified may not file a caveat after the entry of the order admitting a will to probate in solemn form but must seek to have the order set aside for just cause under O.C.G.A. §9-11-60. See Section 5.10 below.

5.9 Appeal of Probate Hearing

As discussed more fully in Chapter 2, the decision of the judge of the probate court on the trial of a petition to probate an alleged will is appealable. In all counties in which the probate court is not an Article 6 Probate Court, the appeal is to the superior court for a de novo trial. Appeals from the Article 6 Probate Courts may not be taken to the superior court, and the appeal is to the Supreme Court, which has exclusive appellate jurisdiction over will contests.

The original will, when proved and recorded, must remain on file in the office of the judge of the probate court. Certified copies are admissible as evidence in any case and in any court. Therefore, even though the “whole record” is brought before the superior court

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300 O.C.G.A. §53-5-25(d).
303 See Section 5.5.2.
305 See McSherry v. Israel, 222 Ga. 520, 150 S.E.2d 646 (1966), in which the appellate court affirmed the trial court's judgment denying a motion to dismiss for failure to transmit the original will. The trial judge stated in
in a *de novo* appeal, a certified copy of the wills and any codicils filed in the probate court should suffice for the purposes of the appeal. From a practical standpoint, retaining the original will in the probate court office eliminates the possibility of its becoming misplaced while being used in another court.

If it is absolutely essential that the original(s) be utilized in another court, such as an appeal in superior court when a forgery of the testator's signature has been alleged, a clerk of the probate court should take the original to the trial and remain there as long as the original is needed and then return with it to the probate court.

### 5.10 Setting Aside Prior Probate

The probate court has original jurisdiction over any action to vacate, set aside, or amend its order admitting a will to probate which alleges:

1. That another will is entitled to be admitted to probate; or
2. That a codicil to the probated will is entitled to be admitted to probate.\(^{306}\)

Any such action must be combined with a petition to probate in solemn form the other will or codicil. The judge considers the petition to probate together with the action to vacate, set aside, or modify the original order and then grants relief as is appropriate with respect to each matter.\(^{307}\) The verified petition must set forth the allegations on which the action is based and the name and address of the then acting personal representative, if any, of the estate, or, if none, the names and addresses of all beneficiaries under the previously probated will. The petition must conclude with a prayer for the issuance of an order vacating, setting aside, or amending the earlier probate; the probate of the new will or codicil in solemn form; and the issuance of new Letters.\(^{308}\)

The beneficiaries under the previously probated will are represented in this type of proceeding by the then acting personal representative, if any; and service of notice upon that open court that he would direct the ordinary to produce and deliver to his court the original will and codicils. This appears to be consistent with the statute, since a probate court judgment is not final while it is on appeal.

\(^{306}\) O.C.G.A. §53-5-50(a).

\(^{307}\) O.C.G.A. §53-5-50(b).

\(^{308}\) O.C.G.A. §53-5-51(a).
personal representative in the same manner as provided under Chapter 11 of Title 53 is equivalent to service upon such beneficiaries.\(^\text{309}\)

If there is no personal representative then in office, the petition must be served upon the beneficiaries (as defined in Code Section 53-5-22) under the previously probated will, in the same manner as heirs are required to be served, unless all such parties assent to the petition.\(^\text{310}\)

If the then acting personal representative or, if none, the beneficiaries under the previously probated will acknowledge service of the petition and assent to the relief requested, it may be granted without further delay.\(^\text{311}\)

If it is discovered after a will has been admitted to probate that there are heirs who were not listed and not given notice, a motion to set aside the judgment could be filed. However, there appears to be no reason why notice could not be given to those heirs citing them to show cause, if any, why the earlier judgment should be set aside, that is, for them to show cause why the will should not have been admitted to probate in the first instance. If those heirs have no valid grounds to object to the will being admitted to probate, there seems no reason to vacate the earlier judgment just to then enter a new judgment admitting the will to probate.

There are other reasons for setting aside an order admitting a will to probate besides the discovery of a later will or codicil, such as fraud, lack of jurisdiction, etc. In those cases, the rules discussed in Chapter 2 concerning modifying or setting aside judgments would normally be applicable.

The probate court also has jurisdiction to vacate a judgment declaring an intestacy upon the discovery of a will and due probate of the will.\(^\text{312}\)

A judgment probating a will in common form may be set aside in a court of equity for fraud relating to jurisdiction.\(^\text{313}\)

\(^{309}\) O.C.G.A. §53-5-51(b).

\(^{310}\) O.C.G.A. §53-5-51(c).

\(^{311}\) O.C.G.A. §53-5-51(d).


\(^{313}\) Abercrombie v. Hair, 185 Ga. 728 (1938).
6. EXECUTORS AND ADMINISTRATORS WITH WILL ANNEXED

6.1 Nomination in a Will

An executor is a person named by the testator in a will to administer the estate of the testator in accordance with the provisions in the will and Georgia law. The will alone is but a nomination of an executor, and a nominated executor has no power or authority until the will has been admitted to probate and the executor has qualified. (See Section 6.22 below on acting without authority.)

While most wills clearly nominate executor(s) as such, no formal words are necessary for a nomination. Any expression by the testator of a desire that a named person is to carry out the provisions of the will or manage or administer the estate will suffice. In other words, a testator may not use the word “executor” but makes it clear that a named person is intended to carry out the will provisions; that would be a sufficient nomination.

6.2 Eligibility to Serve

Any competent adult (a person sui juris), regardless of citizenship or residency, is eligible to serve as an executor in Georgia. Any other “person” as defined above (i.e., other than an individual) is eligible to serve if qualified to act as a fiduciary in this State. Eligibility is, however, subject to the requirements for qualification. (See Chapter 1, Section 2.5 for certain restrictions on a probate judge serving as executor.)

6.2.1 Corporate Fiduciaries as Executors

A corporate fiduciary may be nominated in and serve as an executor under a will. See Chapter 5 on Personal Representatives and Temporary Administrators.

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314 O.C.G.A. §53-1-2(11) defines a person as “an individual, corporation, partnership, association, joint stock company, business trust, unincorporated organization, limited liability company, or two or more persons having a joint or common interest, including as individual or a business entity acting as a personal representative or in any other fiduciary capacity.

315 O.C.G.A. §53-6-10(a).

316 O.C.G.A. §53-6-1.

317 O.C.G.A. §53-6-1. On the issue of the qualification to act as fiduciaries in Georgia, see O.C.G.A. §7-1-242 and Title 53, Ch. 12, Art. 16.
6.3 Objections to Service by Nominated Executor(s)

Beneficiaries and other parties at interest (e.g., creditors) under a will may object to the appointment of a nominated executor on the ground that the interests of that person are adverse to those of the estate and/or the beneficiaries. Upon a satisfactory showing that the nominated executor has a conflict of interest or will not properly administer the estate, the judge of the probate court may deny the granting of the Letters Testamentary to the nominated executor.\(^\text{318}\)

While the validity of a will offered for probate only in common form may not be contested, the qualification and appointment of a nominated executor may be contested in common form proceedings.\(^\text{319}\)

6.4 Powers of Administrator with Will Annexed

The Georgia statute defines an administrator with the will annexed (\textit{cum testamento annexo} or c.t.a.) as "any person, other than an executor, appointed and qualified to administer a testate estate, including a testate estate already partially administered and from any cause unrepresented."\(^\text{320}\) An administrator with the will annexed has all of the rights, powers, privileges, exemptions, and immunities given the named executor, including any power to serve without making inventory or returns.\(^\text{321}\) The administrator c.t.a. has the same authority as to possession of the entire estate as does an executor.\(^\text{322}\) When a will has authorized the executor to keep the estate together and/or to carry on farming interests or a business, the power passes to the administrator c.t.a.\(^\text{323}\) Therefore, unless otherwise stated or obvious from the context, whenever “executor” is used, it will apply to an administrator with will annexed.

The judge of the probate court has the authority to appoint an administrator c.t.a. when (1) no executor has been named in the will; (2) the nominated executor is not \textit{sui juris}; (3) a testate estate is unrepresented for any cause; and (4) an executor, after having qualified, dies, resigns, or becomes incapacitated to serve (and there is no nominated alternate or


\(^{319}\) Id.

\(^{320}\) O.C.G.A. §53-1-2(13).

\(^{321}\) O.C.G.A. §53-7-3.

\(^{322}\) O.C.G.A. §53-7-2.

\(^{323}\) Palmer v. Moore, 82 Ga. 177 (1888).
successor executor willing and able to serve).\textsuperscript{324} An administrator c.t.a. may be unanimously selected by the beneficiaries who are capable of expressing a choice; provided, if the sole beneficiary is the spouse of the decedent and divorce or separate maintenance proceedings were pending between the decedent and the spouse at the time of death, such spouse may not serve. If there is no unanimous selection, the judge of the probate court may make an appointment of anyone who will best serve the interests of the estate, giving preference to (1) any beneficiary or the trustee of a trust that is a beneficiary under the will; or (2) the spouse (if no action for divorce or separate maintenance was pending) or any other heir who is selected by a majority in interest of the beneficiaries, any other eligible person, a creditor, or the county administrator. A beneficiary’s selection may be made by a \textit{sui juris} beneficiary, a beneficiary’s guardian or the person having custody of the beneficiary, the trustee of a trust which is a beneficiary under the will, or the personal representative of a deceased beneficiary receiving a present interest under the will.\textsuperscript{325}

\subsection*{6.5 Successor Executors}

When a vacancy occurs in the executorship, either from death, incapacity, or resignation, the alternate executor(s) named in the will, if any, will be permitted to serve as Successor Executor(s).\textsuperscript{326} The Code establishes no specific procedure for appointing successor executor(s), except to state that a petition is to be filed by an executor seeking to resign. Service of the petition for the appointment of (a) successor executor(s) is to be served on the beneficiaries under the will.\textsuperscript{327} No standard form has been created for this purpose. See Appendix A3-3 for a sample petition Appendix A3-4 for sample Successor Letters Testamentary.

Obviously, upon the death or incapacity of the executor, someone else must advise the court of the circumstance which gives rise to the need for the successor executor(s) to be named. If a guardian or conservator has been appointed for an incapacitated executor, a petition or motion to resign and have a successor appointed may be filed on behalf of the executor. If a personal representative has been appointed for a deceased executor, the

\textsuperscript{324} O.C.G.A. §53-6-13.
\textsuperscript{325} O.C.G.A. §53-6-14.
\textsuperscript{326} O.C.G.A. §53-6-10(b).
\textsuperscript{327} O.C.G.A. §53-7-56.
personal representative may file the petition or motion. If no guardian or conservator has been appointed for an incapacitated executor or\textsuperscript{328} no personal representative has been appointed over the estate of a deceased executor, it would seem that any alternate executor named in the will, any beneficiary, or any other interested person may file a petition or motion with the court to bring the incapacity or death to the attention of the court. If good cause is shown why the Letters Testamentary issued to the executor should be revoked and the successor(s) be appointed, the court has that authority.\textsuperscript{329}

6.6 Serving Pending Resolution of Disputes over Wills

If there is a dispute over the validity of a will, it may become necessary to have someone in place to marshal the assets of the estate, to protect the estate pending the outcome of the litigation, and to take other steps necessary to preserve the estate and/or conduct the business of the estate. If the will has been probated in common form, the executor(s) will be in place. If the will has not been probated in common form, the parties may agree to the probate in common form for the purpose of having an executor in place for that purpose. Otherwise, it will become necessary to have a temporary administrator appointed, in which case, the nominated executor is given preference in the appointment.\textsuperscript{330}

Pending litigation of caveats to wills, executors or temporary administrators are authorized to carry out existing contracts of the decedent, carry on the business of the decedent, and do such acts as are necessary for the protection and preservation of the estate, provided proper orders are secured from the judge of the probate court, after due notice to all parties in interest.\textsuperscript{331}

An executor serving pending the resolution of litigation is often called an executor \textit{pendente lite}.

6.7 Nature of Relationship of Executor to Decedent, Beneficiaries and Creditors

An executor occupies the position of personal representative of the decedent by reason of the personal confidence placed in the executor by the decedent under the terms

\textsuperscript{328} In re Estate of Moriarty, 262 Ga. App 241 (2003).
\textsuperscript{329} O.C.G.A. §53-7-55.
\textsuperscript{330} O.C.G.A. §53-6-30(b).
\textsuperscript{331} O.C.G.A. §53-7-4.
of the will. Therefore, it is incumbent upon the executor to administer the estate in accordance with the instructions given in the will, unless the instructions cannot be followed for some legal reason. The executor holds a position of trust for all persons who have an interest in the estate, including creditors and beneficiaries. One of the obligations of the executor is to protect the interests of creditors, who have the first claim against the assets of the estate. The executor acts for the creditors as well as the beneficiaries in managing the distribution of all of the assets of the estate, including the sale of any property.\footnote{Stewart v. Walters, 278 Ga. 602 (2004); Darnell v. Lipscomb, 225 Ga. Pp. 135 (1997).}

### 6.8 Qualification of Executor

When a will has been admitted to probate by an order of the judge of the probate court, whether in common or solemn form, the next step is the qualification of the executor. The executor qualifies by taking the required oath, posting bond if required, and receiving Letters Testamentary.\footnote{O.C.G.A. §53-1-2(13).} See Section 5.1 above on the difference between common and solemn form probate.

The Georgia statute defines an executor as one who has qualified to administer a testate (with a will) estate.\footnote{O.C.G.A. §53-1-2(7). The term "executor" includes alternate or successor executors.} Thus, any use in the statute of the term "executor" refers to a nominated executor who has taken the oath and been issued Letters Testamentary.\footnote{O.C.G.A. §53-1-2(13).} The term "Personal Representative," as used in the statute, includes an executor, as well as an administrator with will annexed, an administrator of the estate of a person who has died intestate (without a will), and the county administrator.\footnote{O.C.G.A. §53-6-10(b).}

Generally, executors who are nominated in the will have the right to qualify in the order set out in the will.\footnote{O.C.G.A. §53-6-12. This Section also provides that the declination does not preclude the declining executor from later qualifying.} A nominated executor may not be forced to serve and may decline to serve in writing.\footnote{O.C.G.A. §53-6-12.} However, if an executor who is nominated in the will fails to qualify within 90 days after the will is admitted to probate, or is proved to be dead or incapacitated or declines the right to serve, that person loses priority and the next nominated executor then
has 90 days in which to qualify. If the next nominated executor does not qualify within that 90-day period, or is proved to be dead or incapacitated or renounces the right to serve, any other nominated executor may then qualify. A nominated executor who fails to qualify within the time periods set out above loses the priority but is not precluded from qualifying to serve at a later time either as executor or as administrator with will annexed.\textsuperscript{339} Multiple executors with equal duties and responsibilities to the estate may also be appointed by the testator. \textbf{See Section 6.17 below.}

\textbf{6.9 Executor’s Oath}

All executors and administrators c.t.a. are required to take and subscribe the following oath or affirmation:

"I do solemnly swear (or affirm) that this writing now being presented to this court is the true last will of \([\text{name of deceased}]\), deceased, so far as I know or believe, and that I will well and truly execute the same in accordance with the laws of Georgia. So help me God."\textsuperscript{340}

Whenever there is a corporate executor, the form of the qualifying oath could be changed as follows:

"I, \([\text{name of bank officer}]\), do solemnly swear (or affirm) that I am a duly qualified officer of the \([\text{name of bank}]\) and that this writing now being presented to this court is the true last will of \([\text{name of deceased}]\), deceased, so far as I know or believe, and that \([\text{name of bank}]\) will well and truly execute the same in accordance with the laws of Georgia. So help me God."

The qualifying oath should be administered to the executor by the judge or clerk of the probate court and be signed by the executor in the presence of the judge or clerk, who

\textsuperscript{339} \textit{O.C.G.A. §53-6-11.}

\textsuperscript{340} \textit{O.C.G.A. §53-6-16(a).} The phrase “now being presented to this court is” was added to the GPCSFs, and the word “contains” was deleted. The addition was made by the Rules and Forms Committee for purposes of clarification; however, as of the date of this Handbook, the statutory language has not been revised.
attests such signature. If no hearing is to be held, this affords an opportunity to impress upon the executor or administrator c.t.a. the serious obligation which he/she is undertaking. It also affords the executor or administrator c.t.a. an opportunity to ask questions. Explanations may avoid future difficulties and may enable the executor to gain a better understanding of what he/she is required to do. The court may want to provide the executor or administrator c.t.a. with a copy of the “Handbook to Guide Personal Representatives,” especially if the executor or administrator c.t.a. is not represented by an attorney. Of course, advice should not be given on matters of law, and the executor or administrator c.t.a. not represented by an attorney should be encouraged to seek legal counsel as appropriate.

The law provides that the oath or affirmation of an appointed executor or administrator with the will annexed may be subscribed before the judge or clerk of any probate court of this state; no commission is required. The law also authorizes the judge of the probate court who appoints any such fiduciary to grant a commission to a judge or clerk of any court of record of any other state to administer the oath or affirmation. 342 [GPCSF 53]

6.10 Bond [GPCSF 21]

While an executor is not required by statute to post bond upon qualification, if there is a requirement in the will that the executor post bond in any specific amount, or in general terms, the judge of the probate court should require that such a bond be posted. A common practice in drafting wills, however, is to specifically relieve the executor of the necessity of posting bond. Additionally, an executor may be required to post bond upon the court’s finding of mismanagement of the estate. 344

The bond, when required is made payable to the judge of the probate court for the benefit of all interested parties. 345 When bond is required of an executor, whether by the

342 O.C.G.A. §53-6-16(b).
343 O.C.G.A. §53-6-50, which requires a bond only for the personal representative or temporary administrator of an intestate estate.
344 O.C.G.A. §53-6-53
345 O.C.G.A. §53-6-51(a).
terms of the will or by court order, the authority and duties of the executor are not otherwise changed or expanded.\textsuperscript{346}

See Chapter 4, Section 4.2 on Surety and Amount of Bonds.

**6.11 Statutory Powers and Duties of Executors**

The executor is a fiduciary who, in addition to the specific duties imposed by law, is under a general duty to settle the estate as expeditiously and with as little sacrifice of value as is reasonable under all of the circumstances.

The executor is a personal representative and has all rights, powers, duties, and responsibilities of any personal representative, except as modified by the terms of the will.\textsuperscript{347}

See Chapter 5 on Powers and Duties of Personal Representatives and Temporary Administrators.

The executor is entitled to possess and administer the entire estate, including any portion of the estate which is not disposed of by the will and which will become distributable to the heirs after the payment of all debts and satisfaction of all testamentary gifts.\textsuperscript{348}

Generally speaking, executors and administrators are governed by the same laws in the following particulars, unless the will provides otherwise:

1. Commissions allowed, unless the executor’s fee is specified in the will or a separate document;
2. Powers, duties, and liabilities;
3. Manner of effecting sales; making and receiving titles to property sold or purchased by their decedents;
4. Investment of funds;
5. Obtaining discharge;
6. Resignation;
7. Compelling settlements before the judge of the probate court; and
8. Inventory and returns required of personal representatives; returns by personal representatives of the estates of deceased personal representatives.

\textsuperscript{346} Roberts v. Wilson, 198 Ga. 428 (1944).
\textsuperscript{347} O.C.G.A. §53-7-1.
\textsuperscript{348} O.C.G.A. §53-7-2.
6.12 Powers Incorporated by Reference to Statute

In Chapter 12 of Title 53, there is a list of 32 fairly comprehensive powers considered beneficial or needful to any fiduciary in the administration of a trust or an estate.\textsuperscript{349} These powers may be incorporated by reference, in whole or in part, by a testator in his/her will, in which case they will treated as if they had been separately stated in the will. When so incorporated, these powers are in addition to and not in limitation of the common-law and statutory powers of a fiduciary.\textsuperscript{350} Of particular importance to probate judges, these powers include: the power to sell and exchange property at public or private sale; the power to serve without inventory, returns or bond; authority to make distributions in kind; and the authority to make distributions to persons under age 21 by transfer to a custodian under the Georgia Transfers to Minors Act.\textsuperscript{351}

A provision in any will or trust instrument which incorporates powers by citation to Georgia Laws 1973, page 846; Code 1933, Section 108-1204 (Harrison); or Code Section 53-15-3 and which was valid under the law in existence at the time the will was signed by the testator is effective notwithstanding the subsequent repeal of such statute.\textsuperscript{352}

If the powers were not incorporated into the will, the beneficiaries under the will may, by unanimous consent authorize, but not require, the judge of the probate court to grant the executor any of those powers. However, the powers may be granted at the request of the beneficiaries only after the publication of a notice of the request, with no objection being filed by an interested party to the granting of the powers. Consents for beneficiaries who are not \textit{sui juris} may be given by the guardian, if one has been appointed, by either parent of a minor beneficiary, or by a majority of the heirs-apparent of an incapacitated adult; provided that a person may not consent for another when that person is the executor who is or will be serving.\textsuperscript{353}

\textsuperscript{349} O.C.G.A. §53-12-232.
\textsuperscript{350} O.C.G.A. §53-12-231.
\textsuperscript{351} O.C.G.A. §44-5-110 et seq.
\textsuperscript{352} O.C.G.A. §53-12-231(c).
\textsuperscript{353} O.C.G.A. §53-7-1(b).
6.13 Powers Granted Under Will

A testator may make specific provisions in his/her will authorizing certain actions by the executor in a manner different from that required by the law relating to personal representatives in general. Also, the testator may relieve the executor of certain obligations which the law would require in the absence of specific directions by the testator to the contrary, such as making and filing inventory and annual returns.\textsuperscript{354} When a will creates a power of sale which is not expressly limited to a public sale, the power authorizes a private sale by the executor and successors.\textsuperscript{355} Purchasers at sales by executors are bound to see that the executor is acting with authority, either from the will or from the statutory law.\textsuperscript{356}

Even if relieved by the will or by the consent of the beneficiaries, the executor should keep an inventory and records of all income and disbursements and keep all interested parties informed as to the administration of the estate. Whether or not relieved of filing inventory and returns with the court, the executor can always be called upon to account for the handling of the estate and must be prepared always to show that he/she has abided the law and the provisions of the will.\textsuperscript{357}

An executor cannot bind the estate by any contracts made, except those which are authorized by law and by the terms of the will.\textsuperscript{358} An executor who makes unauthorized contracts may be held individually liable on the contract even when the estate is not liable.\textsuperscript{359} When there are multiple executors, all executors must join in the contract, unless otherwise authorized by law or the terms of a will.\textsuperscript{360} The executor has no authority to lease realty except under express testamentary direction or by court order\textsuperscript{361} nor to grant an option to purchase land at private sale for a specified price.\textsuperscript{362} When a will authorizes the lease or sale of property at public or private sale without court order, this power does not include the right

\textsuperscript{354} O.C.G.A. §§53-7-33 and 53-7-69.
\textsuperscript{357} O.C.G.A. §53-7-62.
\textsuperscript{358} O.C.G.A. §53-7-6.
\textsuperscript{359} First National Bank and Trust Company of Vidalia v. McNatt, 141 Ga. App. 6 (1977)
\textsuperscript{360} Id.
\textsuperscript{361} Davis v. Auerbach, 78 Ga. App. 575 (1949).
to grant a long-term option to purchase the property even though the option is a part of a lease.\footnote{Adler v. Adler, 216 Ga. 553 (1961).}

### 6.14 Notice to Debtors and Creditors

The executor is required to publish a notice to all creditors of the estate to render a statement of the claims just as any other personal representative.\footnote{O.C.G.A. §53-7-41.} See Chapter 5 for the timing of the requirement and a form for the notice.

### 6.15 Reporting Requirements: Inventory and Returns

An executor, like any personal representative, is required to file with the judge of the probate court an inventory\footnote{O.C.G.A. §53-7-30.} and annual returns\footnote{O.C.G.A. §53-7-67.} unless specifically relieved by the will\footnote{O.C.G.A. §§53-7-33 and 53-7-69.} or by the unanimous consent of the beneficiaries.\footnote{O.C.G.A. §§53-7-30 and 53-7-68.}

If the will was executed in and is valid under the laws of a state that does not require the filing of inventory or returns, such a will shall be construed as dispensing with the necessity of filing these documents in Georgia even if relief is not expressly stated in the will.\footnote{O.C.G.A. §§53-7-1(b), 53-7-32(b) and 53-7-68(c).} This would require that the law(s) of the other state must be made known to the judge, who may take judicial notice of such law(s).\footnote{O.C.G.A. §53-7-69.}

The executor must also deliver a copy of the inventory and each return to the beneficiaries under the will, except that it is not necessary to mail a copy of the inventory or return to any beneficiary who is not sui juris nor must the court to appoint a guardian for such person.\footnote{See Chapter 2, Section 4.5.} However, any provision in a will or unanimous consent by the beneficiaries which relieves the executor from filing inventory or returns also relieves the executor from

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\footnote{Adler v. Adler, 216 Ga. 553 (1961).} \footnote{O.C.G.A. §53-7-41.} \footnote{O.C.G.A. §53-7-30.} \footnote{O.C.G.A. §53-7-67.} \footnote{O.C.G.A. §§53-7-33 and 53-7-69.} \footnote{O.C.G.A. §§53-7-1(b), 53-7-32(b) and 53-7-68(c).} \footnote{O.C.G.A. §53-7-69.} \footnote{See Chapter 2, Section 4.5.} \footnote{O.C.G.A. §§53-7-30 and 53-7-68.}
sending a copy of the inventory or returns, as the case may be, to the beneficiaries.\textsuperscript{372} Any individual beneficiary may waive the right to receive the inventory or the returns.\textsuperscript{373}

6.16 Executor Compensation, Expenses and Attorneys’ Fees

A nominated executor has the right to offer the will for probate\textsuperscript{374} and, so long as he acts in good faith, can recover from the estate of the decedent expenses incurred, including reasonable attorney's fees, even though the will may be subsequently determined to be invalid.\textsuperscript{375}

Furthermore, as noted in Chapter 5 on Powers and Duties of Personal Representatives and Temporary Administrators, the executor is authorized to employ an attorney to represent the estate by way of legal advice to the executor. Either the executor or the attorney may petition the court for an order awarding fees and expenses for the attorney. Notice of such petition need be given only to the other (that is, to the executor or to the attorney who is not the petitioner).\textsuperscript{376}

Executors are allowed reimbursement for all reasonable expenses incurred in the administration of the estate, including without limitation expenses for travel, the cost of any bond, the expenses of the attorney or other agents.\textsuperscript{377}

Executors are entitled to such compensation as may be set forth in the will or as specified in any written agreement between the testator and the executor, which shall be binding on the estate as fully as though set forth in the will. The beneficiaries under the will may also enter into an agreement with the executor setting the executor’s compensation.\textsuperscript{378}

When there is no provision for compensation in the will and no agreement has been made with the testator or the beneficiaries, the executor is entitled to the same compensation as any other personal representative. See Chapter 5, Section 4 for the statutory schedule of compensation of personal representatives.

\textsuperscript{372} O.C.G.A. §§53-7-32(b), 53-7-33, 53-7-68(c) and 53-7-69.
\textsuperscript{373} O.C.G.A. §§53-7-32(a) and 53-7-68(b).
\textsuperscript{374} See Section 4.4 above.
\textsuperscript{375} O.C.G.A. §53-5-26.
\textsuperscript{376} O.C.G.A. §53-7-6(4).
\textsuperscript{377} O.C.G.A. §53-6-61.
\textsuperscript{378} O.C.G.A. §53-6-60(a).
6.17 Co-Executors and Multiple Executors

If several executors are nominated but only one qualifies, that executor is entitled to execute all of the trusts confided to all, unless prohibited by the will. If more than one is nominated and qualifies, the co-executors must act by unanimous action unless the will provides otherwise. However, if one executor is not able to act due to inaccessibility, illness or other incapacity, the remaining executors may act as if they were the only executors if necessary to administer the estate. The executors may delegate authority to one or more of them to act for all of them. This delegation must be in writing, and it does not relieve the executors who make the delegation of liability, in that all executors remain liable for the actions of the executor who has been authorized to act on their behalf. Lawsuits filed by or against an estate must be brought by or against all executors who qualify.

Unless the will has provided otherwise, a qualified executor becomes liable for a breach committed by another qualified co-executor if the executor:

1. Participated in the breach.
2. Approved, knowingly acquiesced in, or concealed the breach.
3. Negligently enabled the other executor to commit the breach.
4. Neglected to take reasonable steps to compel the other executor to redress the breach in a case where the executor knew or reasonably should have known of the breach.

6.18 Income Received During Administration

As a general rule, income, profits and increase in value of specific testamentary gifts go with the gift. Unless otherwise provided in the will, income received from all other property is to be paid to the income beneficiaries of the residue of the estate.

379 O.C.G.A. §53-7-5(a).
381 O.C.G.A. §53-7-5(b).
382 O.C.G.A. §53-4-60.
383 O.C.G.A. §53-7-7.
6.19 Payment of Debts

The entire estate of a decedent is liable for the payment of all debts of the decedent and the estate. Unless the will provides otherwise, debts are paid from the assets of the estate in the following order;\textsuperscript{384}

1. The residuum, commonly referred to as the residue, of the estate; that is, the portion of the estate distributed by the residuary clause
2. General testamentary gifts, which abate pro rata.
3. Demonstrative testamentary gifts, which abate pro rata.
4. Specific testamentary gifts, which abate pro rata.\textsuperscript{385}

In accordance with the above priorities, the debts are usually paid from the residue of the estate. Unless otherwise provided in the will, a bequest of the residue or any part of it, including a bequest in lieu of year's support, is deemed to be a bequest of the remaining residuum after all debts, including taxes, and expenses of administration have been paid. Both realty and personalty are liable for the payment of debts. When the estate assets in the executor's hands are exhausted, a creditor may proceed against each beneficiary to whom property has been distributed for that beneficiary's pro rata share of the debts.\textsuperscript{386}

Debts and claims against the estate are to be paid in accordance with a priority set forth in the statute. Furthermore, unless otherwise provided by the will, the executor is entitled to the same protections against demands for payments, suits on account, and demands for distribution as are other personal representatives. See Chapter 5 on Powers and Duties of Personal Representatives and Temporary Administrators.

6.20 Distributions under the Will

6.20.1 In General

It is the fiduciary duty of the executor to make all distributions directed under the will of the testator, unless precluded from doing so under the law or by good cause (such as the asset having no longer been owned by the testator).\textsuperscript{387} An executor may be held liable for

\textsuperscript{384} O.C.G.A. §53-4-63.
\textsuperscript{385} O.C.G.A. §53-1-2(16) defines a “testamentary gift” as the interest in real or personal property which a beneficiary is designated to take under a will. See Section 2.1 above.
\textsuperscript{386} O.C.G.A. §53-4-63.
\textsuperscript{387} O.C.G.A. §§53-7-1, 53-4-66 and 53-4-68.
failure to make timely distributions, including interest.\textsuperscript{388} An executor may not withhold estate property from a beneficiary on account of a debt owed by the beneficiary to the executor personally.\textsuperscript{389}

All property which a testator acquires after having made a will also passes under the will if the provisions of the will are sufficiently broad to include the property.\textsuperscript{390} Presumably, a well written residuary clause which makes a broad reference to any property not otherwise disposed of by the will would be sufficiently broad to cover after-acquired property.

6.20.2 Interest on Testamentary Gifts

A general or demonstrative testamentary gift usually bears interest at the legal rate after the expiration of 12 months from the death of the testator; provided, however, that when a general or demonstrative testamentary gift is to be paid at a later time or upon a later event (stated in the will), it bears no interest until such time or event. The provision for interest on such gifts yields however to the equity and necessity of a particular case as the peculiar circumstances of the estate might require.\textsuperscript{391}

6.20.3 Gifts to Deceased Beneficiary

Except as otherwise provided by law (such as in the case of divorce), if a beneficiary dies before the testator but has lineal descendants living at the death of the testator, a testamentary gift, if absolute and without remainder or limitation, does not lapse but passes to the descendants of the beneficiary in the same proportions as if the gift were inherited directly from the deceased beneficiary. This includes gifts to a class of beneficiaries unless there is a clear intent to the contrary.\textsuperscript{392}

6.20.4 Lapsed or void testamentary gift of residuum

A lapsed or void testamentary gift becomes a part of the residuary. A lapsed or void gift of the residuary passes proportionately to the other residuary beneficiaries. If there are

\textsuperscript{388} In re Estate of Barr, 278 Ga. App. 837 (2006).
\textsuperscript{389} LaFavor v. LaFavor, 282 Ga. App. 753 (2006).
\textsuperscript{390} O.C.G.A. §53-4-72.
\textsuperscript{391} O.C.G.A. §53-4-61.
\textsuperscript{392} O.C.G.A. §53-4-64.
no other residuary beneficiaries, a lapsed or void gift of the residuary passes under the rules of inheritance in an intestacy.\textsuperscript{393}

6.20.5 Effect of exchange, loss, theft, destruction, or condemnation of testamentary gift

If, prior to death, the testator exchanges property which is the subject of a specific testamentary gift for other property of like character, or merely changes the investment of a fund so given, the testator is deemed to have intended to substitute the one for the other, and the testamentary gift does not fail. For example, if the testator’s will leaves the “2000 Dodge Ram pickup truck” to a named beneficiary, and, after making the will but before death, the testator trades that truck in for a 2008 Ford F100 pickup truck, the beneficiary will receive the new truck under the will.

If, within six months prior to the testator's death, property which is the subject of a specific testamentary gift is lost, stolen, or destroyed and such loss, etc. is covered, in whole or in part, by insurance, the beneficiary has the right to any proceeds of such insurance that remain unpaid at the testator's death, together with any proceeds which were paid prior to the testator's death. The foregoing provisions shall also apply if the property is damaged but not destroyed, except that the amount of the insurance proceeds or the pecuniary gift to be paid to the specific beneficiary shall be reduced by the cost of any repairs made to the damaged property by the testator or the testator's personal representative before delivery to the beneficiary.

If, within six months prior to the testator's death, property which is the subject of a specific testamentary gift is taken by condemnation, the beneficiary has the right to any condemnation award remaining unpaid at the testator's death, together with any portion of the award paid prior to the testator's death.\textsuperscript{394}

6.20.6 Election by beneficiary with claim adverse to will.

When a beneficiary under a will also has a claim against the estate, the beneficiary must allow all the provisions of the will to be executed as far as the beneficiary can. The mere fact that a beneficiary is also a creditor does not affect the will or the beneficiary’s gift.

\textsuperscript{393} O.C.G.A. §53-4-65. \textbf{See Chapter 8 on Rules of Inheritance.}

\textsuperscript{394} O.C.G.A. §53-4-67.
under the will. However, a beneficiary who has a claim adverse to the will is required to elect whether to claim under the will or against it if both the testamentary gifts and the claim cannot be fully satisfied.395

6.20.7 Election by beneficiary owning testamentary gift of property

When a will includes an attempted testamentary gift of property which is not owned by the testator but has also made a gift to the person who does own the property, the person shall elect to take either under the will or against the will, with certain exceptions. That is, a beneficiary who claims ownership of property which is the subject of an attempted specific testamentary gift to another must decide whether to assert the claim of ownership or receive the testamentary gift to that beneficiary, unless:

1. The will itself, from other causes than the testator’s lack of title, is not effective in passing title to the property in question;
2. The testator has an interest in the property in question upon which the will may operate;
3. The testamentary gift shows that the testator intended to give the property only in the event that the testator’s own title was good; or
4. The benefit given to the person called upon to elect is not from the testator's own property but is by virtue of a power of appointment in the testator.396

6.20.8 Compensation to defeated beneficiary electing against will.

When a beneficiary makes an election under either of the preceding sections against the will (elects to pursue the claim against the estate or elects to assert title to the property), a beneficiary whose gift is thereby defeated is entitled to receive an amount, up to the value of the defeated testamentary gift, out of the property bequeathed to the person who made the election.397
6.20.9 Disposition of heart pacemakers

Georgia law contains a special provision with regard to the sale of a heart pacemaker implanted in a decedent. Any individual who is 18 years of age or older and of sound mind may provide for the sale of his/her heart pacemaker at death by contract or by will. No sale may be made until after the death of the individual with the heart pacemaker. If the sale is authorized under a will, it authority to sell is effective even without probate. If such individual does not make provision for such a sale by contract or will, absent actual notice of contrary indications by the decedent or objection by someone in a class of higher priority, any of the following individuals, in order of priority stated, may sell the heart pacemaker:

1. The spouse;
2. An adult son or daughter;
3. Either parent;
4. An adult brother or sister;
5. A guardian of the person of the decedent at the time of the decedent's death other than a guardian-ad-litem appointed for such purpose; or
6. Any other person authorized or under obligation to dispose of the body.

A buyer who has actual notice of contrary indications by the decedent or actual notice that a sale by a member of a class is opposed by a member of the same or a higher priority class, the purported sale will not be valid.

Unless otherwise provided in a will or contract, all proceeds from the sale are added to the estate of the decedent. A sale or gift may not be made of a nuclear-powered pacemaker. Further, sales of heart pacemakers under this provision shall be subject to:

1. Medical acceptability of the heart pacemaker for reuse; and
2. The laws of this state relating to autopsies.\(^{398}\)

6.20.9 Marital Deduction Testamentary Gift or Transfer

The term "marital deduction testamentary gift or transfer" means a testamentary gift or transfer of assets, including cash, which qualifies for the federal estate tax marital deduction. Where a will authorizes or requires an executor to satisfy a marital deduction

\(^{398}\) O.C.G.A. §53-4-73.
testamentary gift or transfer wholly or partly by a distribution of assets in kind at values which are finally determined for federal estate tax purposes or at values which are determined by reference to such federal estate tax valuation, the executor, in satisfaction of the marital deduction bequest or transfer, shall distribute assets, including cash, which shall have an aggregate fair market value fairly representative of the spouse’s proportionate share of the appreciation or depreciation, from the date or dates of federal estate tax valuation to the date or dates of the distributions for the marital deduction bequest or transfer.\textsuperscript{399}

\textbf{6.20.10 Assent to Testamentary Gifts Necessary}

No testamentary gift passes the title thereto until the assent of the executor is given to the distribution of the property.\textsuperscript{400} The assent of the executor may be expressed or it may be presumed from the executor’s conduct. Assent should be evidenced in writing by a deed or bill of sale conveying real property or tangible personal property or by an assignment or transfer of interests in intangible personal property. In the absence of a prior assent, the discharge of the executor is conclusive evidence of assent. If no assent has been given within one year after qualification of the executor, a beneficiary may cite the executor in the probate court to show cause why assent should not be given or may seek to compel the executor to give assent in an equitable proceeding.\textsuperscript{401}

\textbf{6.21 Breach of Duty and Mismanagement of Assets; Removal}

An executor, as a fiduciary, may be held liable for any breach of duty which causes a loss to another, and the law provides several remedies to address a breach of fiduciary duty.\textsuperscript{402} Even when an executor has been relieved of the obligation to file inventories and returns, the executor may be called upon to account for the administration of the estate by any interested party.\textsuperscript{403}

\textsuperscript{399} O.C.G.A. §53-4-74.  
\textsuperscript{400} O.C.G.A. §53-8-15.  
\textsuperscript{401} Id.  
\textsuperscript{402} O.C.G.A. §53-7-54.  
\textsuperscript{403} O.C.G.A. §53-7-62.
The Court of Appeals has held that the probate court, not the superior court, has exclusive, original jurisdiction over a claim that an executor has breached a fiduciary duty.\textsuperscript{404} Among the remedies which the judge of the probate court may impose for breach of duty is the removal of the executor from office and the revocation of Letters issued to the executor.\textsuperscript{405}

The issues of breach of fiduciary duty and removal are more fully discussed in Chapter 5 on Powers and Duties of Personal Representatives and Temporary Administrators in Section 5.8.

6.21 Resignation and Discharge of Executor

An executor may resign the position in any manner and under any circumstances set forth in the will or upon a petition to the probate court showing that the resignation has been requested in writing by all the beneficiaries (presumably those having a continuing interest in the estate) or other cause(s) under which the resignation will not cause disadvantage to the estate.\textsuperscript{406}

An executor who has fully performed all duties or who has been allowed to resign may petition for discharge from office only or from office and liability under the same rules that apply to any personal representative. Resignation and discharge are more fully discussed in Chapter 5 on Powers and Duties of Personal Representatives and Temporary Administrators in Section 5.10.

6.22 Executor De Son Tort (Person who Acts as Executor without Legal Authority)

If any person, without legal authority, wrongfully intermeddles with or converts to his/her own use, any personal property of a decedent whose estate has no legal representative, that person becomes an executor “\textit{de son tort},” meaning “of his own wrong.”\textsuperscript{407} The person so acting becomes liable to the creditors and heirs at law or beneficiaries of the estate for double the value of the property converted. The person is not

\begin{thebibliography}{9}
\bibitem{405} O.C.G.A. §§53-7-54 and 53-7-55.
\bibitem{406} O.C.G.A. §53-7-56.
\end{thebibliography}
allowed to set off any debt due to him/her by the decedent or any debt voluntarily paid by him/her out of the assets. If the person dies, the personal representative of his/her estate becomes liable in the same manner and to the same extent that it would if the person were still living.\textsuperscript{408} If the person later becomes executor or administrator, he/she cannot be held liable for prior unauthorized conduct which benefited the estate but does become responsible for the proper administration of the estate.\textsuperscript{409} He/she would be liable for any conversion. The Court of Appeals has held that this provision allowing for damages of double the amount must be strictly construed and that, to support such a recovery, it must be shown that the intermeddling was in bad faith, that the possession amounted to a conversion in bad faith, or that the actions taken were attempt to deal with the property as an executor in bad faith. If the actions taken, although intermeddling with property of the estate, are inconsistent with an intention to exercise the office and discharge the duties of a personal representative, the person may not be held liable as an executor \textit{de son tort}, although the person may still be liable to the personal representative when appointed for the property actually handled.\textsuperscript{410}

The liability of such a person is a personal action against the person and cannot be treated as an action against the estate itself.\textsuperscript{411} However, the doctrine of executor \textit{de son tort} has no application to transactions in real property because a transferee of real estate would be obligated to ascertain that the supposed executor has the authority to convey or transfer title to real estate.\textsuperscript{412} The nature of a proceeding under this doctrine, being personal against the executor \textit{de son tort}, is such that it would be an equitable proceeding beyond the jurisdiction of a judge of the probate court. However, situations may be brought to the attention of a judge of the probate court which present this problem, and a judge should have sufficient familiarity with the legal principle involved to refer the inquiring party to an attorney.

\begin{flushright}
\textsuperscript{408} O.C.G.A. §53-6-2.
\textsuperscript{412} O’Neal v. O’Neal, 176 Ga. 418 (1933).
\end{flushright}
6.23 Will Interpretation and Construction

Questions of the construction and interpretation of wills and provisions within wills are inherently matters of equity, beyond the jurisdiction of all probate courts except the Article 6 Probate Courts, which are given concurrent jurisdiction with the superior courts in the construction of wills. Of course, a probate court may apply and enforce clear provisions of a will in determining any estate matters, such as returns, settlements of affairs, and discharge.

6.23.1 Trial of Construction Issues by Article 6 Probate Courts

In trying any case dealing with the determination of the validity of any provision in a will or construing the terms or provisions of a will, the primary goal will always be to carry out the intent of the testator, as far as it may be consistent with the law. The judge trying the case may, when clear and convincing proof of the intent is shown, transpose sentences or clauses, change conjunctions, and supply or delete words when a sentence or clause is unintelligible or inoperative in context.

In construing a will, a judge may hear parol evidence of the circumstances surrounding the testator at the time of execution to explain all ambiguities, whether latent (obvious) or patent (not immediately obvious). However, if the testator’s intent can be ascertained from the “four corners of the will itself,” extrinsic evidence should not be allowed.

If a will is illegal in part, the part which is legal may be sustained. However, if the whole will so constitutes one testamentary scheme that the legal portion alone cannot give effect to the testator’s intention, the whole will must fail.

The trial of a case involving the construction of a will is more fully covered in the Georgia Probate Court Benchbook.

414 O.C.G.A. §15-9-127(9).
416 O.C.G.A. §53-4-55.
417 O.C.G.A. §53-4-56.
419 O.C.G.A. §53-4-57.
APPENDIX TO CHAPTER 3
PROBATE OF WILLS

A3-1. Sample Petition to Enter Safe Deposit Box……………………………………3-88
A3-2. Sample Affidavit Proving Testator’s Signature………………………………3-93
A3-3. Sample Petition for the Appointment of a Successor Executor………………3-94
A3-4. Sample Successor Letters Testamentary………………………………………3-98

Important Notice

Several sample orders and forms have been included in this Appendix. These sample orders and forms have not been officially sanctioned by the Georgia Council of Probate Court Judges. They have, unless otherwise noted, been prepared by the author. They are provided solely as samples. They should be modified or adapted to the specific court for the specific purpose, with any unnecessary material being deleted and any additional material being added.

William J. Self, II
APPENDIX A3-1

PETITION TO ENTER AND EXAMINE
SAFE DEPOSIT BOX AND FOR ORDER
AUTHORIZING DELIVERY OF CERTAIN CONTENTS

GEORGIA, _____________ COUNTY

To the Honorable Judge of the Probate Court:

The petition of ____________________________________________________________, whose mailing address is ________________________, respectfully shows to the Court:

1. On __________, ________________________________________________________, whose place of domicile was __________________________________________________________________ died. Sufficient proof of such death is submitted herewith in the following form(s): ( ) certified copy of death certificate; ( ) copy of obituary published in the ____________________________ (newspaper); ( ) order of funeral service from a local church, synagogue, temple, mosque or funeral home; ( ) written statement from funeral home in possession of the bodily remains of decedent; ( ) written confirmation of death from coroner, hospital, or skilled care nursing facility; or ( ) (other) ____________________________________________.

2. The decedent had contracted the use of the following safe deposit box(es) at the following financial institutions located in the State of Georgia:

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<tr>
<th>Financial Institution</th>
<th>Address</th>
<th>Box No(s.)</th>
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3. Petitioner, whose relationship to decedent is ______________________, desires to open and examine the contents of such safe deposit box(es) and to have delivered to the appropriate person(s) or entity(ies) certain contents thereof in accordance with Georgia law.
WHEREFORE, Petitioner prays that an Order issue directing the above named financial institution(s) to permit Petitioner to open and examine the contents of such safe deposit box(es) in the presence of an officer of the financial institution, and, if requested by Petitioner, directing such financial institution(s):

(1) To remove from any safe deposit box any writing purporting or appearing to be a Last Will and Testament of the decedent and to deliver same to this Court;

(2) To remove from any safe deposit box any writing purporting to be a deed or permit to a burial or cemetery plot or to give burial instructions and to deliver same to Petitioner;

(3) To remove from any safe deposit box any insurance policy or policies on the life of the decedent and to deliver same to the beneficiary named in each such policy; and

(4) Within five banking days after a copy of this Order is presented, to permit Petitioner, the presence of an officer of the financial institution, to inventory the contents of any safe deposit box, which inventory shall be reduced to writing signed by the Petitioner and the officer of the financial institution in whose presence same was taken, a copy of which shall be retained by the financial institution and a copy of which may be filed with this Court.

__________________________________________
PETITIONER

Address:

__________________________________________
Sworn to and subscribed before me, on _________________________

__________________________________________
Clerk of Probate Court or Notary Public

Telephone:

ORDER OF COURT

Upon consideration of the within and foregoing petition, it appearing to the Court that satisfactory proof of death of the named decedent has been presented by Petitioner,

IT IS, THEREUPON, ORDERED AND ADJUDGED that each of the financial
institutions named in the petition shall, upon presentation by the Petitioner of a certified copy of this Order, permit the Petitioner, ________________________, to open and examine, **in the presence of an officer of the financial institution**, the contents of any safe deposit box(es) at such financial institution leased in the name of ________________________, decedent, or to which the decedent had sole access at the time of the death of the decedent, and

**IT IS FURTHER ORDERED** that, if requested by Petitioner, each such financial institution shall:

1. Remove from any safe deposit box any writing purporting or appearing to be a Last Will and Testament of the decedent and **shall deliver same to this Court**;
2. Remove from any safe deposit box any writing purporting to be a deed or permit to a burial or cemetery plot or to give burial instructions and shall deliver same to Petitioner;
3. Remove from any safe deposit box any insurance policy or policies on the life of the decedent and shall deliver same to the beneficiary named in each such policy; and
4. Within five banking days after a copy of this Order is presented, permit Petitioner, **in the presence of an officer or employee of the financial institution**, to inventory the contents of any safe deposit box, which inventory **shall** be reduced to a writing signed by the Petitioner and the officer or employee of the financial institution in whose presence same is taken, a copy of which **shall** be retained by the financial institution and a copy of which **shall** be promptly filed with this Court by the financial institution or the Petitioner.

**SO ORDERED**, this ____ day of ______________, 20____.

_______________________________________
JUDGE, PROBATE COURT

Filed: _________________
Date

________________________
CLERK
INVENTORY OF SAFE DEPOSIT BOX
PURSUANT TO PROBATE COURT ORDER

Financial Institution: _______________________________________

Safe Deposit Box No(s). _________ Decedent: ____________________________

In compliance with Order of the Probate Court of _________ County, dated ____________, the Petitioner, ____________________________, and I, _________________________, as the authorized officer or employee of the above-named financial institution, did on the date shown below, in each other's presence, enter into the safe deposit box(es) shown above and did perform an inventory of the contents thereof, which consisted of the following described items (list and briefly described contents):

_____________________________________________________________________
_____________________________________________________________________
_____________________________________________________________________

(Attach additional sheets or copies of this page if needed).

No items found in the safe deposit box(es) were removed therefrom, except (indicate any items removed and identify the person to whom same were delivered):

(____) A writing purporting or appearing to be a Last Will and Testament of the decedent, which was delivered by the financial institution to the Probate Court of Bibb County.

[NOTE: Do NOT deliver a purported will to the petitioner. It is the responsibility of the financial institution to delivery same to the probate court.]

(____) A writing purporting to be a deed or permit to a burial or cemetery plot or appearing to give burial instructions, which was delivered to Petitioner.

(____) The following insurance policy/policies on the life of the decedent were delivered to the beneficiaries named in each such policy, as noted:

Company, Policy Number, and Face Amount Beneficiary Receiving Policy

_____________________________________________________________________
_____________________________________________________________________
_____________________________________________________________________

Third Edition Ch. 3, pg. 3-91 July, 2009
A copy of this Inventory will be filed by the (____) petitioner or by the (____) financial institution with the Probate Court of _________ County within three (3) days after this date.

Date: _______________.

____________________________________  __________________________________________
Petitioner                               Officer/Employee of Financial Institution
APPENDIX A3-2

IN THE PROBATE COURT OF ________ COUNTY
STATE OF GEORGIA

IN RE: Docket No:

AFFIDAVIT REGARDING TESTATOR’S SIGNATURE ON WILL

Personally before me, the undersigned attesting officer, came __________________, who, after being first duly sworn, deposes and states:

1. My name is _______________________________, and I am a resident of ________ County, Georgia.
2. During his/her lifetime, I knew the testator ________________________, by virtue of _____________________________________________________.
3. I have examined the copy of the alleged Will of ____________________, attached hereto, and can state that, to the best of my own personal knowledge and belief, the signature of the testator thereon is the signature of ________.
4. I further state that I am not interested as an heir, beneficiary or creditor of the Estate of the deceased.
5. I have been advised that this affidavit will be filed with the Probate Court of ________ County in support of the Petition of ______________________ to probate the original of the attached copy as the true last Will and Testament of ________________________________, deceased.

_____________________________

Sworn to and subscribed before me, on __________________________.

Printed Name

_____________________________

Notary Public/Dep. Clerk, Probate Court

SEAL:
APPENDIX A3-3

IN THE PROBATE COURT OF _________ COUNTY
STATE OF GEORGIA

IN RE:                  DOCKET NO.

PETITION FOR THE APPOINTMENT OF SUCCESSOR EXECUTOR OF PREVIOUSLY PROBATED WILL

COMES NOW, ________________, and petitions the court for the appointment of a successor executor and the issuance of successor Letters Testamentary on the Estate of __________________________, deceased, and shows:

(1)
The Last Will and Testament of named deceased was duly probated and admitted to record in (common)(solemn) form by order of this court dated ________.

(2)
Letters Testamentary were issued by this court to ________________, the named executor, on ______.

(3)
The above-named executor died on _____________, prior to fully completing administration of the Estate of __________________________, and it is necessary that a successor executor be granted leave to qualify as such and that successor Letters Testamentary issue accordingly.

(4)
____________________ was named by the testator as the alternate executor and is ready, willing and able to serve in such capacity.

(5)
Notice to the heirs at law is unnecessary because (a) the will is admitted to probate in common form only or (b) the will has been admitted to probate in solemn form and notice was previously given to all heirs at law.

(6)
Below are the names and addresses of every beneficiary under the said will with a continuing interest in the estate who should be notified of this petition and given an opportunity to show cause, if any exists, why should not be appointed successor executor:

<table>
<thead>
<tr>
<th>NAME</th>
<th>AGE</th>
<th>ADDRESS</th>
<th>INTEREST</th>
</tr>
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<tbody>
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</tbody>
</table>

WHEREFORE, Petitioner prays that notice be given to the beneficiaries having a continuing interest in said estate for them to show cause, if any exists, why should not be appointed successor executor and why successor Letters Testamentary should not issue to him/her, unless service is acknowledged and consent to such appointment is filed by each such beneficiary; that be appointed as successor executor; and that successor Letters Testamentary issue to him/her upon qualification.

_______________________________________
Attorney (or Petitioner if pro se)
Address:

State Bar No. ________________

VERIFICATION

GEORGIA, ______ COUNTY

Personally appeared before me the undersigned petitioner(s) who on oath states(s) that the facts set forth in the foregoing petition are true.

_________________________________  ___________________________________________
Petitioner  Petitioner
Address:  Address:

Telephone:  Telephone:

Sworn to and subscribed before me, this ____ day of _______, ____.

_________________________________
Clerk/Notary Public
ACKNOWLEDGMENT OF SERVICE AND
ASSENT TO APPOINTMENT OF
SUCCESSOR EXECUTOR

RE: Petition of ________________ for the appointment of ________________ as successor executor of the Will of ________________, Deceased.

We, the undersigned beneficiaries under the Will of ________________, deceased, hereby acknowledge service of the petition for appointment of successor executor, waive copies of same, waive issuance of citation and all further service and notice, and hereby assent to the appointment of the named alternate executor as successor executor without further delay.

SIGNATURE(S) OF BENEFICIARIES

Sworn to and subscribed before me,
this _____ day of ________, 20__. ______________________________________

NOTARY/CLERK OF PROBATE COURT

Sworn to and subscribed before me,
this _____ day of ________, 20__. ______________________________________

NOTARY/CLERK OF PROBATE COURT

Sworn to and subscribed before me,
this _____ day of ________, 20__. ______________________________________

NOTARY/CLERK OF PROBATE COURT

Sworn to and subscribed before me,
this _____ day of ________, 20__. ______________________________________

NOTARY/CLERK OF PROBATE COURT

______________________________
IN THE PROBATE COURT OF ________ COUNTY
STATE OF GEORGIA

IN RE:                           DOCKET NO.

ORDER APPOINTING SUCCESSOR EXECUTOR
OF PREVIOUSLY PROBATED WILL

It being shown to the court that the Last Will and Testament of the above-named deceased was previously duly probated and admitted to record in (COMMON)(SOLEMN) form and Letters Testamentary were previously issued to the named and qualified executor, and

It being shown to the court that the said executor died prior to completion of administration of the estate, and

It being shown to the court that notice has been given to all beneficiaries having a continuing interest in said estate that the petitioner has requested the appointment of as successor executor of said will, same having been named by the testator as alternate executor, and has requested the issuance of successor Letters Testamentary to such alternate executor, and no objections having been made,

IT IS ORDERED that ________________ have leave to qualify as successor executor and, upon so doing, that successor Letters Testamentary issue to said alternate executor.

IT IS FURTHER ORDERED that Letters Testamentary heretofore issued to be, and the same are hereby, rescinded by the court.

SO ORDERED, this ___ day of ________, ___.

_______________________________________
JUDGE OF THE PROBATE COURT

FILED: ___________________
DATE
_______________________________________
CLERK
OATH

I do solemnly swear (or affirm) that this writing contains the true last will of the within named ____________________, deceased, and that I will well and truly execute the same in accordance with the laws of the State. So help me God.

______________________________
Executor

Sworn to and subscribed before me, this __ day of _____, ___.

______________________________
CLERK/Notary Public
APPENDIX A3-4

STATE OF GEORGIA
COUNTY OF ____________

DOCKET NO:

SUCCESSOR
LETTERS TESTAMENTARY
(Relieved of Filing Returns)

By ____________________________, Judge of the Probate Court of said County.

KNOW ALL WHOM IT MAY CONCERN:

That on the ___ day of __________________, 20___, at a regular term of the Probate Court, the Last Will and Testament dated ________________________, 20 ________, of deceased, at the time of death a resident of said County, was legally proven in ________ form and was admitted to record by order, and it was further ordered that named as Executor(s) in said Will, be allowed to qualify, and that upon so doing, Letters Testamentary be issued to such Executor(s).

On __________________, the said Executor(s) died before the estate could be fully administered. A petition for appointment as the Successor Executor(s) was filed, and, on ______, an order was entered appointing __________________________ as Successor Executor(s) and directing that Successor Letters Testamentary issue upon the taking of the prescribed oath.

NOW, THEREFORE, the said ____________________________, having taken the oath of office and complied with all the necessary prerequisites of the law, is/are legally authorized to discharge all the duties and exercise all the powers of Executor(s) under the Will of said deceased, according to the Will and the law.

Given under my hand and official seal, the ___ day of ________________, 20___.

____________________________________
Judge of the Probate Court

NOTE: The following must be signed if the judge does not sign the original of this document:

Issued by:

___________________________________ (Seal)
Clerk, Probate Court

Third Edition Ch. 3, pg. 3-99 July, 2009
Chapter 4
APPOINTMENT OF ADMINISTRATORS, TEMPORARY ADMINISTRATORS AND COUNTY ADMINISTRATORS

The Revised
HANDBOOK FOR PROBATE JUDGES OF GEORGIA
2010
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CHAPTER 4

APPOINTMENT OF ADMINISTRATORS, TEMPORARY ADMINISTRATORS, 
AND COUNTY ADMINISTRATORS

PREFACE to CHAPTER 4 (Please Read)

This Chapter deals with the appointment of administrators of estates, temporary administrators and county administrators. The appointment of executors and administrators with will annexed is covered in Chapter 3, which deals exclusively with Wills. In Chapter 5, the duties, powers and authorities of all personal representatives and temporary administrators are covered in specific detail.

1. ADMINISTRATION IN GENERAL

Administration of the estate of a decedent who dies intestate (without a will) is most commonly accomplished through a personal representative appointed by the judge of the probate court. Administration gives effect to the law of intestate succession, resulting, after the payment of all debts of the estate, in the distribution of all remaining property (real, personal and intangible) to those who are entitled to receive it, that is, the heirs of the decedent. Determination of heirs and the statutes which govern the distribution to them are discussed in detail in Chapter 8.

An administrator is a person to whom Letters of Administration have been granted by the proper court after qualification. Letters of Administration evidence the administrator’s authority to administer the estate of a decedent. To assure the proper administration of the estate, the administrator must post a bond with a sufficient surety, unless the bond is waived in the procedure described in Section 2.3 below.

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

1. A resident at the time of his death of the county where the application is filed; or
2. A nonresident of Georgia who owned property in the county where the application is filed or had a bona fide cause of action against some person therein.¹

Administration is only necessary when there is property (real, personal or intangible) owned by the deceased which must be administered. If the decedent owned no interest in property which survived the decedent’s death, there is no requirement that administration be done.

For example, if the decedent owned nothing at the time of death, or if everything the decedent did own passed by right of survivorship or beneficiary designation to others, it is not necessary to file any estate proceedings in probate court. Likewise, if an award of year’s support consumes (includes) the entire the estate, there may be no necessity for the appointment of an administrator and the judge orders the estate to be set apart to the spouse and children.²

However, “property,” as used here, may include a claim or cause of action in favor of the decedent, or a policy of insurance which may support and insure a claim or cause of action against the decedent. Where the holder of such a policy was a nonresident, the policy has been considered as being located in any county in Georgia in which the company issuing the policy has an agent and place of business.³

Administration is only granted as to the estate of an individual decedent. Thus, two separate estates, such as those of husband and wife, or of father and son, cannot be administered in one proceeding.⁴

1.1 Eligibility to Serve

Any individual who is sui juris⁵ is eligible to serve as an administrator, regardless of citizenship or residency.⁶ Any other “person”⁷ (other than an individual) is eligible to serve only if that person is otherwise qualified to act as a fiduciary in Georgia.⁸

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¹ O.C.G.A. §15-9-31. In this context, residence means domicile. See Section 2.2.
² O.C.G.A. §53-6-38. See Chapter 6.
⁴ Id.
⁵ O.C.G.A. §53-1-2(14) defines a "sui juris" individual as one who is "age 18 or over and not suffering from any legal disability."
⁶ O.C.G.A. §53-6-1.
1.2 Selection of Administrators

An administrator may be selected by the unanimous vote of all the heirs of the decedent; however, if the sole surviving heir is the spouse of the decedent and there was a divorce or separate maintenance action pending between the spouses at the time of the decedent's death, the spouse may not serve.\(^9\) This rule does not prevent a former spouse who is no longer an heir from serving by selection of the heirs.\(^10\) If a unanimous selection has been made by the heirs, the judge of the probate court may have no discretion and must appoint the person selected unless the person is not competent or is laboring under a legal disability (i.e., is not *sui juris*).\(^11\)

If a unanimous selection is not made, then the judge of the probate court must appoint that person who will best serve the interests of the estate. In making this appointment, the judge should consider, but is not bound by, the following order of preferences:

1. The surviving spouse, unless an action for divorce or separate maintenance was pending between the decedent and the surviving spouse at the time of death;
2. One or more other heirs of the decedent or the person selected by the majority in interest of the heirs;
3. Any other eligible person;
4. Any creditor of the estate; or
5. The county administrator;\(^12\)

The surviving spouse, if the sole heir and not incompetent, is entitled to serve as the administrator to the exclusion of all others if the spouse so chooses. Speculation that a lack of business experience may prevent the spouse from properly managing the estate will not

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7 O.C.G.A. §53-1-2(11) defines "person" as "an individual, corporation, business trust, unincorporated organization, limited liability company, or two or more persons having a joint or common interest, including an individual or a business entity acting as a personal representative or in any other fiduciary capacity."
8 O.C.G.A. §53-6-1. On the issue of the qualification to act as fiduciaries in Georgia, see O.C.G.A. §7-1-242 and Title 53, Ch. 12, Art. 16.
9 O.C.G.A. §53-6-20.
11 O.C.G.A. §53-6-1; *Bell v. Bryan*, 84 Ga. App. 104 (1951). There is no corresponding requirement in connection with the appointment of an administrator c.t.a., where the reference is only to selection by a majority of the beneficiaries. See Chapter 3, Section 6.4.
12 O.C.G.A. §53-6-20.
deprive such spouse of the right to be appointed. Furthermore, the surviving spouse, if the sole heir (and no action for divorce or separate maintenance is pending), has the right to make a selection of the person to act as administrator of the deceased spouse's estate, whether or not the surviving spouse is personally qualified to undertake such administration.

Any heir who is not sui juris must be represented by a “guardian” appointed for the proceeding by the judge of the probate court. If there is no natural guardian and no duly appointed guardian, the court must appoint a guardian-ad-litem. Such guardian may make a selection on behalf of the ward or minor. If a minor is the sole heir at law, the guardian of the minor would have the right to select the administrator.

An individual creditor of the estate may be appointed as administrator. This is the personal right of the creditor, with no authority to nominate another person to become administrator other than another creditor. A corporate creditor may not designate one of the corporation's officers or agents to become administrator unless that person is also a creditor or the corporation is qualified to act as a fiduciary under Georgia law.

2. PETITION FOR LETTERS OF ADMINISTRATION [GPCSF 3]

The petition for letters of administration is filed with the judge of the probate court of the county of domicile of the decedent, if the decedent died while domiciled in Georgia; or, if the decedent was not domiciled in Georgia, in any county where the estate or some portion of the estate is located. Once a probate court of one county has assumed jurisdiction over an estate, that court is entitled to determine the proper jurisdiction, and no petition filed in another probate court may be entertained while the first court retains jurisdiction. This will mean that if a petition for administration has been filed in one county, and it is disputed whether the decedent was domiciled in that county, it is that court which has jurisdiction to

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15 O.C.G.A. §53-11-2. As guardian, the judge may either appoint a guardian-ad-litem or allow the natural guardian, testamentary guardian, guardian of the property, or guardian of the person, if any, to serve, provided that person has no conflict of interest with the heir. Id.
16 O.C.G.A. §53-6-20.
18 O.C.G.A. §53-6-20(4).
20 O.C.G.A. §53-6-21(a).
determine venue. The filing of a petition in another probate (in the county where it is also alleged was the decedent’s domicile) does not give the second probate court jurisdiction to determine domicile; that issue remains in the first court unless and until the proceeding in the first court is dismissed.

The petition for letters of administration must evidence the statutory basis entitling the petitioner to be appointed, that is, state how the petitioner is eligible to serve; otherwise the petition may be dismissed on the motion of any individual with the legal right to serve.22

Every petition for letters of administration must set forth the following:

1. The full name of the decedent;
2. The legal domicile of the decedent;
3. The date of death;
4. The mailing address and place of domicile of the petitioner;
5. Names, ages or majority status, and addresses of the heirs, stating their respective relationships to the decedent; and
6. If any particulars are missing, the reasons for such omissions.23

The petition must be made in writing24 and must be verified.25

2.1 Citations, Objections, and Appointment

Upon filing of the petition, the judge of the probate court issues a citation giving notice of the petition to the heirs of the decedent, unless citation has been waived by all heirs.26 The notice is mailed by first-class mail to each heir at least thirteen (13) days prior to the date on which objections must be filed. If the address of any known heir is unknown, notice must be published27 once each week for four weeks prior to the week which includes the date by which any objections must be filed.28 A guardian-ad-litem must be appointed for any unknown heirs. Also, as noted above, a guardian must also be appointed for any heir who is not sui juris.

22 Berry v. Smith, 85 Ga. App. 710 (1952)
23 O.C.G.A. §53-6-21(b).
24 O.C.G.A. §15-9-86.
27 All publications of notice must be made in the official organ of the county. O.C.G.A. §53-11-4(b).
28 O.C.G.A. §53-6-22.
Any objection to the granting of Letters of Administration must be made by a person having an interest in the estate and in the choice of the administrator, either as an heir or a creditor. No objection may be filed by a person who has no interest in the assets of the estate and their distribution.29

Once citation has been issued and served, the judge of the probate court may appoint someone other than the petitioner as the administrator without the necessity of a new citation.30 In other words, the citation is designed to give notice that application has been made for the appointment of an administrator, and once that notice has been given, there is no need for further notice.31 Although not specifically stated in Chapter 6 of Title 53, it may be permissible for the judge of the probate court to appoint the petitioner without a hearing when no objection has been filed; certainly, a hearing should be held before someone other than the petitioner is appointed. However, when there is no waiver of bond, as discussed below, the holding of a hearing may be well advised, so that the petitioner may be examined carefully about the probable value of the personal property for purposes of setting a bond in an appropriate amount.

In a contest over who should be appointed as the administrator, in the absence of a clear right to appointment or a unanimous selection, the judge of the probate court, in making an appointment, is to determine who would best serve the interests of the estate.32 In an attempt to promote family harmony, the judge may suggest that the parties seek to agree among themselves on some person to act, perhaps including co-administrators or a disinterested third person. The court may suggest appointment of the county administrator or an attorney or other person with experience in administrating similar estates. In doing so, however, the court should take care not to appear to the parties to be promoting any certain person(s).

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30 O.C.G.A. §53-6-23.
31 Id.
32 O.C.G.A. §53-6-20.
2.2 Waiver of Issuance of Citation

The issuance of a citation may be waived if an agreement signed by all of the heirs assenting to the grant of Letters of Administration to the petitioner is filed with the petition. The assent of the heirs must be sworn to or affirmed by each heir before the judge or clerk of a probate court or a notary public. Assent for an heir who is not sui juris may be given by a guardian. Note that the citation cannot be waived if the special relief discussed in Section 2.3 below is requested in the petition for letters of administration.

2.3 Waiver of Bond and Returns and Grant of Certain Powers by Consent of Heirs

The heirs may, by unanimous consent, authorize but not require the judge of the probate court to relieve an administrator of the requirements to post bond and file inventory and returns and/or to give the administrator any of the powers listed in O.C.G.A. §53-12-232. This consent may be included in the petition for Letters of Administration or may be filed by a separate petition filed after appointment. This allows the heirs to have intestate estates administered essentially without court supervision and at reduced costs.

With respect to any heir who is not sui juris, such consent may be given by the guardian. However, the person who would serve as administrator may not consent for his/her own appointment on behalf of someone else. Also, the personal representative of a deceased heir may consent on behalf of that heir.

The provision for waiver of the bond only does not require publication. However, the provision for waiver of the filing of reports and/or the grant of powers requires that a citation be published and that no objection be filed in order for this relief to be granted.

If only a waiver of bond is requested, no publication is necessary; if any other waivers or grants are requested, publication is absolutely necessary.

For all waivers under this Section, there must be unanimous consent, in writing, of all of the heirs. Therefore, the waivers or grant of powers may not be given in any estate having

33 O.C.G.A. §53-11-9(a).
34 O.C.G.A. §53-11-6.
35 O.C.G.A. §53-11-2(b).
36 O.C.G.A. §§53-6-50(c), 53-7-1(b).
37 O.C.G.A. §53-6-50(c).
38 O.C.G.A. §53-7-1(b).
unknown heirs or heirs whose whereabouts are unknown, even if all of the known heirs consent.

3. CONDUCT OF AN ADMINISTRATION HEARING

3.1 Uncontested Cases

If no objection is filed to the petition, no formal hearing is required. However, as noted in Chapter 2, Section 4.1, the judge of the probate court may decide that, as a routine practice or for any particular types of proceedings or for any specific proceeding a hearing will be held by the court, even if the matter is uncontested. Again, when bond will be waived, the holding of a hearing may be well advised, so that the petitioner may be examined carefully about the probable value of the personal property for purposes of setting a bond in an appropriate amount. See Chapter 2, Section 4.1 for a discussion of the benefit of such hearings and the general provisions for proof of a *prima facie* case.

Whether or not a hearing is held, the petitioner must show, either through the allegations of the sworn petition or by testimony before the judge of the probate court or a clerk of the court:

1. That the decedent died domiciled in the county or domiciled outside Georgia owning property in the county;
2. That all heirs of the decedent have been duly named and served;
3. That there is a need for the appointment of an administrator;
4. That the petitioner is legally entitled to the appointment;
5. If bond is to be required, the reasonable estimated value of the real and personal property of the estate; and
6. If any particulars are missing, the reasons for such omissions

The oath should be administered to the petitioner by the judge of the probate court or the clerk. If bond is required, Letters should not be issued until the bond has been posed.

3.2 Contested Cases

If an objection has been filed, the matter should be scheduled for hearing after any necessary time for discovery. When there is an estate which needs to be administered, it may
become important for the judge of the probate court either to try the case expeditiously or to appoint a temporary administrator to manage the estate pending the resolution of the dispute.

The petitioner has the burden of showing that there is an estate which requires administration, or that there is some other legal reason for appointing an administrator, and must show that he/she is entitled to the appointment as either the unanimous choice of the heirs or the person who will best serve the interests of the estate. The caveator has the burden of proof as to the grounds for objection in the caveat. If the petitioner has a higher preference than the caveator, the caveator must prove why the appointment of the petitioner would not serve the best interests of the estate.

However, if the caveator contests the status of the petitioner as an heir of the decedent, it may still be the petitioner’s burden to prove that status. A person claiming to be a common law spouse always bears the burden of proving the existence of the marriage. A person claiming to be the illegitimate child of a deceased bears the burden of proving an entitlement to inherit from the estate of the father, which would be a prerequisite to being eligible to serve as administrator. Similarly, a father of a decedent who was born out of wedlock bears the burden of proving an entitlement to inherit from the estate of the decedent in order to be eligible to serve as administrator.

4. **PROCEDURE UPON QUALIFICATION**

Whether or not a hearing is held, the judge of the probate court or clerk should impress upon the administrator the serious obligation which he/she is undertaking. At this time, the administrator should be given an opportunity to ask questions. Explanations may avoid future difficulties and may enable the administrator to gain a better understanding of what he/she is required to do. The court may want to provide the administrator a copy of the “Handbook to Guide Personal Representatives,” especially if the administrator is not represented by an attorney. Of course, advice should not be given on matters of law, and the administrator not represented by an attorney should be encouraged to seek legal counsel as appropriate.

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39 O.C.G.A. §53-6-20.
4.1 Oath

After the order of appointment is signed, the person named as administrator is required to take the oath prescribed in the Code.44

"I do solemnly swear (or affirm) that (decedent’s name,) deceased, died intestate, so far as I know or believe, and that I will well and truly administer on all the estate of the decedent, and disburse the same as the law requires, and discharge to the best of my ability all my duties as Administrator. So help me God."

The law provides that the oath or affirmation of an appointed administrator may be subscribed before the judge or clerk of any probate court of this state without the necessity of a commission. The law also authorizes the judge of the probate court to grant a commission to a judge or clerk of any court of record of any other state to administer the oath or affirmation.45 [GPCSF 53]

4.2 Bond [GPCSF 21]

The administrator is also required to give bond with good security, approved by the judge of the probate court, in double the value of the estate to be administered,46 unless waived by all of the heirs.47 However, if the bond is with licensed commercial surety authorized to do business in this state, the bond need only be in an amount equal to the value of the estate.48 In any case where bond is required, the amount is based on the value of the personal property only, unless or until any real property is converted into cash, at which time the amount of the bond is to be based upon the value of the entire estate.49 The bond is payable to the judge of the probate court for the benefit of all concerned, attested by the judge or the clerk and conditioned on the faithful performance by the administrator of the

44 O.C.G.A. §53-6-24(a).
45 O.C.G.A. §53-6-24(b).
46 O.C.G.A. §§53-6-50, 53-6-51(c).
47 See Section 2.3.
48 O.C.G.A. §53-6-51(c).
49 Id.
duties as such. These bonds are kept on file by the clerk of the probate court, after being recorded.

Because of the problems and risks which may result from the acceptance of a bond secured by individuals, it is considered best practice to require a corporate surety, except in very unusual cases. In the approval of the security on the bond the judge of the probate court is charged with considerable responsibility, since the surety may be called upon to answer for some default on the part of the personal representative of the estate; if the security turns out to be insufficient or the surety turns out to be unable to meet the assessment, there may be a loss to the estate or heirs. Therefore, before approving the security on the bond, the judge should be satisfied that the security offered is sufficient for the protection of those interested in the estate. If a personal surety is accepted and approved, the person must be shown to have a net worth not less than the amount of the bond (double the value of the estate). Furthermore, if a personal surety is accepted, and the judge is relying upon the value of real property owned by such surety, it is strongly advised that the surety be required to execute a document securing the bond obligation as a lien against the title to the real property, to be recorded on the deed records in the office of the clerk of superior court in the county where the real property is located.

5. DUTIES AND RESPONSIBILITIES

5.1 Notice to Debtors and Creditors

The administrator is required to publish a notice to all creditors of the estate to render a statement of the claims as are all other personal representatives. See Chapter 5 for the timing of the requirement and a form for the notice.

5.2 Reporting Requirements: Inventory and Returns

As a personal representative, the administrator is required to file with the judge of the probate court an inventory and annual returns unless specifically waived as set forth in

\[50\] O.C.G.A. §53-6-51(a).
\[51\] O.C.G.A. §53-6-54.
\[52\] O.C.G.A. §53-7-41.
\[53\] O.C.G.A. §53-7-30.
\[54\] O.C.G.A. §53-7-67.
Section 2.3 above. The administrator must also deliver a copy of the inventory and each return to all heirs of the decedent, except that it is not necessary to mail a copy of the inventory or return to any heir who is not *sui juris* nor must the court appoint a guardian for such person. Any individual heir may waive the right to receive the inventory or the returns.

5.3 Compensation, Expenses and Attorneys’ Fees

As noted in Chapter 5 on Powers and Duties of Personal Representatives and Temporary Administrators, an administrator is authorized to employ an attorney to represent the estate by way of legal advice to the administrator. Either the administrator or the attorney may petition the court for an order awarding fees and expenses for the attorney. Notice of such petition need be given only to the other (that is, to the administrator or to the attorney who is not the petitioner).

Administrators are allowed reimbursement for all reasonable expenses incurred in the administration of the estate, including without limitation expenses for travel, the cost of any bond, the expenses of the attorney or other agents.

The administrator is entitled to the compensation allowable to any personal representative. See Chapter 5, Section 4 for the statutory schedule of compensation of personal representatives.

5.4 Co-Administrators

The court may appoint co-administrators of an estate, in which case they must act by unanimous action. However, if one administrator is not able to act due to inaccessibility, illness or other incapacity, the remaining administrator(s) may act as if they were the only administrators if necessary to administer the estate. Co-administrators may delegate authority to one or more of them to act for all of them. This delegation must be in writing, and it does not relieve the administrators who make the delegation, since all of the

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55 O.C.G.A. §§53-7-1(b), 53-7-32(b) and 53-7-68(c).
56 O.C.G.A. §§53-7-30 and 53-7-68.
57 O.C.G.A. §§53-7-32(a) and 53-7-68(b).
58 O.C.G.A. §53-7-6(4).
59 O.C.G.A. §53-6-61.
administrators remain liable for the actions of the administrator(s) who has been authorized to act on their behalf.\textsuperscript{60}

An “estate” is not a legal entity which can be a party to legal proceedings. The right to bring or defend an action resides in the estate’s personal representative(s).\textsuperscript{61} Since multiple personal representatives must act by unanimous action, suits brought on behalf of or against the “estate” must be brought by or against all personal representatives.\textsuperscript{62} However, if one or more personal representatives moves out of the state, service on all who remain in this state is as effectual and complete as if all personal representatives had been served.\textsuperscript{63}

A qualified administrator becomes liable for a breach committed by another qualified co-administrator if the administrator:

1. Participated in the breach.
2. Approved, knowingly acquiesced in, or concealed the breach.
3. Negligently enabled the other executor to commit the breach.
4. Neglected to take reasonable steps to compel the other executor to redress the breach in a case where the executor knew or reasonably should have known of the breach.\textsuperscript{64}

6. SUCCESSOR ADMINISTRATORS

Personal representatives of intestate estates that have already been partially administered are also included in the category of administrators, although they are generally referred to as successor administrators or administrators \textit{de bonis non} (d.b.n). A successor administrator must give bond under the same rules as any other administrator, based upon the amount of the estate remaining to be administered.\textsuperscript{65} Such an administrator can be appointed only to replace a former administrator who has died, resigned, or been removed.

The successor administrator should receive a final return from the predecessor, showing the value and identification of the remaining estate being surrendered to the successor. The judge of the probate court should require a petition for discharge and a final

\textsuperscript{60} O.C.G.A. §53-7-5(a).
\textsuperscript{62} O.C.G.A. §53-7-5(a); Williams v. McHugh, 17 Ga. App. 59 (1915).
\textsuperscript{63} O.C.G.A. §53-7-13.
\textsuperscript{64} O.C.G.A. §53-7-5(b).
\textsuperscript{65} The requirement is for bond is to be based upon "the value of the estate to be administered." O.C.G.A. §53-6-51(c).
return from the predecessor if at all possible. If the vacancy has resulted from the death of the predecessor, the personal representative of the predecessor’s estate or the surety on the bond of the predecessor may (and should be required to) file the petition and final return.66

There is no standard form for the appointment of a successor administrator (d.b.n.), since the law contemplates that all administrators (except administrators with will annexed) are to be appointed in the same manner, i.e., upon a petition under O.C.G.A. §53-6-21. However, there would appear no need to repeat information that has not changed since the original petition was filed.

7. TEMPORARY ADMINISTRATORS [GPCSF 2]

A temporary administrator may be appointed by the judge of the probate court at any time and without notice to handle an unrepresented estate for the purpose of collecting the debts and personal property of the decedent, to continue until the temporary administrator is discharged or a personal representative is appointed.67 There is no appeal from the order appointing a temporary administrator.68 The judge is to appoint as the temporary administrator that person whom the judge determines to be in the best interests of the estate.69 The eligibility requirements are the same as for other personal representatives.70 The county administrator in his/her official capacity may be appointed temporary administrator if the judge finds such appointment appropriate.

The temporary administrator becomes the custodian of the estate and has the power to collect and preserve the assets and to expend funds for that purpose if approved by the judge of the probate court after such notice as the judge deems necessary.71 No private agreement may expand the authority of a temporary administrator.72 The temporary administrator may not interfere with real property in any way other than to protect it,73 except that, for good cause shown, the temporary administrator may follow the procedures for sales covered in

66 O.C.G.A. §53-7-71(b).
67 O.C.G.A. §§53-1-2(15), 53-6-30(a), 53-6-31.
68 O.C.G.A. §53-6-30(c).
69 O.C.G.A. §53-6-30(b).
70 O.C.G.A. §53-6-1.
71 O.C.G.A. §53-6-31.
Chapter 5, Section 3. Although a temporary administrator may not sue for recovery of real property, a temporary administrator may intervene in a suit for land, including a suit for recovery of just compensation in condemnation proceedings. A temporary administrator may file suit to recover a debt owed to or personal property belonging to the estate, but if a permanent administrator is appointed pending the suit, the administrator may (should) be made a party in lieu of the temporary administrator.

If proper orders are secured from the judge of the probate court after due notice to all parties at interest, a temporary administrator, pending the appointment of a personal representative, is authorized:

1. To carry out existing contracts of the decedent.
2. To carry on the business of the decedent.
3. To do such acts as are necessary for the protection and preservation of the estate.

Notice should be served in accordance with Chapter 11 of Title 53.

A temporary administrator may not be appointed if a personal representative has already been appointed, except pending an appeal. However, a temporary administrator may be appointed if a will has not been probated, and the executor nominated in the will must be given preference in this appointment.

Bond is required of every temporary administrator, except when the sole asset of the estate is real property. There is no procedure for waiver of bond of a temporary administrator. The statutes requiring the filing of inventory and returns apply only to personal representatives, which does not include temporary administrators. However, as a condition of appointment, the judge of the probate court may want to require a temporary administrator to file inventory and returns.

74 O.C.G.A. §53-8-10(b).
76 Hayes v. Hayes, 137 Ga. 362 (1911).
78 O.C.G.A. §53-6-31.
79 O.C.G.A. §53-7-4.
81 O.C.G.A. §53-6-30(b).
82 O.C.G.A. §53-6-50(a).
8. **ANCILLARY ADMINISTRATION**

If an intestate decedent who was not domiciled in Georgia owned real property located in Georgia, the real property will be distributed to the heirs in accordance with the laws of intestacy of the state of Georgia. In such a case, upon the petition of any heir, creditor, or any duly qualified personal representative of the decedent appointed in the jurisdiction of the decedent’s domicile, the judge of the probate court may appoint an administrator for the decedent’s estate in Georgia.

Notice is given to the heirs as in the case of the appointment of an administrator of a Georgia domiciliary. Absent an objection and a showing of good cause to the contrary, the decedent's duly qualified personal representative appointed in the state of domicile shall be appointed as ancillary administrator of the estate in Georgia, if otherwise qualified to act as a personal representative in Georgia. This person will be known as the "ancillary administrator" or the "ancillary personal representative."

The ancillary administrator must, upon qualification, give notice to the creditors of the decedent who are domiciled in Georgia, in the same manner as is required for decedents who die domiciled in Georgia.

9. **COUNTY ADMINISTRATORS**

9.1 **Appointment and Qualifications**

The judge of the probate court of each county is required to appoint a county administrator, whose duty it is to take charge of all unrepresented estates within the county which are not likely to be represented. Additional county administrators may also be appointed, who shall have all the same powers, duties and responsibilities as the county administrator. The county administrator also is *ex officio* county guardian (conservator).

Every county administrator must have attained the age of 21 years and have been a domiciliary of the county of appointment for at least one year prior to appointment. However, if the individual to be appointed is an active member in good standing of the State

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83 O.C.G.A. §53-5-35.
84 O.C.G.A. §53-5-39.
85 O.C.G.A. §53-5-40.
86 O.C.G.A. §53-5-35(a).
87 O.C.G.A. §53-6-35(b).
88 O.C.G.A. §29-8-1.
89 O.C.G.A. §53-6-36(a).
Bar of Georgia, such individual need not be a domiciliary of the county but only a domiciliary of this state. An order of appointment must be recorded in the Minutes of the probate court.

If the county governing authority consents, the county administrator may be paid an annual fee for serving as such, in an amount established by agreement of the county governing authority, the judge of the probate court, and the individual serving. Any such fee will be in addition to commissions authorized under other provisions of law.

The county administrator is required to give bond in the amount of $5,000.00 for the faithful performance of the duties as such, and suit can be brought on the bond by any person aggrieved by the conduct of the county administrator, just as in cases of suits on bonds of other administrators. However, the judge should require a bond of sufficient amount to cover the value of any single estate or the value of all estates managed by the county administrator. The judge may require a separate bond for any estate managed by the county administrator.

The county administrator is appointed by the judge of the probate court for a term of four years, with the term expiring on the first Monday in March or on the date a successor is appointed and qualified. Vacancies for any reason are to be filled by the judge for the unexpired term.

If for any reason an estate is unrepresented and not likely to be represented, the judge of the probate court is required to vest the administration in the county administrator, after notice as provided for the appointment for any administrator. Separate Letters of Administration are to be issued to the county administrator in each case, and the county administrator has all of the powers and rights and is subject to all of the requirements of law relating to other administrators.

90 O.C.G.A. §53-6-36(b).
91 O.C.G.A. §53-6-35(c).
92 O.C.G.A. §53-6-36(b).
93 O.C.G.A. §53-6-41.
94 O.C.G.A. §53-6-42.
95 O.C.G.A. §53-6-37(a).
96 O.C.G.A. §53-6-38.
97 O.C.G.A. §53-6-40(a).
If for any reason a county has no county administrator and the need arises for the administration of an unrepresented estate, the judge of the probate court is required to vest the administration in the clerk of the superior court.\(^98\)

The judge of the probate court may, for good cause shown, revoke the Letters of the county administrator in any case, may require additional security on the bond, or may issue such other orders as are expedient or necessary for the benefit of the particular estate.\(^99\)

Whenever for the good of any estate placed or about to be placed in the care of the county administrator, it appears to be necessary, the judge of the probate court may require additional security on the bond or an additional bond.\(^100\) In cases where it appears that an estate has significant value, the better practice would be to require the county administrator to post bond for that particular estate, in addition to the regular blanket bond, thereby providing adequate bond specific to the estate being administered.

The county administrator is subject to removal for failure to provide additional security or to post additional bond within the time set by the court.\(^101\)

A county administrator may resign the office and may be removed from office. Unless the Letters of appointment have been revoked, the county administrator continues to discharge the duties as administrator after the expiration of or removal from the office with regard to the estates already being administered.\(^102\)

Upon the removal or resignation of the county administrator, the judge of the probate court should appoint a new county administrator for the unexpired term.\(^103\)

### 9.2 Special Appointment for Purposes of Lawsuit Only

There is a special provision which allows the judge of the probate court to appoint the county administrator (only) to represent an estate for the sole purpose of making it possible to commence or continue a lawsuit against the estate.\(^104\) In such a case, the judge will relieve the county administrator of all liabilities, duties, and obligations otherwise imposed on administrators, except for those duties that are directly related to the acceptance of service of

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98 O.C.G.A. §53-6-39.
99 O.C.G.A. §53-6-42.
100 O.C.G.A. §53-6-43.
101 O.C.G.A. §53-6-44(c).
102 O.C.G.A. §53-6-37(b).
103 O.C.G.A. §53-6-37(a).
104 O.C.G.A. §53-6-40(b).
process and qualification as administrator and other duties directly related to the lawsuit. This relief includes, but is not limited to, the marshaling of assets, the publication of notice to creditors, the filing of inventory and returns, and the posting of a separate bond.¹⁰⁵

There is no standard form for petitioning to have the county administrator appointed for this purpose. See Appendix A4-1 for a sample petition and Appendix A4-2 for sample Letters of Administration to County Administrator for Lawsuit.

The judge may also provide for reasonable compensation to be paid to the county administrator by the petitioner in an amount sufficient to cover the time and expenses related to the lawsuit. This compensation will be determined by the judge in the same manner as the amount of any extra compensation claimed by an administrator is determined.¹⁰⁶ See Chapter 5, Section 4 on Compensation of Personal Representatives.

9.3 Value of County Administrator

A competent and energetic county administrator can be of invaluable assistance to the judge of the probate court. Of particular benefit is the opportunity to make use of the experience and lack of conflict of interest of the county administrator when there is a dispute over who should serve as administrator of an estate. The appointment of the county administrator may often be seen by parties to such a dispute as an alternative which removes the personalities from the dispute and provides a disinterested, third party with qualifications which should inspire confidence that the estate will be properly administered without favor to any parties to the dispute. Additionally, there almost certainly will be, from time to time, estates of decedents who have died domiciled in the county without known or close relatives. The county administrator can administer the estate, liquidate the assets, and pay the debts while seeking to determine who the heirs of the decedent are.

¹⁰⁵ Id.
¹⁰⁶ O.C.G.A. §53-6-40(b).
APPENDIX TO CHAPTER 4
APPOINTMENT OF ADMINISTRATORS, TEMPORARY ADMINISTRATORS AND COUNTY ADMINISTRATORS

A4-1. Sample Petition for Appointment of County Administrator for Lawsuit…4-21
A4-2. Sample Letters of Administration to County Admin. for Lawsuit…………4-30

Important Notice

Several sample orders and forms have been included in this Appendix. These sample orders and forms have not been officially sanctioned by the Georgia Council of Probate Court Judges. They have, unless otherwise noted, been prepared by the author. They are provided solely as samples. They should be modified or adapted to the specific court for the specific purpose, with any unnecessary material being deleted and any additional material being added.

William J. Self, II
IN THE PROBATE COURT OF ___________ COUNTY
STATE OF GEORGIA

INRE:

DOCKET NO.

PETITION FOR LETTERS OF
ADMINISTRATION AND APPOINTMENT
OF COUNTY ADMINISTRATOR FOR
PURPOSES OF LAWSUIT

The petition of ________________ whose domicile is ________________,
and whose mailing address is ________________________________, shows to the
Court that:

1.

______________________________________________

whose

First

domicile was ______________________________________

Middle

Last Name

Street

City

County

State

departed this life on _________________________, 20_____.

2.

The estate of the decedent is unrepresented, and it is necessary that the County Administrator
be appointed for the sole purpose of making it possible to commence or continue a lawsuit against the
said estate, in which lawsuit the petitioner is an interested party.

3.

Listed below are the names of all the decedent's heirs with the age or majority status, address,
and relationship to decedent set opposite the name of each:

Name

Age

Address

Relationship

(or over 18)
4.

Additional Data: Where full particulars are lacking, state here the reasons for any such omission. Also, state here all pertinent facts which may govern the method of giving notice to any party and which may determine whether or not a guardian ad litem should be appointed for any party. If any heirs listed above are cousins, grandchildren, nephews or nieces of the decedent, please indicate the deceased ancestor through whom they are related to the decedent.

5.

(Check one):

_____ Notice of this petition must be published because the identities and/or addresses of all the heirs are not known.

_____ Notice of this petition need not be published because the identities and addresses of all the heirs are known.

6.

To the knowledge of the petitioner, no other proceedings with respect to this estate are pending, or have been completed, in any other probate court in this state.

Wherefore, petitioner prays that service be perfected and that, if no good cause is shown to the contrary:

a. The County Administrator be appointed as Administrator of the estate of said decedent for the sole purpose of commencing or continuing a lawsuit against the said estate; and

b. The Court relieve the said Administrator from all liabilities, duties and obligations otherwise imposed on the administrator of an estate, including but not limited to the marshaling of assets, the publication of notice to creditors, the filing of an inventory, the filing of returns, and the posting of a separate bond, except for these duties and obligations directly related to the acceptance of service of process and qualification as administrator and other duties directly related to the lawsuit.

______________________________  ______________________________
Signature of Attorney (or petitioner if pro se)  Signature of Attorney (or petitioner if pro se)
Address:                                                                          Address:
Telephone Number:                                                               Telephone Number:
State Bar #:                                                                   State Bar #:
VERIFICATION

GEORGIA, ________ COUNTY

Personally appeared before me the undersigned petitioner(s) who on oath state(s) that the facts set forth in the foregoing petition are true.

Petitioner
Residence Address:

Petitioner
Residence Address:

Telephone Number:

Telephone Number:

Sworn to and subscribed before me, this ___ day of ____________, 20_____.

________________________

Clerk of Probate Court or Notary Public
SELECTION AND CONSENT BY HEIRS

Note: If an heir is not sui juris, the guardian appointed by the Court or the person that the Court determined may act as guardian is authorized to consent for such non sui juris heir in accordance with the provisions of Chapter 11 of Title 53 of the Revised probate Code of 1998.

We, being heirs of the estate of _________________________________________, deceased, and being sui juris unless otherwise indicated, do hereby acknowledge service, waive all further notice, and consent to the appointment of the County Administrator as Administrator of the estate of said decedent for the sole purpose of making it possible to commence or continue a lawsuit against the said estate. We further acknowledge that the County Administrator will be relieved by the Court from all liabilities, duties and obligations otherwise imposed on the administrator of an estate, including but not limited to the marshaling of assets, the publication of notice to creditors, the filing of an inventory, the filing of returns, and the posting of a separate bond, except for these duties and obligations directly related to the acceptance of service of process and qualification as administrator and other duties directly related to the lawsuit.

SIGNATURE(S) OF HEIRS

Sworn to and subscribed before me,
this ____ day of __________,20__.

____________________________________
NOTARY/CLERK OF PROBATE COURT

Sworn to and subscribed before me,
this ____ day of __________,20__.

____________________________________
NOTARY/CLERK OF PROBATE COURT

Sworn to and subscribed before me,
this ____ day of __________,20__.

____________________________________
NOTARY/CLERK OF PROBATE COURT

Sworn to and subscribed before me,
this ____ day of __________,20__.

____________________________________
NOTARY/CLERK OF PROBATE COURT

Sworn to and subscribed before me,
this ____ day of __________,20__.
ORDER FOR SERVICE OF NOTICE

Probate Court of _______ County

(Complete only if applicable:)

Since the heirs have not made a unanimous selection and consent to the appointment, it is ordered that notice be issued and served as follows upon any heirs who did not acknowledge service. Notice of this petition must be mailed by first-class mail to each heir with a known address at least 13 days prior to the date on or before which any objection is required to be filed. If there is any heir whose current address is unknown or any heir who is unknown, notice must be published once each week for four weeks prior to the week which includes the date on or before which any objection must be filed.

____________________________________
DATE JUDGE OF THE PROBATE COURT

NOTICE

GEORGIA, _______ COUNTY PROBATE COURT

_____________________________ has petitioned for the appointment of the County Administrator as Administrator of the estate of ________________ deceased, of said County for the sole purpose of making it possible to commence or continue a lawsuit against the estate of said decedent. If the petition is granted, the County Administrator shall be relieved by the Court from all liabilities, duties and obligations otherwise imposed on the administrator of an estate, including but not limited to the marshaling of assets, the publication of notice to creditors, the filing of an inventory, the filing of returns, and the posting of a separate bond, except for these duties and obligations directly related to the acceptance of service of process and qualification as administrator and other duties directly related to the lawsuit. All interested parties are hereby notified to show cause why said petition should not be granted. All objections to the petition must be in writing, setting forth the grounds of any such objections, and must be filed with the court on or before ___________, 20_______. If any objections are filed, a hearing will be (held on __________________ ) (scheduled at a later date). If no objections are filed, the petition may be granted without a hearing.

JUDGE OF THE PROBATE COURT

By: ___________________________
CLERK OF THE PROBATE COURT
CERTIFICATE OF MAILING

GEORGIA, _________ COUNTY

I do hereby certify that I have this day mailed by first-class mail a copy of the above Notice in this matter to each heir with a known current address as listed by the petitioner who did not acknowledge service in an envelope, properly addressed and with adequate postage thereon, and deposited in the United States Mail, with the return address of this Court thereon.

__________________________________  _____________________________
DATE                                      CLERK, PROBATE COURT
PROBATE COURT OF ____ COUNTY  
STATE OF GEORGIA

RE:   ESTATE OF                                     )   ESTATE NO. _________________
       ________________________________,            )   PETITION FOR LETTERS OF
       )   ADMINISTRATION AND FOR THE
       )   APPOINTMENT OF THE COUNTY
       )   ADMINISTRATOR FOR THE SOLE
       )   PURPOSE OF COMMENCING OR
       )   CONTINUING A LAWSUIT

FINAL ORDER

The petition of __________________________ for issuance of Letters of Administration on the estate of ____________, deceased, has been duly filed. Service was perfected according to law. It appears that said decedent died domiciled in said county with an estate currently unrepresented and that there exists a necessity for the appointment of an administrator for the sole purpose of making it possible to commence or continue a lawsuit against the said estate.

IT IS THEREFORE ORDERED that ______________________, as the County Administrator of this County, be, and is hereby, appointed Administrator of the estate of said decedent for the sole purpose of commencing or continuing a lawsuit against the estate, and that appropriate Letters be issued upon said Administrator's taking the oath as provided by law. It is further ordered that the said Administrator be, and is hereby, relieved from all liabilities, duties and obligations otherwise imposed on the administrator of an estate, including but not limited to the marshaling of assets, the publication of notice to creditors, the filing of an inventory, the filing of returns, and the posting of a separate bond, except for these duties and obligations directly related to the acceptance of service of process and qualification as administrator and other duties directly related to the lawsuit.

IT IS FURTHER ORDERED that the petitioner shall pay to said Administrator a fee in (the sum of $ ____________) (an amount to be determined by the Court hereafter) for the time devoted to and expenses incurred in the performance of the duties and obligations with respect to the estate.

_________________________                        _________________
               DATE                             JUDGE OF THE PROBATE COURT

FILED: __________________

____________________
DATE

DEPUTY CLERK
OATH

Georgia, _______ County

I do solemnly swear or affirm that ______________________, deceased, died with an estate currently unrepresented, so far as I know or believe, and that, having been appointed for the sole purpose of making it possible to commence or continue a lawsuit against the estate, I will discharge to the best of my ability all my duties as such Administrator and for such purposes. So help me God.

______________________________
County Administrator

Sworn to and subscribed before me this ___ day of ____________, 20____.

______________________________
Clerk/Judge, Probate Court
APPENDIX A4-2

STATE OF GEORGIA
COUNTY OF _____________ DOCKET NO: _____________

LETTERS OF ADMINISTRATION
(County Administrator for Lawsuit Only)

BY JUDGE PROBATE COURT OF BIBB COUNTY

WHEREAS, ________________ died intestate (check one:)

_____ domiciled in this County;

_____ not domiciled in this State but is alleged to be the County of venue for a cause of action against the decedent's estate.

and this Court granted an order appointing ______________________ County Administrator, as Administrator of the estate of said decedent, on condition that said Administrator give oath as required by law; and the said Administrator having complied with said conditions; the Court hereby grants unto said administrator full power to do and perform the duties directly related to the acceptance of process and other duties directly related to the lawsuit according to the laws of this State, and without further duties, powers, or responsibilities for administration of the estate of the decedent.

IN TESTIMONY WHEREOF, I have hereunto affixed my signature as Judge of the Probate Court of said County and the seal of this office, this ___ day of __________, 20____.

_________________________________
Judge of the Probate Court
(SEAL)

Note: The following must be signed if the Judge does not sign the original of this document:

Issued by:

______________________________
Clerk, Probate Court
Chapter 5

POWERS AND DUTIES OF PERSONAL REPRESENTATIVES AND TEMPORARY ADMINISTRATORS

The Revised
HANDBOOK FOR PROBATE JUDGES OF GEORGIA
2010
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Preamble to Chapter 5  (Please read)

This Chapter discusses the general powers and duties of all personal representatives. The statutory definition of "personal representative" includes administrators (of intestate estates), administrators with the will annexed, county administrators, and executors. It does not include temporary administrators. The appointments and qualifications of executors and administrators with the will annexed, as well as the specific powers and duties of same, are covered in Chapter 3. The appointments of administrators (of intestate estates), temporary administrators, and county administrators are covered in Chapter 4. The limited powers and duties of Temporary Administrators are covered in Chapter 4, Section 7.

Unless otherwise noted, all powers and duties of personal representatives covered in this Chapter apply to administrators (of intestate estates), administrators with the will annexed, county administrators, and executors. When there is a distinction with reference to a particular type of personal representative, the reference will refer specifically to the particular type of personal representative. In other words, if the term “administrator” is used, as opposed to “personal representative,” the point being made applies specifically only to administrators (of intestate estates).

The testator may by will alter, amend, expand upon or restrict the statutory powers of personal representatives, and the powers and authorities granted under the will control over the statutory powers discussed in this Chapter. However, when any statutory power or authority discussed in this Chapter is not covered by the terms of the will, the executor and/or administrator with will annexed has all of the duties, powers and authorities which apply to any personal representative.

1 O.C.G.A. §53-1-2(12).
1. **DUTIES OF PERSONAL REPRESENTATIVES**

1.1 **In General**

Upon qualification as the personal representative of the estate, the person has certain duties, including:

1. Gathering, or "marshaling," the assets of the estate and preserving them during administration.
2. Filing an inventory of the decedent's property.
3. Publishing notice to debtors and creditors, and paying valid debts.
4. Obtaining leave to sell and conducting sales of real and personal property if necessary.
5. Distributing assets to heirs or beneficiaries.
6. Filing annual returns
7. Final settlement and discharge.

1.2 **Securing Assets**

The first primary obligation of the personal representative is to marshal (collect), preserve and protect the known assets of the decedent. This may involve changing locks, taking photographs or inventorizing of household furniture, furnishings and personal items, storing valuable items, and protecting the decedent's important records such as tax returns. All property should be kept insured if possible. The operation of motor vehicles by anyone not a named insured should be prohibited or carefully monitored because of the potential liability to the estate.

After all immediately known assets have been secured, the personal representative should search for additional assets which might not be known to the personal representative. Reference should be made to tax returns, bank statements, and other important papers of the decedent in aide of ascertaining the likelihood of other assets. Records maintained by the decedent on any computers should be reviewed for disclosure of other assets. All mail of the decedent should be forwarded to the personal representative and should be carefully reviewed, not just for the purpose of ascertaining the debts of the estate but for the disclosure of other assets.
Obviously, when the personal representative is a close relative (spouse, child, etc.) of the decedent, much more may be known about the assets of the decedent than in cases where the personal representative did not enjoy a close relationship with the decedent or the decedent was particularly private about personal affairs.

1.2.1 Passage of Title; Right of Personal Representative to Possession

Upon the death of an intestate decedent who is the owner of any interest in real property, the title to any such interest which survives the intestate decedent vests immediately in the decedent’s heirs, subject to divestment by the appointment of a personal representative of the estate. Upon the appointment of a personal representative, the title to any interest in real property which survives the intestate decedent vests in the personal representative for the benefit of the heirs or beneficiaries and creditors of the decedent. Title to such property does not vest in the heirs or beneficiaries until the personal representative assents to such vesting.\(^2\) The title to all other property (personal and intangible) owned by an intestate decedent vests in the personal representative of the estate for the benefit of the decedent’s heirs or beneficiaries and creditors.\(^3\)

Upon the appointment of an administrator, the right to the possession of the whole estate is in the administrator, and, as long as administration continues, the right to recover possession of the estate from all other persons is solely in the administrator. An action seeking to recover property filed by someone other than the personal representative will be dismissed for lack of standing, unless equitable exceptions exist, such as unwillingness for some cause on the part of the personal representative to bring suit.\(^4\) The administrator may recover possession of any part of the estate from the heirs or purchasers from them; but, in order to recover real property, it is necessary for the administrator to show, upon the trial, either (1) that the property which is the subject of the action has been in the administrator’s possession and without the administrator’s consent is held by the defendant at the time of bringing the action or (2) that it is necessary for the administrator to have possession for the purpose of paying the debts, making a proper distribution, or for other purposes provided for

\(^2\) O.C.G.A. §53-2-7(a), (c).
\(^3\) O.C.G.A. §53-2-7(b).
by law. An order for sale or distribution, granted by the judge of the probate court after notice to the defendant, shall be conclusive evidence of either fact.⁵

[NOTE] The above provisions use the word “administrator” in the text of the Code Sections; however, there would appear to be the same right of possession in a personal representative or temporary administrator.

1.3 Notice to Creditors

Within 60 days after the date of qualification, every personal representative is required to publish in the official newspaper of the county a notice directed generally to all creditors of the estate to present their claims to the personal representative of the estate. The notice must be published once a week for four weeks.⁶ The judge of the probate court should bring this legal requirement to the attention of the personal representative at the time of qualifying.

While not required by law, good practice suggests that the notice also be directed to anyone who may owe money to the estate. Hence, the notice is usually referred to as “Notice to Debtors and Creditors.” See Appendix A5-1 for a Sample form of the Notice to Debtors and Creditors.

1.4 Claims of Creditors

Claims against estates rank in the following order of priority:⁷

1. Year's support for the family.

2. Funeral expenses, whether or not the decedent leaves a surviving spouse, in an amount appropriate to the circumstances of the decedent while in life. If the estate is solvent, the personal representative is authorized to provide a suitable protection for the grave of the decedent.

3. The other necessary expenses of administration.

4. Reasonable expenses of the decedent's last illness.

5. Unpaid taxes or other debts due this state or the United States.

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⁵ O.C.G.A. §53-2-7(d).
⁶ O.C.G.A. §§53-7-41 and 53-11-4.
⁷ O.C.G.A. §53-7-40.
6. Judgments, secured interests, and other liens created during the lifetime of the decedent, to be paid according to their priority. Secured interests and other liens on specific property are given preference only to the extent of such property.

7. All other claims.

Creditors who fail to file notice of their claims within three months after the last publication of the notice to creditors lose all rights to participate on an equal basis with creditors of the same priority if the personal representative has already made distribution before late notice of the claim. Creditors who fail to file timely claims may not hold the personal representative liable for misappropriation of the funds for paying the other creditors. If the personal representative has funds on hand and no claims of a higher priority remain unpaid, the assets are to be used for payment of the claim despite the failure of the creditor to give timely notice. In other words, failure to timely file notice of claim does not eliminate the debt or the obligation to pay; the creditor simply loses any priority.

1.5 Payment of Debts; Suits against Personal Representatives/Six Month Exemption

The personal representative is not required to pay the debts of the estate, wholly or in part, until the expiration of six months from the date the first personal representative qualifies to serve. If partial payment is made, it must be pro rata on debts of equal priority, including any debts due the personal representative, and must continue on a pro rata basis until the debts of the estate are paid. Successive payments must be made at the end of each year until the estate is paid out. The entire estate is liable for payment of debts unless otherwise provided by law.

The Supreme Court has held that a mortgage debt on real property owned by the decedent and another, title to which passed by right of survivorship to the co-owner, did not have to be paid by the personal representative of the estate. Since title to the property was

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8 O.C.G.A. §53-7-41.
9 O.C.G.A. §53-7-42(a). The use in the statute of the term "personal representative" indicates that the six-month period does not begin to run at the time a temporary administrator is appointed, since a temporary administrator is a not personal representative under O.C.G.A. §53-1-2(12).
10 O.C.G.A. §53-7-42.
11 O.C.G.A. §53-7-40.
received by the co-owner not by means of a will or the laws of intestacy, the property itself was the principal fund for payment of the mortgage. The Court noted that, if the property were foreclosed on, the estate could be held liable for any deficiency.\textsuperscript{12}

No suit to recover a debt due from the decedent may be commenced against a personal representative until the expiration of six months from the date of qualification of the first personal representative to serve.\textsuperscript{13} The purpose of this exemption period is to give the personal representative the opportunity to ascertain and assess the condition of the estate,\textsuperscript{14} to protect him/her against having to pay out assets during this period, and to give him/her the opportunity to administer the estate in accordance with the law concerning priorities.\textsuperscript{15} Since the exemption from suit is for the personal protection of the personal representative, he/she may waive it by expressly consenting to the bringing of a suit within the exemption period.\textsuperscript{16}

The exemption from suit applies to:
1. Suits for the recovery of debts;
2. Suit for tort liability for alleged wrongful death;\textsuperscript{17} and
3. Suit for personal injury.\textsuperscript{18}

The exemption does not apply to:
1. Suits against the administrator to cancel a deed;\textsuperscript{19}
2. Foreclosures of a security deed or a bill of sale;\textsuperscript{20}
3. Sales under power;\textsuperscript{21}
4. Suits for specific performance of contracts for the sale of land;\textsuperscript{22}
5. Suits for enforcement of a promise to leave certain property to the plaintiff;\textsuperscript{23} and
6. Suits to impose an implied trust.\textsuperscript{24}

\textsuperscript{12} Manders v. King, 284 Ga. 338 (2008).
\textsuperscript{13} O.C.G.A. §53-7-42(b).
\textsuperscript{14} O.C.G.A. §53-7-41.
\textsuperscript{17} Jones v. Womack, 53 Ga. App. 741 (1936).
\textsuperscript{18} Tufts v. Threlkeld, 31 Ga. App. 452 (1923).
\textsuperscript{21} Id.
\textsuperscript{22} Sutton v. McMillan, at FN 19.
\textsuperscript{23} Liberty Nat. Bank & Trust Co. v Diamond, 227 Ga. 200 (1971).
\textsuperscript{24} Sutton v. McMillan, at FN 19.
An “estate” is not a legal entity which can be a party to legal proceedings. The right to bring or defend an action resides in the estate’s personal representative(s). Since multiple personal representatives must act by unanimous action, suits brought on behalf of or against the “estate” must be brought by or against all personal representatives. However, if one or more personal representatives remove(s) himself/herself out of the state, service on all who remain in this state is as effectual and complete as if all personal representatives had been served.

Any debt that is not due by its terms at the time for the payment of debts of equal priority must be satisfied by the personal representative, and the estate will be discharged as to such debt. The debt must be satisfied in the manner that the personal representative deems to be in the best interests of the estate, under the following rules:

1. The debt may be prepaid, in accordance with the terms of any right to prepay.
2. The agreed present value of the debt may be paid, by agreement with the creditor.
3. The debt may be assumed by one or more heirs or beneficiaries or any other person, by agreement with the creditor.
4. Future payment of the debt may be arranged by creating a trust, giving a deed to secure debt or a security interest, or obtaining a bond or other security from one or more heirs or beneficiaries or otherwise, by agreement with the creditor or by order of the judge of the probate court after notice to the creditor and a hearing.

Similarly, the heirs or beneficiaries may not demand a distribution until after the expiration of the exemption period. If the personal representative makes partial or total distribution within that period, he/she does so at his/her own risk. If the estate has been distributed to the heirs or beneficiaries of the estate without notice of an existing debt, a creditor may compel the distributees to contribute pro rata to the payment of the debt.

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26 O.C.G.A. §53-7-5(a); Williams v. McHugh, 17 Ga. App. 59 (1915).
27 O.C.G.A. §53-7-13. “Removes” is not defined but seems to imply absenting oneself from the state not necessarily involving a change in domicile or residence.
28 O.C.G.A. §53-7-44. This section is not applicable if the will makes other provisions for the satisfaction of debts that are not yet due.
30 O.C.G.A. §53-7-43.
1.6 Compromise of Claims and Debts

Personal representatives are authorized to compromise, adjust, arbitrate, assign, sue on, defend against, abandon, or otherwise deal with or settle debts or claims in favor of or against the estate. A petition for leave to compromise a doubtful claim is no longer required under the Revised Probate Code of 1998; however, there is no prohibition against the filing of such a petition by a personal representative who wishes to have the benefit of an order approving the compromise after notice to the heirs or beneficiaries.

A personal representative who declines to litigate any claim may assign the claim to a creditor, an heir of an intestate estate, or a beneficiary of a testate estate for the purpose of pursuing the claim at that person’s own expense. After reimbursement of the expenses to the creditor, heir, or beneficiary, any remaining proceeds must be paid over to the personal representative for administration as part of the estate.

1.7 Continuing Business of Decedent

A personal representative may exercise discretion in continuing the business of the decedent for the 12 months following qualification and may continue it thereafter provided an order from the judge of the probate court is secured. In this order the judge may specify such terms and conditions as he/she deems appropriate for the continuation of the business. To secure such an order the personal representative must file a petition and give notice in writing to the heirs or beneficiaries in accordance with Chapter 11 of Title 53. The heirs or beneficiaries may waive the notice and acknowledge service.

Before granting such a petition, the judge of the probate court should require the presentation of evidence which indicates that the continuation of the business is in the best interests of the estate rather than what may be in the personal interest of the personal representative. The personal representative is required to manage and dispose of the property of the estate for the best interest of the estate.

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31 O.C.G.A. §53-7-45.
32 Id.
33 O.C.G.A. §53-7-6(5).
1.8 Making and Executing Contracts

The personal representative may contract for labor or service for the benefit of the estate, upon such terms as he/she deems best. Such contracts made in good faith bind the estate when approved by the judge of the probate court.\(^{35}\)

A personal representative is authorized to employ competent legal counsel according to the needs of the estate. Either the personal representative or the attorney employed may, by petition to the judge of the probate court duly served on the other, obtain a judgment fixing the attorney's fees and expenses.\(^{36}\)

The personal representative, as far as possible, is to fulfill the executory (that is, uncompleted) contracts and comply with the executed contracts of the decedent, unless the personal skill of the decedent was part of the consideration. The personal representative has a corresponding right to demand performance by all the other parties to the contract.\(^{37}\)

1.9 Borrowing Money

A personal representative may borrow money and pledge the assets of the estate to secure a loan for the purpose of paying taxes which are a charge against the estate. In order to do so, he/she must file a petition to the judge of the probate court and specify:

1. The amount to be borrowed;
2. The purpose for which it is to be used;
3. The rate of interest to be paid;
4. The property to be pledged as security; and
5. The period over which it is to be repaid.\(^{38}\)

Notice of such petition, in accordance with Chapter 11 of Title 53, must be given to all interested parties, who may file objections. Upon hearing the petition, if the judge of the probate court is satisfied as to the truth of the allegations and considers it for the best interests of the estate, an order may be granted authorizing the personal representative to

\(^{35}\) O.C.G.A. §53-7-6(2).
\(^{36}\) O.C.G.A. §53-7-6(4).
\(^{37}\) O.C.G.A. §53-7-6(3).
\(^{38}\) O.C.G.A. §53-7-6(1).
borrow money and encumber the particular assets. The order is binding as to all interested parties given notice.\textsuperscript{39}

1.10 **Other Rights and Duties**

If a personal representative has paid all claims and debts and has assets due minor heirs or beneficiaries having no guardian, then, with the approval of the judge of the probate court, the personal representative may pay the necessary expenses of maintenance and education of such minor heirs or beneficiaries and take credit for such payments in the accounting.\textsuperscript{40}

A personal representative may petition the judge for permission to perform any other act that is in the best interests of the estate.\textsuperscript{41}

2. **INVESTMENTS BY PERSONAL REPRESENTATIVES**

The 1998 revisions to Title 53 give all personal representatives three options for investing the estate assets, unless otherwise directed by a will or other governing instrument: (1) legal investments, (2) prudent investments, and (3) specially authorized investments.

2.1 **Legal Investments**

The personal representative may choose to limit investments of estate property to those investments that are listed in Code Sections 53-8-2 and 53-8-3. These “legal investments” constitute a “safe harbor” for personal representatives and insulate them from any further determination as to the suitability of the investments.\textsuperscript{42} They are:

1. Real property, provided a proper court order is obtained. Such an order may be granted by the judge of the probate court or by the judge of the superior court. Notice to every heir or beneficiary is required. If all the heirs or beneficiaries have acknowledged service and consented, such an order can be entered by the judge immediately;\textsuperscript{43} and:

2. County and municipal bonds which have been validated;

\begin{itemize}
\item \textsuperscript{39} Id.
\item \textsuperscript{40} O.C.G.A. §53-7-8.
\item \textsuperscript{41} O.C.G.A. §53-7-6(6).
\item \textsuperscript{42} O.C.G.A. §53-8-1(a).
\item \textsuperscript{43} O.C.G.A. §53-8-2.
\end{itemize}
3. Bonds issued by any county board of education for the purpose of building and equipping schoolhouses and which have been validated and confirmed;

4. Bonds and other securities issued by this state or the Board of Regents of the University System of Georgia;

5. Bonds or other obligations of the United States government and the bonds of any corporation created by an Act of Congress, if guaranteed by the United States government;

6. Interest-bearing deposits in any chartered state or national bank or trust company or savings and loan association which is located in this state to the extent that they are insured by the Federal Deposit Insurance Corporation or other comparable insurance.44

### 2.2 Prudent Investments

Alternatively, the personal representative may make investments outside the listed investments and be judged in accordance with the standard of care set out in Code, often called the “prudent investor” standard: “the personal representative shall exercise the judgment and care, under the circumstances then prevailing, which persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital.”45

Within the limitations of this standard of care, and considering individual investments as a part of an overall administrative strategy, the personal representative may acquire and retain any kind of property and every kind of investment, including but not limited to bonds, debentures, and other corporate obligations, and stocks "which persons of prudence, discretion, and intelligence acquire or retain for their own account."46

### 2.3 Specially Authorized Investments and Retained Investments

The investment options that are outlined in Code Section 53-8-1 are applicable only if there is no will or other agreement that directs the investment of the estate property; however, 

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44 O.C.G.A. §53-8-3.
45 O.C.G.A. §53-8-1(b)
46 O.C.G.A. §53-8-1(c).
this will not restrict a court of proper jurisdiction from allowing a personal representative to
deviate from the terms of such will or agreement.47 Therefore, unless a will or agreement
provides otherwise, personal representatives are authorized to retain as investments any
property owned by the estate, even though such property may not otherwise be designated as
a legal investment for fiduciaries. Personal representatives are not held liable for such
retention unless guilty of gross neglect in retaining certain property and may retain the
original securities received, as well as any securities which come to them as a result of
mergers or consolidations. The right to retain existing investments extends also to stock
dividends, stock splits, and liquidating dividends. Personal representatives are also given the
right to exercise stock purchase rights on securities held by them.48

Banks or trust companies serving as personal representatives are specifically
authorized to acquire or retain interests in an investment company or investment bank even
though the bank or trust company or an affiliate provides services to that investment
company or investment bank.49

Corporate fiduciaries are authorized to retain, exchange, or convert stock of that
fiduciary's own issue even if, in the case of an exchange, the stock or other securities
received in exchange are not substantially equivalent to those originally held. These
provisions also apply to any holding company which holds stock or other interests in the
corporate fiduciary.50

If a personal representative is authorized by law or the governing instrument or a
court order to invest in obligations of the United States government or agencies of the
government or obligations unconditionally guaranteed by the government, the investment
may be made either directly or in the form of securities in an open-end or closed-end
management type investment company or investment trust registered under the Investment
Company Act of 1940. The portfolio of the investment company or investment trust must: be
limited to this type of obligation and repurchase agreements fully collateralized by such
obligations and involve delivery of the collateral directly or through a custodian; and the

47 O.C.G.A. §53-8-1(d).
48 O.C.G.A. §53-8-5.
49 O.C.G.A. §53-8-1(e).
50 O.C.G.A. §53-8-5.
investment company or investment trust must provide constant asset value. An investment made in this manner is still subject to the standard of care set out in O.C.G.A. §53-8-1.\(^{51}\)

This complicated Section essentially means that a personal representative may invest in a mutual fund which purchases and holds no investments other than obligations of the U.S. government or its agencies or other obligations which are unconditionally guaranteed by the U.S. government.

Other sections of the Code authorize certain specified investments for all fiduciaries, including executors, other personal representatives, trustees, guardians (conservator), and custodians. These investments technically are not considered part of the “safe harbor” of “legal investments.” However, there is nothing to indicate that the Legislature intended to repeal or restrict these investments for personal representatives. In any event, these investments would likely meet the “prudent investor” standard discussed above. These specifically authorized investments include:

1. Real property loans (a) which are not in default, (b) which are secured by mortgages or deeds to secure debt conveying a first security title to improved realty, (c) which are insured pursuant to the provisions of the National Housing Act, and (d) with respect to which real estate loans, on or after default, pursuant to such insurance, debentures in at least the full amount of unpaid principal are issuable, and which debentures are fully and unconditionally guaranteed both as to principal and interest by the United States.\(^{52}\)

2. Housing authority bonds.\(^{53}\)

3. Redevelopment bonds.\(^{54}\)

4. Urban redevelopment bonds.\(^{55}\)

5. Farm loan bonds issued by federal land banks or joint-stock land banks.\(^{56}\)

6. Jekyll Island State Park Authority bonds.\(^{57}\)

\(^{51}\) O.C.G.A. §53-8-4.

\(^{52}\) O.C.G.A. §53-12-284.

\(^{53}\) O.C.G.A. §8-3-81.

\(^{54}\) O.C.G.A. §8-4-11.


\(^{56}\) O.C.G.A. §53-12-286.

\(^{57}\) O.C.G.A. §12-3-267.
7. University education authority bonds.  
8. State school education authority bonds.  

3. SALES BY PERSONAL REPRESENTATIVES

3.1 Sales of Perishable Property [GPCSF 15]

Perishable property, property that is likely to deteriorate, or property that is expensive to keep is to be sold as early as possible, consistent with the interests of the estate. This is sometimes referred to as a “quick sale.” The sale is made under order of the judge of the probate court in the manner determined by the judge to be in the best interest of the estate, after such notice and/or opportunity for hearing, if any, as the judge deems practicable under the circumstances. If there is time to do so, it is good practice to require notice at least by first class mail to the heirs or beneficiaries whose addresses are known or can be determined by reasonable diligence. If some addresses are unknown, it may be a good practice to require publication of a notice at least once in the official newspaper, unless the cost is prohibitive in comparison to the value of the property. The proposed method and terms of sale should be set forth in the petition and in any notice. Items of tangible personal property, such as furniture and automobiles, are often sold under this procedure, as items which are expensive to keep, decline in value, and are most susceptible to theft or vandalism.

Particularly with regard to “quick sales,” the judge of the probate court is not bound only to the two traditional methods of fiduciary sales: public auction on the courthouse steps and private sale by contract. The judge may approve any method of sale which appears appropriate to the circumstances and the type of property. For example, a personal representative might petition for authority to conduct an estate sale or auction by a person or company specializing in estate liquidations. Or, a personal representative might propose to put an automobile in an auto auction with a minimum acceptable bid.

58 O.C.G.A. §20-3-169.
59 O.C.G.A. §20-2-570.
60 O.C.G.A. §32-10-45.
61 O.C.G.A. §53-8-11.
Novel and creative methods should be given due consideration and be allowed when in the best interest of the estate. Expect to see proposals for sales of estate property over the Internet, particularly using E-Bay,® Craigslist,® and specialty sites.

3.2 Sales of Listed Stocks and Bonds

A personal representative may sell at private sale stocks or bonds of the types described below, without an order from or report to the probate court, subject to the following requirements:

1. The securities must be listed, or admitted to unlisted trading privileges on any exchange, or quoted regularly in any newspaper having general circulation in Georgia.
2. The sale price cannot be less than the stock exchange bid price or the published bid price at the time of sale.
3. Reasonable brokerage commissions may be paid if they are not in excess of those customarily charged by stock exchange members.\(^{62}\)

Unless the personal representative is relieved from making annual returns, the details of the sale should be shown in the next annual return.

The law does not specifically require a return of sale for “quick sales” or sales of listed stocks. However, the judge of the probate court may order returns of sales in those cases, either routinely or with regard to a specific sale. The personal representative is, of course, obligated to report the sale on the annual returns.

3.3 Sales and Other Uses and Dispositions of All Other Types of Property

[GPCSF 14]

Except as provided in Sections 3.1 and 3.2 above, a personal representative who desires to sell, rent, lease, exchange, or otherwise dispose of estate property must do so in accordance with the procedures set out in the Code.

The personal representative must file a verified\(^{63}\) petition with the probate court which includes the following information:

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\(^{62}\) O.C.G.A. §53-8-12.
1. The property involved and the interest of the estate in that property;
2. The specific purpose of the transaction;
3. The proposed price, if any;
4. All other terms or conditions of the proposed transaction; and
5. The names, addresses, and ages or majority status of the heirs of an intestate estate or the affected beneficiaries of a testate estate.

If any of the particulars described above are not included, the petition must also state the reason for the omission.\(^{64}\)

Notice of the petition must be given to the heirs or affected beneficiaries (that is, beneficiaries having an interest under the will in the subject property) in accordance with the provisions in Chapter 11 of Title 53 of the Code.\(^{65}\) The notice must set forth the date by which any objection to the proposed transaction must be filed\(^{66}\) and may state that, if no objections are filed, the petition may be granted without a hearing.\(^{67}\) See Chapter 2, Sections 3.2 and 3.3.1 on Notice and Service.

If no written objection is filed, the judge of the probate court shall order summarily the proposed sale in the manner and terms set out in the petition. If timely written objection is filed, the judge must hear the matter.\(^{68}\) After hearing the matter, the judge will grant or deny the petition or, alternatively, make such other order as best serves the interests of the estate. This order may include a requirement that the sale be a private sale or a sale at public outcry, including confirmation of the sale by the court or otherwise. As stated above, however, the court is not limited to the two traditional methods of public auction and private sale by contract. The order may be appealed as with other cases in the probate court.\(^{69}\)

Where a personal representative sells real property, liens on such real property may be divested and transferred to the proceeds of the sale as a condition of the sale.\(^{70}\)

\(^{63}\) O.C.G.A. §53-11-8.
\(^{64}\) O.C.G.A. §53-8-13(a).
\(^{65}\) O.C.G.A. §53-8-13(a).
\(^{66}\) O.C.G.A. §53-8-13(b).
\(^{67}\) O.C.G.A. §53-11-9.
\(^{68}\) Id.
\(^{69}\) O.C.G.A. §53-8-13(c).
\(^{70}\) Id.  It is unclear why specific language regarding an appeal appears only in this Code Section in Chapter 8. Presumably, an order granting a “quick sale” is appealable, although it may be presumed that the sale likely will have already occurred before an appeal is filed. However, an appeal filed before the sale will stop the sale by virtue of the supersedeas of the appeal.
\(^{70}\) O.C.G.A. §53-8-13(f).
3.4 Warranty by the Personal Representative

The estate is not bound by any warranty made by the personal representative in any deed or contract. Neither is the personal representative bound personally, unless there is a distinct expression of the intent to create a personal liability.\textsuperscript{71}

3.5 Returns of Sales

The personal representative must make a full return to the probate court of every sale made under Code Section 53-8-13, specifying the property sold, the purchasers, the amounts received, and the terms of sale.\textsuperscript{72} A recital of compliance with legal provisions in the personal representative's deed is \textit{prima facie} evidence of the facts recited.\textsuperscript{73}

The law does not set a time for filing the report of sale, but it should be done promptly, probably not later than 30 days after the sale is made. The judge may set a specific date or time period in the order granting leave to sell. In connection with a sale of real property, a copy of the closing statement will usually suffice as a return of sale.

3.6 Sales by Ancillary and Foreign Personal Representatives

A personal representative serving under the laws of another state of the domicile of a decedent who was not domiciled in Georgia may exercise certain powers without ancillary probate or administration, provided the personal representative is a citizen of the United States.\textsuperscript{74} Included among these powers are the power to sell and convey any property of the decedent that is located in this state and give deeds of assent and otherwise transfer or execute evidence of ownership of real or personal property located in Georgia pursuant to the decedent's will or the Georgia laws of intestacy.\textsuperscript{75}

These powers must be exercised in the same manner and in conformity with all of the requirements applicable to Georgia personal representatives, meaning that whenever a Georgia personal representative would be required to file a petition for leave to sell, etc., the

\textsuperscript{71} O.C.G.A. §53-8-14.
\textsuperscript{72} O.C.G.A. §53-8-13(d).
\textsuperscript{73} O.C.G.A. §53-8-13(e).
\textsuperscript{74} O.C.G.A. §53-5-42.
\textsuperscript{75} Id. Georgia's laws of intestacy control the identification of the heirs and the distribution of real property to the heirs of a decedent not domiciled in Georgia. O.C.G.A. §53-5-38.
foreign personal representative must do so also. If the foreign personal representative is acting pursuant to the decedent's will, the personal representative may exercise all powers to the extent contemplated by the will.

When a foreign personal representative executes any deed of assent or conveyance with respect to real property located in Georgia, the personal representative must attach to the deed an authenticated copy of the personal representative's letters and, if there is a will, a certified copy of the decedent's will. The clerks of the superior court are not authorized to accept for filing and recording any deed given by a foreign personal representative that does not conform to these requirements.\(^76\)

The filing of a petition for ancillary probate or administration in Georgia will suspend those rights and authorities of the foreign personal representative, but those rights and authorities will be reinstated if the Georgia proceedings are terminated without a grant of ancillary probate or administration. A petition for ancillary probate or administration of the estate may be filed and an ancillary personal representative appointed.\(^77\) Such an ancillary personal representative is authorized to sell and convey any property belonging to the testator or intestate decedent in this state under the same rules described in Sections 3.1, 3.2 and 3.3 above for sales by personal representatives of Georgia domiciliaries.

Any person having an interest in the real or personal property located in Georgia of a decedent who has died domiciled on another state may petition the probate court having jurisdiction (the probate court in any county in which the decedent owned real or personal property in Georgia) for ancillary probate or administration and may petition a court of equity to compel the foreign personal representative to protect that person’s interests. If an action in equity is filed in the superior court, the superior court may (1) require ancillary probate or administration (meaning require the filing of a petition for same in probate court, since the superior court is without authority to initially grant probate or administration) or (2) transfer the matter to the probate court having jurisdiction for disposition, and (3) order the preservation or protection of the subject property pending the ancillary probate or administration.\(^78\)

\(^{76}\) O.C.G.A. §53-5-43.  
\(^{77}\) O.C.G.A. §53-5-39.  
\(^{78}\) O.C.G.A. §53-5-44.
4. **COMMISSIONS AND ALLOWANCES**

4.1 **Compensation Pursuant to Will or Agreement**

The compensation of a personal representative may be provided in a written agreement signed by all of the heirs of an intestate decedent. In the case of an executor or an administrator with the will annexed, the compensation may be specified either in the will, in a written agreement entered into prior to the decedent's death with the decedent, or in a written agreement signed by all of the beneficiaries.

4.2 **Standard Compensation**

If the personal representative's compensation is not set forth in the will or such an agreement, then the rules described in this Section control the compensation.

The personal representative is entitled to:

1. Two and one-half percent commission on all sums of money received by the personal representative on account of the estate, except on money loaned by and repaid to the personal representative, and 2 1/2 percent commission on all sums paid out by the personal representative, either for debts, legacies, or distributive shares;

2. Ten percent commission on the amount of interest made if, during the course of administration, the personal representative shall receive interest on money loaned by the personal representative in that capacity and shall include the same on the return to the probate court so as to become chargeable therewith as a part of the corpus of the estate;

3. Reasonable compensation, as determined in the discretion of the judge of the probate court and after such notice, if any, as the judge shall direct, for the delivery over of property in kind, not exceeding 3 percent of the appraised value and, in cases where there has been no appraisal, not over 3 percent of the fair value as found by the judge, irrespective of whether delivery over in kind is made pursuant to proceedings for that purpose in the probate court and

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79 O.C.G.A. §53-6-60(a).
80 Id.
irrespective of whether the property, except money, is tangible or intangible, personal or real; and

4. In the discretion of the judge of the probate court, compensation for working land for the benefit of the parties in interest in no case exceeding 10 percent of the annual income of the property so managed.  

For an example of a computation of commissions, see Chapter 10, Section 19 or Chapter 11, Section 15.

A personal representative is entitled to commissions for debts, legacies, or distributive shares paid to himself/herself. However, the personal representative is not entitled to a commission for any amount paid as commissions to himself/herself or any other personal representative as commissions or other compensation. If there is more than one personal representative serving simultaneously, the commissions are divided according to the services of each.

As used in subsection 1. above, “sums of money” has been held not to include “stocks” or “bonds.” It remains uncertain what effect the opinion in the Miraglia case will have on an earlier opinion by the Attorney General opining that bonds are “money loaned” for purposes of subsection 2. above.

With regard to the 10 percent commission on interest on money loaned under subsection 2. above, certain bonds, certificates of deposit and other interest-bearing deposits, and actual loans constitute "money loaned" for purposes of this provision but not stocks and other investments. Such commission is not in addition to but in lieu of the

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81 O.C.G.A. §53-6-60.
82 O.C.G.A. §53-6-60(e).
83 O.C.G.A. §53-6-60(d).
85 The Court of Appeals made no reference to the 1987 opinion of the Attorney General, and there is no indication that it was argued before or considered by the Court of Appeals in the opinion.
86 1987 Op. Att’y Gen. No. U87-26. Although the opinion refers specifically only to municipal bonds, the Attorney General applied the “general and accepted definition of a bond (as) a certificate or evidence of a debt on which the issuing company or government agency promises to pay the bondholders a specific amount of interest for a specified length of time and to repay the loan on the expiration date.”
87 Id.
88 In re Estate of Miraglia, supra.
standard 2 1/2 percent commission of money received nor does such commission apply to any money loaned by the personal representative to himself/herself.\textsuperscript{89}

Concerning the compensation for distribution in kind under subsection 3. above, an allowance is made upon a motion or petition and after such notice, if any, as the judge directs, and the amount shall not exceed 3 percent of the value of the property delivered in kind. A distribution in kind is the delivery over of real or personal property to an heir or beneficiary other than cash or a cash equivalent.\textsuperscript{90} In cases where there has not been an appraisal, the fair value must be determined by the judge.\textsuperscript{91}

Before granting compensation for distribution in kind or for the working of land, it is probably best practice to give at least ten days' notice by first class mail plus an additional 3 days for mailing to interested parties.\textsuperscript{92}

4.3 Compensation to Successive Personal Representatives

A fund passing to successive personal representatives can be charged commissions only once. The commissions for receiving the funds are paid to the personal representative who brings them into the estate and the commissions for paying out are paid to the personal representative who actually disburses the funds. No commissions are paid for handing over the fund to a successor personal representative.\textsuperscript{93}

This Code section only prohibits duplicate commissions to fiduciaries "holding and receiving in the same right." It appears that an executor and a trustee under the same will would be holding in different rights (even if the same individual or corporate fiduciary serves in both capacities), as would a conservator paying over the balance of an estate to the personal representative, and would not be affected by this Code section. However, the trustee of a testamentary trust may not claim a commission for receipt of the trust funds when the executor has not actually established the trust.\textsuperscript{94}

\textsuperscript{89} O.C.G.A. §53-6-60(b).
\textsuperscript{90} Since “stocks” and “bonds” have been held not to be “sums of money,” they certainly must be personal or intangible property, and it is the opinion of the author, at least until a definitive ruling by an appellate court, that delivery of stocks and bonds to heirs or beneficiaries must, because of this opinion, be a distribution in kind.
\textsuperscript{91} O.C.G.A. §53-6-60(b)(3).
\textsuperscript{92} O.C.G.A. §53-11-5.
\textsuperscript{93} O.C.G.A. §53-6-60(d); In re Estate of Louise Donald, 222 Ga. App. 355 (1996).
\textsuperscript{94} In re Estate of Moore, 292 Ga. App. 236 (2008).
NOTE: There can be no commission taken on delivering over to a successor the assets of an estate by a resigning or removed personal representative. The resigning or removed personal representative takes no commission on the distribution, whether in cash or in kind, and the successor personal representative can take no commission on the receipt. On the other hand, a conservator may take commissions on distribution of assets to the personal representative of the estate of the former ward, and the personal representative may take commissions on the receipt of same.

4.4 Additional (Extra) Compensation

A personal representative may petition the judge of the probate court for compensation that is greater than the statutory amounts described above. The petition for allowance of extra compensation must be served on the heirs (or any affected beneficiaries, if there is a will) in accordance with Chapter 11 of Title 53. After any objections are heard, or if there are none, the award of extra compensation by the judge will be conclusive as to all parties in interest.

When extra compensation is claimed, the personal representative must prove the nature, character and value of the services rendered. The Comment to Code Section 53-6-62 points out that, when considering the petition for extra compensation, the judge should determine "whether the estate administration involved unusually greater time or effort, whether the personal representative had responsibilities with respect to assets that were not subject to the jurisdiction of the probate court, whether the estate involved significant tax issues, whether the personal representative also performed legal services for the estate, and whether the personal representative continued or liquidated a business enterprise of the estate." In other words, extra compensation should be awarded when the services have been extraordinary, that is, above and beyond what might be considered the usual and routine services of a personal representative.

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95 O.C.G.A. §53-6-62(a). If the amount of compensation has been specified in a will and is less than the statutory amount, the personal representative may petition under this same Code section for greater compensation. O.C.G.A. §53-6-62(c).
96 O.C.G.A. §53-6-62(b).
4.5 Forfeiture or Renunciation of Compensation

Failure to file returns as required results in forfeiture of commissions for that year, unless the judge of the probate court, for cause shown, relieves the forfeiture by special order entered on the Minutes.\(^{101}\) The forfeiture of commissions for failure to file returns is not absolute but is discretionary with the judge.\(^ {102}\) In the interest of efficient management of estates the judge should hold personal representatives to a high standard of accountability and promptness and should not approve commissions when the conduct of the personal representative has not been in accordance with honest and orderly administration. The commissions should be allowed in situations involving only slight neglect, but when the personal representative's conduct, after notice, amounts to a refusal to follow legal requirements the commissions should be denied.

A personal representative may renounce the right to receive all or any part of the compensation allowed by law.\(^ {103}\)

4.6 Expenses

A personal representative is allowed, after such notice, if any, as the judge directs, the reasonable expenses that are incurred in the estate administration. These include but are not limited to expenses for travel, expenses and premiums incurred in securing a bond, and expenses of attorneys or other agents.\(^ {104}\) When expenses are shown on a return and the personal representative has certified to sending copies to all heirs or beneficiaries as required, that should be sufficient notice, and the 30-day period should be sufficient time for interested parties to file objections. However, this does not preclude the court’s own inquiry. Since the approval of a return is *prima facie* evidence of its correctness,\(^ {105}\) the approval of the return should be deemed as an approval of the expenses shown on the return.

\(^{101}\) O.C.G.A. §53-6-60(f).

\(^{102}\) Shackelford v. Whatley, 172 Ga. App. 127 (1984). See, however, Fuller v. Moister, 246 Ga. 397 (1980) where the Supreme Court upheld the grant of a summary judgment to a successor personal representative who had sued the removed personal representative, and there were no orders in the probate court records relieving the forfeitures.

\(^{103}\) O.C.G.A. §53-6-60(g).

\(^{104}\) O.C.G.A. §53-6-61.

\(^{105}\) See Section 5.6 below.
5. RETURNS AND REPORTS BY PERSONAL REPRESENTATIVES

5.1 Inventory

Within six months after qualifying, the personal representative is required, unless relieved, to make an accurate and complete inventory of all the property owned by the decedent at the time of death. The time for filing the inventory may be extended by the judge of the probate court for good cause shown. The personal representative must declare, under oath, that the inventory contains a true statement of all the property of the decedent that is within the knowledge of the personal representative.\footnote{O.C.G.A. §53-7-30.}

The inventory is to be a statement of all of the property of the decedent within the hands, possession or knowledge of the personal representative.\footnote{Ellis v. McWilliams, 70 Ga. App. 195 (1943).} Although it need not be filed earlier than the six-month deadline, whenever it is filed, it should relate back to the date of death. It is the “beginning point” and should reflect everything as originally taken in or marshaled by the personal representative plus all assets acquired up to the date of the affidavit of its correctness. It should not be a statement of the funds or assets remaining on the date of the inventory. Expenditures and other disbursements or dispositions will be reflected on the first annual return. The inventory is an admission, though not a conclusive one, of possession of or control over the assets listed, and, once filed, it is the personal representative’s burden to prove and show any incorrectness.\footnote{Id.}

The personal representative must file the inventory with the court and deliver a copy of it to the \textit{sui juris} heirs or beneficiaries of the estate by first-class mail. Any heir or beneficiary may waive the right to receive the inventory by delivering a signed writing to that effect to the personal representative. The waiver may be revoked at any time.\footnote{O.C.G.A. §53-7-32.} The inventory filed with the court must state under oath that the inventory has been mailed to all the heirs or beneficiaries who are entitled to receive it and must include the names of any heirs or beneficiaries who have waived the right to receive it.

If there is more than one personal representative, the inventory must be made jointly by them but will not be conclusive proof of joint possession of the assets.\footnote{O.C.G.A. §53-7-31.}
Failure or neglect to file a correct inventory is ground for the removal of the personal representative.\textsuperscript{111}

There is no standard form for the inventory in a decedent’s estate. See Appendix A5-2 for a sample form.

\section*{5.1.1 Relief from Filing Inventory}

The will of a testator may relieve the executor of the duty to file an inventory with the court.\textsuperscript{112}

The heirs or beneficiaries, by unanimous consent, may authorize but not require the judge of the probate court to relieve the personal representative of the duty of filing an inventory with the court and from sending a copy to the heirs or beneficiaries. The heirs or beneficiaries may do this as part of the petition for Letters of Administration or the petition to probate the will or by a separate petition.\textsuperscript{113} The petition may specifically seek relief from the inventory requirement\textsuperscript{114} or may do so by seeking the grant of the powers contained in Code Section 53-12-232,\textsuperscript{115} which include the power to serve without filing inventory.\textsuperscript{116} See Chapter 4, Section 5.2.

\section*{5.2 Annual and Final Returns}

Unless relieved by the terms of a will or by a court order, every personal representative is required to make and file annual returns within 60 days after the anniversary date of qualification, in each year. The annual return is to be a true and just, verified accounting (also called a “return”) of all receipts and expenditures on behalf of the estate during the year preceding such anniversary date. The return should include a statement of any other fact necessary to explain the true condition of the estate, together with an updated inventory of the assets of the estate as of the anniversary date. With this return, the personal representative must file either the original vouchers, showing the correctness of each item, or an affidavit stating that the original vouchers were compared to each item on the return, and

\textsuperscript{111} O.C.G.A. §53-7-34.
\textsuperscript{112} O.C.G.A. §53-7-33.
\textsuperscript{113} O.C.G.A. §§53-7-1(b), 53-7-32(b).
\textsuperscript{114} O.C.G.A. §53-7-32.
\textsuperscript{115} O.C.G.A. §53-7-1(b).
\textsuperscript{116} O.C.G.A. §53-12-232(31).
that the return is correct. In any case, the judge of the probate court may require the production of the original vouchers. If the original vouchers are filed with the return, they must remain in the probate court for 30 days.\textsuperscript{117}

The annual reporting period may be changed to establish an ending date other than the anniversary of the date of qualification by court order after petition by the personal representative or upon the court’s own motion.\textsuperscript{118} Even if the reporting date has not been changed, the judge may accept and approve a return that does not cover the appropriate accounting period. However, unless the judge also enters an order that changes the reporting date, the acceptance of such a return will not cause the reporting period to be changed from that established either by the anniversary date of qualification or by a previous court order.\textsuperscript{119}

The author strongly suggests that “categorical” returns (those which give total expenditures for categories of expenses, such as rent, utilities, medical expenses, etc.) not be accepted and that returns be required to be an itemization of every transaction, showing the date, sources, and amounts of every item of income and the date, check number, payee and purpose of every expenditure or deduction.

The law provides no details as to what is to be shown on an updated inventory accompanying. Presumably, it should be a statement or itemization of the cash and other assets on hand at the end of the accounting period, the approximate fair market values of assets other than cash, and the location of all assets including bank accounts.

In addition to filing the annual return with the probate court, the personal representative must mail by first-class mail a copy of the return to each \textit{sui juris} heir of an intestate estate or \textit{sui juris} beneficiary of a testate estate. The personal representative must file a verified statement with the court stating that these required mailings have been made.\textsuperscript{120} Any heir or beneficiary may waive individually the right to receive the annual return by delivering a signed statement to that effect to the personal representative. The waiver may be revoked in writing at any time.\textsuperscript{121}

The return, when admitted and approved by the judge of the probate court, is \textit{prima facie} evidence of the correctness of the transactions shown; it is the burden of anyone

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{117} O.C.G.A. §53-7-67(a).
\item \textsuperscript{118} O.C.G.A. §53-7-67(b).
\item \textsuperscript{119} Id.
\item \textsuperscript{120} O.C.G.A. §53-7-68(a).
\item \textsuperscript{121} O.C.G.A. §53-7-68(b).
\end{enumerate}
\end{footnotesize}
challenging the correctness to prove the error. If not admitted and approved, it is the burden of the personal representative to prove correctness.\textsuperscript{122}

There is no standard form for the Return. See Appendix A5-3 for a sample form.

5.2.1 Relief from Filing Returns

A testator may in a will dispense with the requirement that the personal representative file an annual return with the probate court or the beneficiaries or both. Any will which provides relief from filing with the court automatically relieves the personal representative from sending a copy to beneficiaries, unless the will specifically requires it. If a will was executed by the testator in another state and the will is valid under the laws of Georgia, the personal representative is not required to file annual returns if under the laws of the state where the will was executed, the personal representative would not have been required to file annual returns or if the will otherwise expresses the intent to relieve the personal representative from all reporting requirements. This would require that the law(s) of the other state must be made known to the judge, who may take judicial notice of such law(s).\textsuperscript{123} However, dispensing with the requirement for filing annual returns must not work any injury to creditors or persons other than beneficiaries under the will.\textsuperscript{124}

The heirs or beneficiaries, by unanimous consent, in the original petition or in a subsequent petition, may authorize but not require the probate court to relieve the personal representative from filing annual returns with them or with the court or both, pursuant to Code Section 53-7-1(b). Any such unanimous consent which relieves the personal representative from filing returns with the court automatically relieves him from sending a copy to the heirs or beneficiaries.\textsuperscript{125} See Chapter 4, Section 2.4.

5.3 Intermediate Reports

A personal representative may file what is known as an intermediate report any time after the six-month period following qualification but not more frequently than once every

\textsuperscript{122} Ellis v. McWilliams, 70 Ga. App. 195 (1943).
\textsuperscript{123} See Chapter 2, Section 4.5.
\textsuperscript{124} O.C.G.A. §53-7-69.
\textsuperscript{125} O.C.G.A. §53-7-68(c).
Personal representatives who are relieved under the will or by consent of
the heirs or beneficiaries from the duty to file returns may still elect to file intermediate
reports. An intermediate report is essentially an accounting or return of the affairs and
condition of the estate for an intermediate period of time, usually from the qualification date
or the date of approval of a prior intermediate report.

By filing such a report, the personal representative seeks approval from the court,
after notice to heirs or beneficiaries, of the actions and transactions taken by the personal
representative during the intermediate reporting period. For various reasons, a personal
representative may wish to have approval of the condition of the estate at some point before
taking further action concerning the estate.

5.3.1 Intermediate Reports- Petition

If the personal representative elects to file this type of accounting, he/she must file a
petition and a report in the probate court setting forth all information required for annual
returns, and in addition, the following:

1. The period covered by the report.
2. Names and addresses of living heirs of an intestate estate or beneficiaries of a
testate estate known to the personal representative, showing those who have or
may require a guardian; a description of any possible unborn or unascertained
heirs or beneficiaries; the name of the surety and the amount of bond.
3. A separate schedule of the principal at the beginning of the accounting period
and the status at that time of its investment; the investments received from the
deceased and still held; additions to the principal during the period, with dates
and sources of acquisition; investments collected, sold, or charged off, with
the loss or gain and whether credited to principal or income; investments
made during the accounting period with the date, source, and cost of each;
deductions from principal during the period, with date and purpose of each;
principal on hand at end of period, how invested, and the estimated market
value of each investment.

126 O.C.G.A. §53-7-73(a).
4. A separate schedule of the income on hand at the beginning of the period and in what form held; the income received during the period, when and from what source; income paid out during the period, when and to whom and for what purpose; and income on hand at the end of the period, and how invested.

5. A statement of unpaid claims, with reason for nonpayment, including a statement as to whether any estate or inheritance taxes have become due and, if so, whether paid.

6. A brief summary of the account.

7. Such other facts as the court may require.127

5.3.2 Intermediate Reports- Notice and Hearing

When the petition and return are filed with the judge of the probate court, a citation is issued and served in accordance with Chapter 11 of Title 5, which requires any objections to be filed in writing and within the deadlines.128 At or before the time fixed for the hearing (which initially will be the deadline for objections stated in the citation), objections may be filed by any party at interest, in which event the hearing is automatically continued until a date certain.

5.3.3 Intermediate Reports- Judgment

If the report is found to be correct and the transactions are found to be within the duty and authority of the personal representative, the judge of the probate court shall enter an order so finding. If it appears that the personal representative is liable to the estate or to any heir or beneficiary of the estate, it is the duty of the judge to enter a judgment surcharging the personal representative in any amount authorized by the law and the evidence.129

If the accounting involves a question of the construction of the will, the judge of the probate court of a non-article Article 6 Probate Court is required to enter an order transferring the construction issue to the superior court for a determination of such question. Further proceedings in the probate court may be suspended pending a final decision by the superior court. After the question of construction has been determined, the judge of the

127 O.C.G.A. §53-7-73(b).
128 O.C.G.A. §§53-7-73(c), 53-11-10(a).
129 O.C.G.A. §53-7-76.
probate court proceeds with the accounting.¹³⁰ Judges of the Article 6 Probate Courts may determine any issues involving the construction of the will.¹³¹

All parties are bound by the order of the judge of the probate court on the intermediate report and cannot, except for an appeal, contest in any court any matters covered by the accounting and the order in the absence of fraud, accident or mistake.¹³² The judge may tax costs against the estate or the parties as the court may deem fair and reasonable.¹³³

The judgment is appealable as in other cases in the probate court. Parties who have been served and have filed no objections need not be given notice of an appeal or any other further proceedings and their consent shall not be required for an appeal.¹³⁴

5.4 Final Returns

When the personal representative has collected all the assets, paid all the debts, and made distribution of the entire remaining estate to the heirs or beneficiaries, a final return is filed. This return is the last return and need not be for a full year. It should show no assets remaining in the estate, except in certain rare cases concerning unclaimed funds.¹³⁵ If there is a problem in settling with the heirs or beneficiaries, the procedure described in Section 5.7.1 may be used before the final return is filed.

A return of a nonresident personal representative can be admitted to record on the affidavit of the surety. If the personal representative dies, the personal representative of his/her estate may make the return for him. If there is no personal representative of the estate, then the surety on the bond of the deceased personal representative may make the return. The legal effect is the same as if the return were made by the personal representative.¹³⁶

¹³⁰ O.C.G.A. §53-7-75.
¹³¹ O.C.G.A. §15-9-127(9).
¹³² O.C.G.A. §53-7-77.
¹³³ O.C.G.A. §53-7-77.
¹³⁴ O.C.G.A. §53-7-74, 53-11-10(b).
¹³⁵ O.C.G.A. §53-7-51. When there are unclaimed funds due to a missing heir, a custodial account with the judge of the probate court should be established prior to filing the final return and be reflected on such return.
¹³⁶ O.C.G.A. §53-7-71.
5.5 Responsibility of Judges Concerning Returns

An important responsibility of the judge of the probate court is to insure that all persons required by law to file returns do so at the time required by law. The judge is required to maintain a docket of all those required by law to make returns and immediately after the January term in each year, or as soon thereafter as the court deems practicable, is required to cite all defaulters to show cause for their neglect.\(^{137}\) This is not a matter which is discretionary. Whenever a citation is issued to require the filing of proper accountings, not only does the personal representative forfeit all commissions unless good cause is shown,\(^{138}\) but he/she becomes chargeable personally for all costs in connection with the citation and subsequent proceedings. The estate cannot be charged for costs which have resulted from the neglect of the personal representative. Willful and continued failure to make an accounting is good cause for removal of a personal representative,\(^{139}\) as well as for the forfeiture of commissions.

When a return has been filed, it is the responsibility of the judge of the probate court to audit the return carefully, to compare the individual items of the return with any vouchers, and to approve or disapprove the items. Approval should not be given unless any supporting vouchers are consistent with the return, nor should approval be granted if disbursements are not proper under the law.

Determining what disbursements may legally be made can become complicated. Certain items, such as court costs and bond premiums, are proper charges without any order of the court; others, such as sales of property and advancements to minors, may require court orders, and approval of these items on an annual return should not be given unless the proper procedures have been followed or the defect is remedied. The return should evidence the proper computation of commissions, the payment of all claims in accordance with the priority, and disbursements, if made, in accordance with the will of the testate decedent or with the rules of inheritance for an intestate decedent.

If the return is found to be correct and no objections are made within 30 days from the time it is filed and mailed to the heirs or beneficiaries who have not waived such notice,

\(^{137}\) O.C.G.A. §53-7-72.
\(^{138}\) O.C.G.A. §53-6-60(f). If good cause is shown, the judge of the probate court must enter a special order to relieve the personal representative from the forfeiture of commissions. Id.
\(^{139}\) O.C.G.A. §53-7-72.
the judge of the probate court approves the return and orders it to record, along with any attached vouchers. The return and any copies of the vouchers are kept in the office. Any original vouchers, after having been recorded, are returned to the personal representative on demand.\footnote{\textit{O.C.G.A.} §53-7-70.}

If the return is found not to be correct, the court should take such further action as is appropriate. After the defect is explained to the personal representative, he/she may be willing or able to correct the problem and file an amended return. If the problem is serious, the procedure described in \textit{Section 5.8}, Breach of Fiduciary Duty, should be followed.

\textbf{5.6 Effect of Approval of Return}

The approval and recording of a return which substantially complies with the requirements of the law is \textit{prima facie} evidence of its correctness in favor of the personal representative.\footnote{\textit{Id.}} Anyone who seeks to impeach its correctness must carry the burden of proving that it is incorrect. If a return is not filed, allowed, and recorded, there is no presumption of its correctness and the burden rests upon the personal representative to submit proof of its correctness in the final accounting and settlement.\footnote{\textit{Ellis v. McWilliams}, 70 Ga. App. 195 (1943).} Therefore, filing proper returns at the time required by law and having them approved by the judge and recorded gives the personal representative an advantage when the time comes to conclude the estate.

\textbf{5.7 Settlement, Removal, Resignation and Discharge}

\textbf{5.7.1 Final Settlement of Accounts before Judge of the Probate Court}

If there is a disagreement between the personal representative and the heirs or beneficiaries or if the personal representative desires court approval of a proposed final settlement, the following procedure is available. The procedure is not generally used where there is no disagreement or concern about the method of final settlement.

Any person interested as an heir or beneficiary of an estate, after six months from the granting of letters, may cite the personal representative to appear before the judge of the probate court for a settlement of the accounts. Alternatively, the personal representative may
cite all the heirs or beneficiaries and all persons who claim to be creditors whose claims the personal representative disputes or cannot pay in full to appear for a settlement of the accounts by the judge. An executor or administrator *c.t.a.* may file such a petition or be cited even though he/she has been relieved by the will from giving bond and from making any returns of his/her acts and doings to any court.\footnote{In re Estate Chambers, 261 Ga. App. 737 (2003).}

If the personal representative resigns, is removed, or dies, an heir of an intestate estate or a beneficiary of a testate estate, the sureties of the personal representative or other personal representatives, or the successor personal representative may petition for an accounting and settlement. In the event a petition is filed for such accounting and settlement, the probate court retains jurisdiction over the personal representative until such accounting and settlement is completed.\footnote{O.C.G.A. §53-7-61.}

A settlement which is approved by the judge of the probate court is conclusive upon the personal representative and all heirs or beneficiaries and all remaining persons who claim to be creditors who receive notice of the hearing. The judge may, in his/her discretion, give the personal representative additional time to settle the estate.\footnote{O.C.G.A. §53-7-62(a).}

In order to initiate a proceeding for settlement, the petitioner should file a verified written petition in the probate court, requesting issuance of the citation.\footnote{O.C.G.A. §§15-9-86, 53-11-8.} Notice must be served in accordance with Chapter 11 of Title 53.\footnote{O.C.G.A. §53-11-1.} When the personal representative is the petitioner, notice must be to all heirs or beneficiaries and any creditors whose claims have not been paid. When the petition is filed by some other interested party, the personal representative must be notified, and any other heirs, beneficiaries or creditors who are not petitioners should also be notified.

After due notice, the judge of the probate court may proceed to an accounting, hear evidence on any contested question, and order a final settlement between the personal representative and the heirs or beneficiaries. When the settlement is found to comply with the provisions of a will, as opposed to calling for a disposition contrary to the terms of the will, the procedures set forth in Code Section 53-5-25 will not apply.\footnote{In re Estate of Nesbit, 299 Ga. App. 426 (2009).} The order may be
appealed.\textsuperscript{149} The settlement can be enforced by a judgment, writ of fieri facias (fi.fa.), execution, or attachment for contempt.\textsuperscript{150} When a judgment has been obtained against the principal and surety of a personal representative, guardian (conservator), or other fiduciary, a levy may be made upon any property of any defendant in fi.fa. The judge of the probate court may enter judgment and execution against the principal and surety and grant judgment and execution in favor of the surety against the principal upon payment of the judgment by the surety.\textsuperscript{151}

While it has often been held that probate courts have no jurisdiction to determine title to property, in at least one case, the Supreme Court has held that in an action to settle accounts it was proper for the judge of the probate court to hear and determine the ownership of accounts which had previously been in the name of the decedent but had been changed to joint and POD accounts by the executor before the death of the decedent, using a power of attorney.\textsuperscript{152} In the \textit{Greenway} case, the judge determined that the accounts were property of the estate and ordered the executor to distribute the bank deposits to the estate beneficiaries.

The Court of Appeals has held that a petition for an accounting is an action against the personal representative, upheld an award of attorney’s fees from the removed personal representative, \textit{personally}, under Code Section 9-15-14(b), and reversed the award of attorney’s fees \textit{from the estate} for the successful accounting action.\textsuperscript{153}

The superior courts have concurrent jurisdiction with the probate courts over the settlement of accounts of a personal representative.\textsuperscript{154}

\subsection*{5.7.2 Accounting for Income; Recording Receipts; Refunding Bonds}

A personal representative will be charged with all income actually earned during the period of one year after the date of qualification.\textsuperscript{155}

For the period following the initial one year after qualification, the personal representative must account for all the income earned on the following types of property:

\begin{itemize}
\item \textsuperscript{149} O.C.G.A. §53-7-62(c).
\item \textsuperscript{150} O.C.G.A. §53-7-63.
\item \textsuperscript{151} O.C.G.A. §53-7-22.
\item \textsuperscript{152} \textit{Greenway v. Hamilton}, 280 Ga. 652 (2006).
\item \textsuperscript{153} \textit{Estate of Hotlzclaw}, 293 Ga. App. 577 (2008).
\item \textsuperscript{154} O.C.G.A. §53-7-60.
\item \textsuperscript{155} O.C.G.A. §53-7-64(1).
\end{itemize}
1. Property the personal representative is authorized by Georgia law to hold or invest in without securing court approval.

2. Property the personal representative is authorized by any court to hold or invest in.

3. Property the personal representative is authorized by the will to hold or invest in.\(^{156}\)

In addition, the rules concerning liability set forth in Section 5.8, Breach of Fiduciary Duty, may be relevant to the accounting.

For all other property that is administered by the personal representative during the period following the initial one-year period, the personal representative must be charged with the greater of the income earned on the property or the income that would have been earned if invested at the legal rate of interest fixed by the laws of this state and in effect during the time the property was held.\(^{157}\) Each item of property is treated separately so that income in excess of the legal rate that is earned on one item may not be used to make up a deficiency in income earned on any other item.\(^{158}\)

At all times during the course of administration, the personal representative will be charged only with the interest that is actually earned, if any, on funds that are held in a reasonable sum to pay anticipated expenses.\(^{159}\)

If final receipts given by heirs or beneficiaries to a personal representative are attested, they may be admitted to record in the probate court or superior court of the personal representative's residence or of the county in which the estate is administered.\(^{160}\)

When litigation against the estate is pending or is threatened or the personal representative has notice of a claim, he/she may demand that, prior to distribution of the property, the heirs or beneficiaries give refunding bonds to indemnify him/her against the claim, and upon the failure of the heirs or beneficiaries to give such bonds, the personal representative may withhold a sufficient amount to cover the claim.\(^{161}\)

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\(^{156}\) O.C.G.A. §53-7-64(2)(A).
\(^{157}\) See O.C.G.A. §7-4-2.
\(^{158}\) O.C.G.A. §53-7-64(2)(B).
\(^{159}\) O.C.G.A. §53-7-64(3)
\(^{160}\) O.C.G.A. §53-7-65.
\(^{161}\) O.C.G.A. §53-7-66.
5.8 Breach of Fiduciary Duty by and Removal of Personal Representatives

If the personal representative or a temporary administrator commits or threatens to commit a breach of fiduciary duty, an heir of an intestate estate, a beneficiary of a testate estate, or any creditor has several potential causes of action: to seek recovery of damages for breach of fiduciary duty; to seek the appointment of another personal representative or temporary administrator to administer the estate; to seek removal of the personal representative or temporary administrator; to seek reduction or denial of compensation to the personal representative or temporary administrator; to compel performance of the duties, enjoin the breach, and to seek redress of the breach by payment of money or otherwise. If the estate assets have been misapplied and can be traced into the hands of persons who had notice of the misapplication, a trust will attach to those assets. Unless the will provides otherwise, a personal representative may also be liable for a breach of fiduciary duty committed by another personal representative. See Chapter 3, Section 6.17.

While injunctive relief is generally a matter of equity, equity will not enjoin proceedings and processes of a court of law, absent some intervening equity or other proper defense of which a party, without fault on his/her part, cannot seek at law. Code Section 53-7-54 does not say where the cause of action lies. Starting primarily with the case of Heath v. Sims, the appellate courts have increasingly recognized the broad powers the probate courts have under the laws. In fact, the Court of Appeals has stated that the probate courts have “exclusive, original jurisdiction over a claim that (the personal representative) has breached a fiduciary duty,” and that the probate court may exercise its “sound equitable discretion” when considering the remedy to apply to a breach of fiduciary duty. In addition, the Court of Appeals has held that the probate court may award compensation, general and nominal, punitive damages and expenses of litigation, including attorney’s fees. Nonetheless, the Court of Appeals subsequently opined that “a superior court can

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163 O.C.G.A. §53-7-54. These causes of action are identical to those that may be brought against a trustee for breach of fiduciary duty under O.C.G.A. §53-12-192.
164 O.C.G.A. §53-7-54(b).
165 O.C.G.A. §9-5-1.
166 O.C.G.A. §9-5-2.
exercise its concurrent jurisdiction over the administration of estates when complete and adequate remedies at law are unavailable, or where equitable interference is necessary for full protection of rights of parties in interest. Therefore, it would seem that all of the remedies set forth in Code Section 53-7-54 may be pursued in probate court, except where injunctive relief alone is sought or where equity is necessary for a complete and adequate remedy. Of course, that Code Section also states that these remedies do not preclude resort to any other appropriate statutory or common law remedy.

While it has often been held that probate courts have no jurisdiction to determine title to property, in Greenway v. Hamilton discussed in Section 5.7.1 above, the Supreme Court affirmed the determination by a judge of the probate court that certain accounts were property of the estate and ordered the executor to distribute the bank deposits to the estate beneficiaries.

In addition to or in place of being made a party to an heir's or beneficiary’s cause of action described above, a personal representative can be sanctioned by the judge of the probate court for:

1. Willful and continued failure to make required returns.
2. Failure to file correct inventory if required.
3. Failure to show good cause why a bond should not be given upon a motion of the judge of the probate court or the representative of any party in interest.
4. Any other reason showing that good cause exists to revoke the Letters or impose other sanctions.

The possible sanctions which the court may levy, in the judge's discretion, include:

1. Removal from office by revocation of Letters.
2. Requirement of additional bond.
3. Settlement of accounts, as discussed in Section 5.7.1.

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172 O.C.G.A. §53-7-54(c).
173 O.C.G.A. §53-7-55.
174 O.C.G.A. §53-7-72.
175 O.C.G.A. §53-7-34.
176 O.C.G.A. §53-6-53.
177 O.C.G.A. §53-7-55.
4. Any other order the court deems appropriate under the case,\textsuperscript{178} including forfeiture of commissions.\textsuperscript{179}

When anyone interested in the estate institutes the proceeding for removal or sanctions, such person should file a petition setting forth the grounds and the relief sought. Then the judge of the probate court must cite the personal representative to answer to any charge brought in the petition. In addition, the judge must cite the personal representative whenever it appears to the court that good cause exists for revocation of Letters or other sanctions.\textsuperscript{180}

The Court of Appeals has held that a claim for breach of fiduciary duty requires proof of three elements: (1) the existence of a fiduciary duty, (2) breach of that duty, and (3) damage caused by the breach.\textsuperscript{181} Further, the Court of Appeals has held that the discretionary powers of the judge of the probate court under Code Section 53-7-55 “are very broad and may be exercised whether the violation of law under consideration is a minor or major matter.”\textsuperscript{182} A personal representative or temporary administrator is a fiduciary owing the utmost good faith in the handling of the estate.\textsuperscript{183}

A removed personal representative may be required to account to his/her successor or the sureties or the sureties of any other personal representatives, as well as to the heirs, beneficiaries, and creditors. This can now be compelled in the probate court by a petition for accounting and settlement filed by the successor, the heirs or beneficiaries, the surety or creditors. The probate court retains jurisdiction over the personal representative until the accounting and settlement is completed.\textsuperscript{184} If one of several personal representatives is removed, the entire estate remains in the hands of the others, and the removed personal representative may be required to account to them.\textsuperscript{185}

\textsuperscript{178} Id.
\textsuperscript{180} Id.
\textsuperscript{183} Id.
\textsuperscript{184} O.C.G.A. §53-7-61.
\textsuperscript{185} O.C.G.A. §§53-7-5(a), 53-7-61.
5.9 Resignation of Personal Representatives

If a personal representative resigns, the court will appoint a successor. If there is a will, the personal representative may resign in any manner and under any circumstances described in the will, without petitioning the probate court. Otherwise, a personal representative desiring to resign must file a petition for resignation with the judge of the probate court, showing that all the heirs of an intestate estate or beneficiaries of a testate estate have requested the resignation or showing to the satisfaction of the court one of the following reasons:

1. He/she is unable to continue due to age, illness, infirmity or other good cause.
2. The administration of the estate involves greater burdens than were contemplated or should have been contemplated and these burdens work a hardship on the personal representative.
3. A disagreement exists with one or more of the heirs or beneficiaries concerning the personal representative's management of the estate and the disagreement seems deleterious to the estate.
4. His/her resignation will result in or permit substantial financial benefit to the estate.
5. There are other personal representatives who will continue in office without adversity to the estate.
6. His/her resignation will not be disadvantageous to the estate.\(^\text{186}\)

The petition will be served in the manner provided in Chapter 11 of Title 53 upon all the heirs of an intestate estate or the beneficiaries of a testate estate who have not consented.\(^\text{187}\) If the judge finds to his/her satisfaction that there has been a unanimous request for resignation or that one of the enumerated conditions has been met, the personal representative will be allowed to resign.

A resigning executor has no authority to designate a successor unless the will gives that authority,\(^\text{188}\) and any provision of the will designating a successor executor or a method

\(^{186}\) O.C.G.A. §53-7-56(a). These are the same circumstances that would allow for the resignation of a trustee under O.C.G.A. §53-12-175.

\(^{187}\) O.C.G.A. §53-7-56(b).

\(^{188}\) Darnell v. Tate, 206 Ga. 576 (1950).
of appointing a successor should be followed. See Chapter 3, Section 6.5. If the will does not indicate a successor or method of filling the vacancy, an administrator with will annexed must be appointed.

A personal representative who resigns pursuant to the terms of the will or who is allowed to resign by the judge of the probate court may still be called to account by the heirs or beneficiaries, the sureties, or the successor, in the same manner as a personal representative who has been removed. Alternatively, the personal representative may petition for discharge from liability in the same manner as a personal representative who has completed the administration of the estate, as discussed in the next Section.

5.10 Petition for Discharge

5.10.1 Discharge from Office and Liability [GPCSF 33]

A personal representative who has fully discharged all the duties or who has been allowed to resign may petition the judge of the probate court to pass an order discharging the personal representative from all liability. A temporary administrator may petition for discharge in the same manner as a personal representative. In addition to stating that the personal representative or temporary administrator has fully administered the estate, the petition must include:

1. The names and addresses of all known heirs of an intestate decedent or all known beneficiaries of a testate decedent, including any person who has succeeded to the interest of a deceased heir or beneficiary, and must specify which of these persons is or should be represented by a guardian.

2. A statement that the personal representative has paid all claims against the estate or an enumeration of the claims that have not been paid and the reasons for such nonpayment.

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189 O.C.G.A. §53-6-10(d).
191 O.C.G.A. §53-7-61. The provisions of this Code section are also applicable if a personal representative dies while in office. See Section 5.7 above.
192 O.C.G.A. §53-7-50(a).
193 O.C.G.A. §53-7-52.
3. A statement that the personal representative has filed all necessary inventories and returns or has been relieved of these filings.\(^{194}\)

When the petition is filed, the judge of the probate court issues and serves a citation in the manner provided in Chapter 11 of Title 53 to all the heirs or beneficiaries, except as noted in the immediately following paragraph, requiring them to file any objections to the discharge. Also, any creditors whose claims are disputed or who have not been paid in full due to insolvency of the estate must be served. In all cases, the citation is published in the official county newspaper one time at least ten days prior to the date by which objections must be filed.\(^{195}\)

It is not necessary, however, to notify any heir or beneficiary who has relieved the personal representative of all liability or with respect to whom the personal representative has been relieved of all further liability in a binding proceeding such as a settlement of accounts pursuant to Code Sections 53-7-60 through 53-7-63 or an intermediate report pursuant to Code Sections 53-7-73 through 53-7-76. Also, for purposes of the above citation requirement, “beneficiary” is limited to a person, including a trust, who is designated in a will to take an interest in real or personal property and (a) who has a present interest, including but not limited to a vested remainder interest but not including a trust beneficiary where there is a trustee who is not also the personal representative seeking discharge and (b) whose identity and whereabouts are known or may be determined by reasonable diligence.\(^{196}\)

If no objections are filed, the order for discharge will be entered by the judge of the probate court without further proceedings or delay. If objections are filed, the judge must hold a hearing and examine closely the condition of the estate and the conduct of the personal representative. If the judge is satisfied that the personal representative has faithfully and honestly discharged the trust, the judge grants an order of discharge, and the personal representative is discharged of any liability as such. Any heir, beneficiary, or creditor who is a minor at the time of discharge and who is not represented by a guardian can sue the personal representative within two years after attaining majority.\(^{197}\) A discharge procured

\(^{194}\) Id.
\(^{195}\) O.C.G.A. §53-7-50(b).
\(^{196}\) Id.
\(^{197}\) O.C.G.A. §53-7-50(c).
through fraud can be set aside on motion and proof of fraud.  

In a hearing for discharge, the judge of the probate court has the power to decide any question presented which is necessary to a determination of whether the personal representative has discharged the duties to the estate.  

When a caveat has been filed, the caveator has the burden of proof. However, the judge has no jurisdiction to decide an issue as to whether one is, or is not, indebted to the estate.

Possession of unclaimed funds does not prevent the personal representative from being discharged. There is authority for creating an account with the judge of the probate court as custodian of the share of any missing heir. If there is a missing heir, the custodial account should be established before discharge is sought.

5.10.2 Discharge from Office Only  [GPCSF 33]
A personal representative may petition the court solely for discharge from office (and not from liability) by filing the petition described above and by giving notice by publication one time in the official county newspaper and by first-class mail to all creditors of the estate whose claims have not been paid, informing them of their right to file an objection and be heard.

5.10.3 Property Discovered after Discharge
If other property of the estate is discovered after a personal representative has been discharged, the judge of the probate court, upon the petition of any interested person, may appoint the same personal representative or a successor or alternate to administer the newly discovered estate property. Notice of this petition must be made as the judge directs. If a new appointment is made, unless the court orders otherwise, no claim previously barred may be asserted in the subsequent administration.

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198 O.C.G.A. §53-7-53.
202 O.C.G.A. §53-7-51.
204 O.C.G.A. §53-7-50(e).
205 O.C.G.A. §53-7-50(d).
It should be noted that there is no absolute requirement that a personal representative apply for a discharge but that the statute is permissive in nature.\(^{206}\) For example, if the sole beneficiary under a will is also the executor, there may be no real reason for petitioning for discharge. In this case, it is good practice for the personal representative notify the judge of the probate court in writing that he/she has paid all debts, received all assets, and does not intend to make formal application for discharge.

There should be a formal order of discharge from all liability for any personal representative who has given bond in order to terminate liability on the bond.

The judgment discharging the personal representative from all liability relieves him/her of any further liability to persons interested in the estate, unless the judgment is set aside by a former minor heir, beneficiary, or creditor, who was not represented by a guardian,\(^{207}\) for fraud,\(^{208}\) or as otherwise provided by law concerning relief from judgments.\(^{209}\) A certified copy of the order of discharge would serve the same purpose as Letters of Dismission issued under prior law.

5.11 Distributions and Assents by Personal Representatives

5.11.1 Personal Representative’s Assent to Passage of Title to Property

The assent of the personal representative to passage to the heirs of title to property which does not need to be sold may be express or implied.\(^{210}\) Preferably, this assent should be evidenced in writing by:

1. A deed of conveyance to real property.
2. A bill of sale for personal property.
3. An assignment or transfer of interests in intangible personal property.\(^{211}\)

The participation by a personal representative in proceedings which result in a settlement by which title is transferred by consent decree is tantamount to assent.\(^{212}\) If there

\(^{206}\) O.C.G.A. §53-7-50(a).
\(^{207}\) O.C.G.A. §53-7-50(c).
\(^{208}\) O.C.G.A. §53-7-53.
\(^{209}\) O.C.G.A. §9-11-60.
\(^{210}\) O.C.G.A. §53-8-15(b).
\(^{211}\) Id.
is no prior assent, the discharge of a personal representative will be conclusive evidence of the personal representative's assent.\textsuperscript{213}

At any time after the lapse of one year from the date the personal representative is qualified, an heir or beneficiary who is entitled to property from an estate may cite the personal representative to show cause why assent should not be given and may compel assent by an equitable proceeding.\textsuperscript{214}

All wills that are probated or established in a state other than Georgia constitute muniments of title for the transfer of real property in this state to the beneficiaries named in the will. Ancillary probate is not required for the purpose of conveying real property in Georgia to the beneficiary(ies) named in the will of non-domiciliary. A deed of assent from the duly qualified foreign personal representative may be given, and exemplified copies of the Letters and the will must be attached. The requirements are set forth in Chapter 3, Section 5.4.

\textbf{5.11.2 Distribution in Kind}

An administrator may distribute all or a portion of an intestate estate in kind.\textsuperscript{215} If the distribution is pro rata as to each asset that is distributed in kind, the administrator may make such distribution without securing the approval of the heirs or the judge of the probate court.\textsuperscript{216} If the distribution is not pro rata as to each asset, the administrator may make an in-kind distribution only with the written consent of all of the heirs or upon an order of the judge of the probate court.\textsuperscript{217}

Any heir or the administrator may petition the court for a distribution in kind that is not pro rata as to each asset. The petition must include the names and addresses of all the heirs and beneficiaries, and a description of the requested distribution. The petition must be served on the heirs as provided in Chapter 11 of Title 53.\textsuperscript{218} If no objection is filed, the administrator will be ordered to distribute the assets in the manner requested. If there is

\textsuperscript{213} O.C.G.A. §53-8-15(c).
\textsuperscript{214} O.C.G.A. §53-8-15(d).
\textsuperscript{215} O.C.G.A. §53-2-30. This Code section will not limit any method of distribution set out in a will nor will it require court approval of such a distribution if the will does not so require.
\textsuperscript{216} O.C.G.A. §53-2-30(a).
\textsuperscript{217} O.C.G.A. §53-2-30(b).
\textsuperscript{218} O.C.G.A. §53-2-31.
objection, the judge of the probate court may, in his/her discretion, order a distribution of the assets in kind in shares that are pro rata or are not pro rata as to each asset.\textsuperscript{219}

However, an executor who is also a beneficiary, even though given discretion to make distributions in kind, may not exercise that discretion to the detriment of other beneficiaries or contrary to the terms and intent of the will of the testator.\textsuperscript{220}

[NOTE] The above provisions use the word “administrator” in the text of the Code Sections; however, except as otherwise provided by the will, distributions in kind by an executor or an administrator \textit{c.t.a.} would seemingly be governed by these provisions, as would an action by a beneficiary for distribution in kind.\textsuperscript{221}

\section*{5.11.3 Funds Due Missing Heirs or Beneficiaries}

Judges of the probate courts are permitted, in their discretion, to serve as custodians of funds which are due to any missing heir of an intestate estate or any beneficiary of a testate estate when the heir or beneficiary cannot be located by the personal representative. If such funds are accepted by the judge as custodian, the judge is required to turn the funds over to the Department of Revenue fifteen (15) years after receipt of same.\textsuperscript{222}

\section*{5.11.4 Escheat}

"Escheat" is the reversion of property to the state upon a failure of heirs of a decedent to appear and make claim for or against property owned by the decedent at death for which no other disposition was provided either by will or otherwise.\textsuperscript{223}

A personal representative may have, after the payment of all debts and distribution of as much of the estate as the personal representative may accomplish, property remaining which is unclaimed or cannot be distributed because the heir(s) entitled to same cannot be found. If a will of a testator fails to properly and completely dispose of the residuary of the estate, the lapsed gift of the residuary passes to the heirs of the testator as though there were

\begin{itemize}
\item \textsuperscript{219} O.C.G.A. §53-2-32.
\item \textsuperscript{220} \textit{Harp v. Pryor}, 276 Ga. 478 (2003).
\item \textsuperscript{221} \textit{In re Estate of Nesbit}, 299 Ga. App. 496 (2009).
\item \textsuperscript{222} O.C.G.A. §53-9-8.
\item \textsuperscript{223} O.C.G.A. §53-2-50.
\end{itemize}
an intestacy.\textsuperscript{224}

If no person has appeared and claimed to be an heir within four years from the date Letters of any kind on an intestate decedent's estate were granted, the personal representative shall petition the judge of the probate court of the county in which the Letters were granted for determination that property has escheated to the state.\textsuperscript{225} Presumably, this would also apply to the lapse of a gift of the residuary of a testate decedent. There is no standard form for such a petition.

The petition must set forth the full name of the decedent, the date of death, the fact that no person has appeared and claimed to be an heir, and the property of the estate which may have escheated to the state. Upon filing of the petition, the judge of the probate court shall issue a citation as provided Chapter 11 of Title 53, requiring the heirs, if any, to file any objection to the petition by a date that is at least 60 days from the date of the citation, and shall order notice by publication to all heirs of the decedent as provided in Code Section 53-11-4 (once each week for four weeks).\textsuperscript{226}

If no individual files objection as an heir who is entitled to the property on or before the date set in the citation, the judge of the probate court orders the property to be paid over and distributed to the county board of education to become a part of the educational fund. If an individual files objection as an heir who is entitled to property, the judge shall hold a hearing to try the issue whether or not the objector is an heir entitled to the property. In such case, no property is delivered to the county board of education unless and until the claimant is determined not to be entitled to the property.\textsuperscript{227}

When the property is paid over or distributed to the county board of education, the administration of the estate shall be terminated following a final return and the granting of a petition for discharge. The proceedings are conclusive upon and shall bind all the heirs of the estate. All expenses incurred in the administration of such proceedings shall be paid from the property or proceeds of the estate.\textsuperscript{228}

\textsuperscript{224} O.C.G.A. §63-4-65.
\textsuperscript{225} O.C.G.A. §53-2-51(a).
\textsuperscript{226} O.C.G.A. §53-2-51(a) and (b).
\textsuperscript{227} O.C.G.A. §53-2-51(c) and (d).
\textsuperscript{228} O.C.G.A. §53-2-51(e), (f), and (g).
APPENDIX TO CHAPTER 5
POWERS AND DUTIES OF PERSONAL REPRESENTATIVES AND TEMPORARY ADMINISTRATORS

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A5-2. Sample Inventory of Decedent’s Estate ................................. 5-49
A5-3. Sample Annual-Final Return of Personal Representative .......... 5-52

Important Notice

Several sample orders and forms have been included in this Appendix. These sample orders and forms have not been officially sanctioned by the Georgia Council of Probate Court Judges. They have, unless otherwise noted, been prepared by the author. They are provided solely as samples. They should be modified or adapted to the specific court for the specific purpose, with any unnecessary material being deleted and any additional material being added.

William J. Self, II
NOTICE TO DEBTORS AND CREDITORS

IN RE: ESTATE OF

All creditors of the estate ______________________, late of ______________ County, deceased, are hereby notified to render in their demands to the undersigned according to law, and all persons indebted to law, and all persons indebted to said estate are required to make immediate payment.

This __ day of __________, 20__. 20__.

NAME: ________________________________

ADDRESS: ________________________________

CITY/STATE: ________________________________

ATTORNEY: ________________________________

______________________________

______________________________

______________________________

PUBLICATION DATES: ________________________________

______________________________
IN THE PROBATE COURT OF __________ COUNTY 
STATE OF GEORGIA

ESTATE OF: 
Decedent

DOCKET NO. ________

INVENTORY

<table>
<thead>
<tr>
<th>ITEM/DESCRIPTION</th>
<th>APPROXIMATE VALUE</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Attached additional sheets, if necessary)</td>
<td></td>
</tr>
</tbody>
</table>

1. REAL ESTATE (Give address or brief description)
   - Parcel One: ____________________________
   - Parcel Two: ____________________________
   - Parcel Three: ____________________________
   - Parcel Four: ____________________________
   - Approximate value of real estate from additional sheets (No. ___) __________

   **TOTAL APPROXIMATE VALUE OF REAL ESTATE** __________

2. PERSONAL PROPERTY
   A. Bank Accounts (Give name of financial institution and account number)
      1. Savings Accounts:
         a. ____________________________
         b. ____________________________
      2. Checking Accounts:
         a. ____________________________
         b. ____________________________
   B. Stocks (Give # shares and company), Bonds (Give face amount), and other securities (Describe):
      1. ____________________________
      2. ____________________________
      3. ____________________________
      4. ____________________________
   C. Vehicles (Automobiles, trucks, boats, etc.)
      1. ____________________________
      2. ____________________________
      3. ____________________________
   D. Other personal property and personal effects (Describe)
      1. ____________________________
      2. ____________________________

Revised Handbook   Ch. 5, pg. 5-49   January, 2010
3. ________________________________________________

4. ________________________________________________

5. ________________________________________________

6. ________________________________________________

Approx. value of personal property from additional sheets (No.__) ________________

TOTAL APPROX. VALUE OF PERSONAL PROPERTY ________________

AMOUNT OF BOND POSTED PREVIOUSLY ________________

AMOUNT OF BOND POSTED HEREWITH ________________

TOTAL AMOUNT OF CURRENT BOND ________________

Affidavit

GEORGIA,___________ County

I (We), _________________________________, personal representative(s) of the Estate of ________________________________, Decedent, do swear that the foregoing schedule contains a just, true and complete INVENTORY of property, real and personal, belonging to the said Estate within my (our) hands, possession, control or knowledge, so help me (us) God.

____________________________________
(Administrator)(Executor)

Sworn to and subscribed before me,
on __________________________

________________________________
Notary Public or Clerk of Probate Court

GEORGIA, ____________ COUNTY

I declare that I (we) have this date delivered by first-class mail a true and correct copy of the foregoing INVENTORY filed for the Estate of ________________________________, Decedent, to each [beneficiary of the testate estate] [heir of the intestate estate] as required by law, except to each of the following who have delivered to me (us) a written waiver of the of the right to receive such copy, which waiver has not been revoked:

________________________________

Sworn to and subscribed before me,
on __________________________

________________________________
(Administrator)(Executor)(Attorney)

Sworn to and subscribed before me,

________________________________
Notary Public or Clerk of Probate Court
ORDER ADMITTING TO RECORD

PROBATE COURT OF _______________ COUNTY

The within and foregoing INVENTORY of the Estate of the named Decedent having been on file for thirty days in this office, and the same appearing correct, and no objections having been filed, it is hereby ordered that said Inventory be admitted to record.

SO ORDERED on ____________________.

___________________________________
JUDGE, PROBATE COURT OF
______________ COUNTY, GA

Filed: ________________
Recorded: ________________

Clerk: ________________
Clerk: ________________

Minute Book: _______ Page: _______
APPENDIX A5-3

Instructions for Completing
Annual Return of Temporary Administrator
Or Personal Representative

The annual returns of temporary administrators and/or personal representatives required to file accountings with the Probate Court must be full, complete and accurate. Estimations and rounding of figures are not permitted. The return is, in essence, a transaction report of every receipt and every expenditure and is similar to a simple check register on a personal bank account. If all funds are deposited into the estate account(s) and all payments are made by check or drafts from the estate account(s), completing the return should be no more difficult than transferring the information from the bank records to these forms. It is the responsibility of the temporary administrator or personal representative to fully and properly complete the returns required; it is not the responsibility of court staff to prepare or correct returns. Incorrect, incomplete or unbalanced returns will simply be returned to the fiduciary for completion or correction. Please NOTE: all returns must be typed or legibly printed in black ink. Illegible returns will NOT be accepted for filing.

Page 1

1. Enter the Estate Name (Decedent) in the box at the top right.
2. Enter the name of the Temp. Administrator or Personal Representative on the line in the next box.
3. Enter the Docket No. (the case number) on the line indicated.
4. Enter the Estate Name again on the line indicated.
5. Circle “Final” or “Annual” to indicate the type of return.
6. Enter the dates covered by the return. If this is the first return, the beginning date will be the ending date from the last return.
7. Complete the Summary Accounting.
   A. Enter the balance from the last accounting. If this is the first return, the beginning balance is zero; everything received will be reported under Receipts.
   B. Enter the Total Receipts for the period covered by the return. Include all funds and accounts initially transferred to and/or deposited into the estate account(s) and all additional funds received, including all income received from all sources and all interest paid on any accounts or deposits. “If you received it, you must report it.” Note: an itemized statement of receipts or a transaction report is required. This will be a report of all cash receipts and will report all transactions in all cash or cash equivalent accounts, as well as any transactions made in cash.
   C. Add the beginning balance and the receipts, and enter the Subtotal.
   D. Enter the Total Expenditures for the period covered by the return. Include every amount disbursed, spent or paid out, including any automatic drafts from accounts and any bank charges, check printing charges, service charges or other fees. Include also any funds paid out in cash (a practice discouraged by the court). “If you spent it, you must report it.” Note: an itemized statement of expenditures or a transaction report is required. This will be a report of all cash expenditures and will report all transactions in all cash or cash equivalent accounts, as well as any transactions made in cash.
   E. Subtract the expenditures from the Subtotal, and enter the ending balance on the next line.
   F. Enter the value of all other assets from the schedule on Page 3; add that amount to the ending cash balance, and enter the Total Value of the Estate.
8. Complete and sign the Verification. Your signature must be notarized or be witnessed by a Probate Court Clerk. Include the full information on how you may be contacted if there are any questions about your return.

Page 2
1. **Bank Account Verifications:** The balances in all accounts must be verified. A certificate signed by a bank employee for each account is required unless you provide the court a copy of the bank statement for the account showing the account balance on the ending date of the return.

2. **Affidavit in Estates of Decedents:** A copy of the return must be provided to each heir or beneficiary, and the Temporary Administrator or Personal Representative must sign the Affidavit on Page 2. The signature must be notarized or witnessed by a Probate Court Clerk.

Page 3
1. **Investments:** If there are stocks, bonds or other investments in the estate, these must be itemized and disclosed on Page 3. Cash management accounts, money market accounts and any other accounts which are handled essentially the same as checking or savings accounts should be included in the reporting of cash receipts and expenditures and should not be listed here. Investments should be shown at their original cost, if known, or at the value at the time of receipt into the estate. Gains or losses will be reported only when sales or other transfers occur.

2. **Other Assets:** All other property in an estate must be itemized and valued. Unless required by the court, a formal appraisal is not necessary. The value should be the approximate fair market value. Tax values and “blue book” values may be used.

3. **Verification of Investments:** All investments held by a broker or financial institution must be verified. A certificate signed by an employee of each brokerage firm or institution is required unless you provide the court a copy of a statement of holdings showing the investments held on the ending date of the return.

**Receipts**
You must attach an itemization of the Cash Receipts shown in the Summary Accounting. Include all funds and accounts initially transferred to and/or deposited into the estate account(s) and all additional funds received, including all income received from all sources and all interest paid on any accounts or deposits. Include also any funds received in cash but not deposited (a practice discouraged by the court). “If you received it, you must report it.” A printed transaction report from an accounting or bookkeeping software program may be attached in lieu of the Receipts page, if preferred.

**Expenditures**
You must attach an itemization of the Cash Expenditures shown in the Summary Accounting. Each transaction must be separately itemized by date, check number, payee, purpose and exact amount. Include every amount disbursed, spent or paid out, including any automatic drafts from accounts and any bank charges, check printing charges, service charges, penalties, or other fees. Include also any funds paid out in cash (a practice discouraged by the court). “If you spent it, you must report it.” A printed, itemized transaction report from an accounting or bookkeeping software program may be attached in lieu of the Expenditure page, if preferred.
ACCOUNTING OF TEMPORARY ADMINISTRATOR OR PERSONAL REPRESENTATIVE OF DECEDENT’S ESTATE  

IN THE PROBATE COURT OF BIBB COUNTY, GEORGIA

TEMPORARY ADMINISTRATOR(S)/PERSONAL REPRESENTATIVE(S)

IN THE MATTER OF THE ESTATE OF Decedent

Final – Annual STATEMENT OF ACCOUNT

From ______________________ to ______________________

Summary Accounting

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>CASH BALANCE FROM LAST ACCOUNTING</td>
<td>$</td>
</tr>
<tr>
<td>ADD: TOTAL RECEIPTS*</td>
<td>$</td>
</tr>
<tr>
<td>TOTAL RECEIPTS*</td>
<td>$</td>
</tr>
<tr>
<td>SUBTOTAL</td>
<td>$</td>
</tr>
<tr>
<td>SUBTRACT: TOTAL EXPENDITURES*</td>
<td>$</td>
</tr>
<tr>
<td>TOTAL VALUE FROM SCHEDULE</td>
<td>$</td>
</tr>
<tr>
<td>TOTAL VALUE OF ESTATE AT END OF PERIOD</td>
<td>$</td>
</tr>
</tbody>
</table>

* NOTE: All receipts and expenditures must be itemized on the sheets attached or by attaching a printed and complete transaction report.

** NOTE: All balances must be verified by signed certificates or by attaching copies of bank statements showing balances on the ending date.

Verification by Fiduciary

STATE OF GEORGIA  
COUNTY OF BIBB

I, ________________, being duly sworn, depose and say that I am the __________________ of the estate of ______________________, that I now reside at ______________________, and that this is a full and true account of the estate for the period stated, to the best of my knowledge and belief. For purposes of contacting me with regard to this return, my daytime telephone number is ________________, my evening telephone number is ________________, my cell telephone number is ________________, and my email address is ________________.

Sworn to and subscribed before me, on ______________________

(Notary or Clerk, Probate Court)

(Signatures Temp. Administrator(s)/Personal Rep.(s)

To be completed by Court Staff: Calculation of Bond Sufficiency

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>TOTAL VALUE OF ESTATE AT END OF PERIOD FROM ABOVE</td>
<td>$</td>
</tr>
<tr>
<td>LESS: TOTAL VALUE OF REAL PROPERTY IN ESTATE</td>
<td>-</td>
</tr>
<tr>
<td>NON REAL ESTATE VALUE OF ESTATE AT END OF PERIOD</td>
<td>$</td>
</tr>
<tr>
<td>CURRENT SURETY BOND AMOUNT</td>
<td>$</td>
</tr>
<tr>
<td>AMOUNT OF BOND EXCESS/DEFICIENCY</td>
<td>$</td>
</tr>
</tbody>
</table>
ORDER ADMITTING RETURN TO RECORD

The foregoing Return and its affidavit having been carefully examined and found correct, and having remained on file in office for _____________ days and no objections having been filed thereto, the same is allowed; and it is ordered that said return together with its affidavit be recorded as the law requires.

___________________
Filed

__________________________
(Deputy) Clerk

Recorded this _____ day of _____________, 20__.

______________________________
Deputy Clerk, Probate Court

JUDGE, PROBATE COURT
NOTE: Use the certificates on this page to verify balances in each account held OR attach copies of blank statements for each account showing balances on ending date.

**AFFIDAVIT OF TEMPORARY ADMINISTRATOR OR PERSONAL REPRESENTATIVE**

The undersigned Temporary Administrator/Personal Representative does hereby certify to the Court that:

- all bond premiums due for the surety bond of the fiduciary have been paid
- that all income tax returns required to be filed to date have been filed
- that all income and estate taxes, if any, have been paid to date
- that all ad valorem taxes, if any, due on property of the Estate have been paid

(Signature of Temporary Administrator/Personal Representative)

Sworn to before:

____________________________
CLERK of Probate Court/Notary Public

**CERTIFICATE OF BALANCES ON DEPOSIT**

(Name and Address of Institution)

I do certify that on __________________________, 20_____, there was on deposit in this institution to the credit of the estate managed by this Fiduciary the following:

Checking Account Balance: $__________________   Savings Account Balance: $__________________

Certificate(s) of Deposit at Face Value: $__________________

Interest paid and credited to the above accounts during period of this Statement of Account totaled $__________________.

(Do NOT include accrued but unpaid interest)

(Signature and Title of Certifying Official)

(NOTE: Please copy this page if additional certificates are needed)

NOTE: The following affidavit must be completed by the administrator or executor (or the attorney for the administrator or executor) of the estate of a decedent who is required by law or court order to file returns.

**Affidavit of Service of Copies for Decedent’s Estate**

I (we) certify that I (we) have this date delivered in person or by first-class mail a true and correct copy of the attached Annual/Final Return filed for the Estate of __________________________, decedent, to each (beneficiary of the testate estate) (heir of the intestate estate) as required by law, except to each of the following who have delivered to me (us) a written waiver of the right to receive such copy, which waiver has not been revoked: ____________________________________________________________________________________________.

Sworn to and subscribed before me on __________________________, 20_____.

____________________________
ADMINISTRATOR/EXECUTOR/ATTORNEY

____________________________
CLERK of Probate Court/Notary Public

____________________________
ADMINISTRATOR/EXECUTOR/ATTORNEY
<table>
<thead>
<tr>
<th>DATE ACQUIRED</th>
<th>DESCRIPTION</th>
<th>Cost or Value at Acquisition</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Investments Held by Broker/Institution (e.g., stocks, bonds, etc.): (Itemize)</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Other Assets (e.g., real estate, automobiles, personal property, etc.): (Itemize and describe)</td>
<td>Present Value</td>
</tr>
</tbody>
</table>

TOTAL VALUE OF OTHER ASSETS IN ESTATE $

CERTIFICATE OF INVESTMENTS HELD

(Name and Address of Institution)

I do certify that on ________________, 20__, there were held by this institution to the credit of the estate managed by this Fiduciary the Investments shown above and that the cost or value at acquisition are correct.

(Signature and Title of Certifying Official)

(NOTE: Please copy this page if additional space is needed)
NOTE: All RECEIPTS must be itemized on this page, OR a printed transaction report, showing all RECEIPTS for the period, must be attached to the Return.

<table>
<thead>
<tr>
<th>DATE</th>
<th>SOURCE AND DESCRIPTION OF ALL SUMS RECEIVED</th>
<th>AMOUNT</th>
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</table>

TOTAL RECEIPTS $  

(NOTE: Please copy this page if additional space is needed)
NOTE: All EXPENDITURES must be itemized on this page, OR a printed transaction report, showing all EXPENDITURES for the period, must be attached to the Return.

<table>
<thead>
<tr>
<th>DATE</th>
<th>CHECK NO.</th>
<th>TO WHOM WRITTEN AND PURPOSE</th>
<th>AMOUNT</th>
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<tbody>
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</table>

**TOTAL EXPENDITURES** $ 

(NOTE: Please copy this page if additional space is needed)
Chapter 6

YEAR’S SUPPORT

The Revised
HANDBOOK FOR PROBATE
JUDGES OF GEORGIA
2010
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Chapter 6

YEAR'S SUPPORT

1. ENTITLEMENT; PURPOSE

1.1 In General

The proceeding for a year’s support from the estate of the decedent is a peculiar proceeding almost unique to Georgia. It is designed to provide, for a limited time, maintenance and support from the estate of the decedent for those individuals whom the decedent was legally bound to support during life. It is humanitarian in nature and has been called an anomaly. The award may be made in any form of property, including money. There is not (and never has been) a requirement that the spouse and minor children return to the estate any property that has not been used by them for support at the end of the 12-month period.

An award of year’s support becomes a debt of the estate of the highest priority among debts. Whether the decedent died testate or intestate, whether the estate is solvent or insolvent, and whether the decedent was male or female, the surviving spouse, if any, and the minor child or children, if any, are entitled to a year's support from the estate of the decedent.

Entitlement to a year's support award is a matter of status and is established by demonstrating that the petitioner belongs to one of the two classes of intended beneficiaries: a surviving spouse who has not remarried at the time of filing; a minor child or minor children who remain dependent on the decedent (have not turned 18 or married prior to filing).

---

1 An Internet search found proceedings or allowances called “year’s support” only in South Carolina and Tennessee. See South Carolina General Statutes, GS§30-15, and Tennessee Code Annotated, TCA§30-2-102.
3 O.C.G.A. §53-3-1 (comment).
4 O.C.G.A. §53-3-1(b).
5 O.C.G.A. §53-3-5(a).
6 O.C.G.A. §53-3-1(c).
8 O.C.G.A. §53-3-2(b).
1.2 Separate Awards

If the decedent leaves minor children by different spouses, the judge of the probate court must specify the portion of the property awarded to the children of the former spouse or spouses. Even if the surviving spouse is also the parent of the minor children, the judge has the discretion to make separate awards for the spouse and the children if the judge deems such awards to be in the best interests of the parties. These portions vest separately in the spouse and children.

1.3 Minimum Award

The law no longer sets a minimum on the amount of the year’s support award nor does it set a maximum. Each case is dependent upon the facts and circumstances of the particular family, their standard of living, and the size of the estate.

2. Development of the Current Year's Support Law

Year's support evolved from recognition of the duty of the spouse and parent to protect and provide for the surviving spouse and children, and to supply their immediate wants and necessities during the period of administration. Because the personal representative was formerly allowed twelve months within which to collect the assets and determine the condition of the estate and could not sooner be required to make any distribution to heirs or legatees, the year's support statute made provision for the surviving spouse and minor children during this period to allow them to adjust to their altered situation.

A 1986 statute abolished the former requirement that appraisers be appointed to value the estate property. The law now requires the applicant, in a verified application, to allege the property necessary to support those for whom the award is requested for one year. Under the Revised Probate Code of 1998, the judge of the probate court is directed to grant the year's support award if no objection to the petition is filed. Thus, in many cases, the amount and property awarded will simply be that which is requested in the petition.

---

9 O.C.G.A. §53-3-8(a).
10 O.C.G.A. §53-3-8(b).
11 Under the Pre-1998 Probate Code, there was a minimum award of $1,600. Former Code Section 53-5-2(b).
13 Id. The period is now six months. O.C.G.A. §§53-7-41 and 53-7-42.
Furthermore, the Revised Probate Code of 1998 contains no provision for additional awards for subsequent years, which were allowable under the prior Code.

3. **Spousal Election under Will**

   A testator may provide in a will that the provisions under the will for the spouse are intended to be in lieu of year’s support, thereby forcing the spouse to make an election between taking under the will and seeking an award of year’s support.\(^{14}\) That is, if the decedent’s will contains a clause providing that the benefits under the will for the spouse are intended to be in lieu of year’s support, the spouse must either (1) take under the will or (2) seek and award of year’s support but may not do both. If the decedent’s will does not have such a clause, the spouse may take under the will and file a petition for an award of year’s support.

   There is no similar provision which puts minor children of a testator to such an election. Therefore, a provision in a testator’s will purporting to put the spouse and minor children to an election will be ineffective as to the minors.

4. **Restrictions on Rights to Year's Support**

   The following restrictions and limitations apply to every petition for an award of year's support:

   1. All petitions must be filed within 24 months from the date of death of the decedent;\(^ {15}\)
   2. All petitions by or for a surviving spouse must be filed during the time that the spouse has not remarried and during such spouse's lifetime;\(^ {16}\) and
   3. The right of a minor to an award of year's support from the estate of a deceased parent is barred by the marriage or death of the minor or by the minor's attaining the age of 18 years prior to the filing of the petition.\(^ {17}\)

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\(^{14}\) O.C.G.A. §53-3-3.
\(^{15}\) O.C.G.A. §53-3-5(c).
\(^{16}\) O.C.G.A. §53-3-2(a).
\(^{17}\) O.C.G.A. §53-3-2(a).
5. **Petition for Year’s Support** [GPCSF 10]

A petition may be filed by:

1. The surviving spouse; or
2. A guardian or other person who is acting on behalf of the spouse and/or on behalf of a minor child or children.\(^{18}\)

The petition is to be filed in the county of domicile of the decedent. If the decedent was a nonresident who owned property in Georgia, a petition seeking a year’s support may be filed in any county in which property sought to be awarded is located.\(^ {19}\) This is true even if the spouse or children are nonresidents.\(^ {20}\)

All petitions for year’s support must be filed within 24 months of the decedent’s death and contain the following information:

1. The surviving spouse’s full name (if the decedent was survived by a spouse);
2. The full name and date of birth of each surviving minor child; and
3. A schedule of the property (including household furniture) that the petitioner proposes to have set aside (awarded) as year’s support.\(^ {21}\)

Where any real property is proposed to be set apart, the petition must fully and accurately describe the real property with a legal description that would be sufficient to pass title to the property under the laws of this state.\(^ {22}\)

6. **Notice of Petition for Year’s Support**

6.1 **Citation and Publication**

Citation giving notice of the petition must be issued and published once a week for four weeks. The citation orders all persons concerned to show cause by a specified date why the petition for year’s support should not be granted.\(^ {23}\)

6.2 **Notice When a Personal Representative is Serving**

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\(^{18}\) O.C.G.A. §53-3-5(a).

\(^{19}\) Id.


\(^{21}\) O.C.G.A. §53-3-5(b).

\(^{22}\) O.C.G.A. §53-3-5(b).

\(^{23}\) O.C.G.A. §53-3-6(b).
If there is a qualified personal representative of the decedent's estate and the petitioner is not the sole personal representative of the estate, the judge of the probate court or the clerk must cause a copy of the citation to be sent by first-class mail to such personal representative.\(^{24}\) The personal representative represents all other parties in interest of the estate, that is, heirs, beneficiaries and/or creditors. In other words, it is the responsibility of the personal representative to take such action as he/she deems necessary or appropriate in response to the petition for year’s support in accordance with the personal representative’s fiduciary duties to all other heirs, beneficiaries and creditors. If the petitioner is one of multiple personal representatives, the other personal representatives may be served with the notice and shall have the responsibilities set forth herein.

### 6.3 Notice When No Personal Representative is Serving or Spouse is Sole Personal representative

If there is no personal representative of the estate of the decedent, or if the petitioner is the sole personal representative, notice of the petition must be given to all ascertainable interested persons. In such a case, the petitioner is to provide the names, ages, and addresses of all known interested persons; the petitioner is required to make reasonable inquiry to ascertain the names, last known addresses, and ages of all interested persons.\(^{25}\) The term “interested persons” means the decedent’s children, spouse, other heirs, beneficiaries, creditors, and any others having a property right in or claim against the estate of the decedent which may be affected by the year’s support proceedings.\(^{26}\)

### 6.4 Mailing of Notice and Guardians-ad-Litem

In all cases, the notice must be sent, by first-class mail, no less than 21 days prior to the deadline for objections set forth in the citation.\(^{27}\) However, the Supreme Court has held that the fact that an order in a year's support proceeding was entered within 28 days from the first publication of citation did not invalidate the award.\(^{28}\)

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\(^{24}\) O.C.G.A. §53-3-6(c)(1).
\(^{25}\) O.C.G.A. §53-3-6(c)(2).
\(^{26}\) O.C.G.A. §53-3-6(a).
\(^{27}\) O.C.G.A. §53-3-6(c).
\(^{28}\) O.C.G.A. §53-11-10(a); Johnson v. City of Blackshear, 196 Ga. 652 (1943).
As a general rule, if any interested persons are minors or incapacitated adults, a “guardian” must be appointed for them or the proceedings will not be conclusive as to them.\textsuperscript{29} Service upon or notice to the guardian constitutes service upon or notice to the party represented, and no additional service upon or notice to such party is required.\textsuperscript{30} Even if the estate is represented by a personal representative who is not the petitioner, it is good practice to appoint a guardian-ad-litem for any minor child of the decedent on whose behalf the petition has not been filed.

There is also a specific, additional requirement that a copy of the petition be mailed by the judge of the probate court within five days after it is filed to the tax commissioner or tax collector of any county in which real property proposed to be set apart is located.\textsuperscript{31} Each such tax commissioner or tax collector should be listed in the petition as an interested person.

### 7. Approval of Uncontested Year’s Support Petition

There is no necessity for a formal hearing on a petition for year’s support when no objection has been filed. However, the judge of the probate court should note the date of death and determine that the 24-month statute of limitations has not run. The judge should also determine that proper notice has been given and that the citation has been published as required by law. Unless there is a legal defect in the petition or it is obvious that someone for whom an award is sought is not eligible, the judge of the probate court has no authority to modify the request and must enter an order setting aside the property as applied for in the petition.\textsuperscript{32}

### 7.1 Amendments to Year’s Support Petitions

While there is no specific provision in Chapter 3 of Title 53 allowing an amendment to a petition for year’s support, all petitions filed in the probate courts may be amended, at least up until the time of the entry of a pretrial order.\textsuperscript{33} Certainly before a final order has been entered, a petition for year’s support may be amended. If a petition is amended which adds

\textsuperscript{29} O.C.G.A. §53-11-2(a); However, a natural guardian or other duly appointed guardian may not represent the individual in the year’s support proceeding if that person is the petitioner or there is any other conflict of interest between them.

\textsuperscript{30} O.C.G.A. §53-11-2(b).

\textsuperscript{31} O.C.G.A. §53-3-6(d).

\textsuperscript{32} O.C.G.A. §53-3-7(a).

property to or amends the schedule of property sought, service of the amendment should be made again on all interested parties and an amended citation should be published, since the first notice put all interested parties on notice that the petitioner(s) seek(s) the property originally scheduled. If a petition is amended to add additional “interested parties,” unless the addresses of some of the additional parties are unknown, there would seem to be no need for republishing notice; however, all additional interested parties should be given notice by first class mail, with not less than 21 days within which to file objections.

What is less clear is whether an order granting an award of year’s support may be set aside for the purpose of amending the schedule of property and/or the list of interested parties. During the term of court in which the final order is granted, the judge of the probate court may set aside any judgment on motion of a party or on the court’s own motion.\(^\text{34}\) If a final order is set aside for the purpose of amending the schedule of property and/or the list of interested parties, due process would seem to require that all interested parties be re-served with a new notice and that a new citation be published.

8. Objections to Year’s Support
8.1 Who May Object and Grounds

Generally, any person interested in the administration of the estate may object to the granting of a year’s support to the surviving spouse or children.\(^\text{35}\) Specifically, our courts have held that objections may be filed by: creditors,\(^\text{36}\) heirs,\(^\text{37}\) privies in estate to heirs,\(^\text{38}\) beneficiaries,\(^\text{39}\) and the executor\(^\text{40}\) or administrator.\(^\text{41}\) On the other hand, our courts have held that certain parties do not have standing to object to a year’s support petition: a creditor of a beneficiary,\(^\text{42}\) a tort claimant who has not filed suit,\(^\text{43}\) and a city holding a paving lien.\(^\text{44}\)

\(^{34}\) See Chapter 2, Section 5.4.4.
\(^{42}\) McGahee v. McGahee, 204 Ga. 91 (1948).
Grounds of a caveat may include, but are not limited to: the petitioner is not the legal spouse or child of the decedent,\textsuperscript{45} lapse of time during which the surviving spouse has occupied the land,\textsuperscript{46} excessiveness of amount,\textsuperscript{47} inconsistent provisions of the will creating an estoppel,\textsuperscript{48} a valid contract waiving year's support,\textsuperscript{49} the 24-month limitation of action or other technical grounds relating to proper notice and citation.

8.2 Hearing and Determination

When an objection has been filed, the judge of the probate court should hold a hearing after notice to parties and counsel, at which both sides are given the opportunity to present evidence.

The petitioner carries the burden of proving that the amount requested is, in fact, the amount that is necessary for a year’s support.\textsuperscript{50} If the validity of the marriage is at issue, the spouse will bear the burden of proof as to the marriage to the decedent at the time of death.\textsuperscript{51}

The final determination of the amount and nature of the property to be awarded will be made by the judge of the probate court, unless the matter is tried before a jury in an Article 6 Probate Court. The amount awarded is to be sufficient to maintain for the surviving spouse and minor children the standard of living they enjoyed prior to the death of the decedent, after consideration of the following:

1. The support available from sources other than year's support, including but not limited to the principal of any separate estate and the income and earning capacity of the individual seeking an award of year’s support;
2. The solvency of the estate; and
3. Such other relevant criteria as the court deems equitable and proper.\textsuperscript{52}

The decisions of the appellate courts over the past decade have interpreted and applied those three considerations in such a varied manner that it is difficult to give precise guidance to judges of the probate court when deciding these cases. What guidance might be

\textsuperscript{46} Mashburn v. Mashburn, 64 Ga. App. 388 (1941).
\textsuperscript{50} O.C.G.A. §53-3-7(c).
\textsuperscript{52} O.C.G.A. §53-3-7.
given would come only from a summary of recent, important decisions which show the application of the criteria to the particular facts of each case.

**Hunter v. Hunter**, 256 Ga. App. 898 (2002) – An award of the residence of the decedent was held to be “clearly excessive” in that there was no evidence that the value of the property bore a reasonable relationship to the amount the spouse needs to support and maintain herself for 12 months. The court stated, “year’s support is not intended to pay the surviving spouse for the loss of the relationship or the personal sacrifices made during the marriage.”

**In re Estate of Battle**, 263 Ga. App. 73 (2003) – the court’s calculation of the award, which considered a lump sum death benefit to the spouse, was upheld when no transcript of the trial was included in the record.

**Allgood v. Allgood**, 263 Ga. App. 177 (2003) – spouse had received $126,000 from non-probate assets; she testified that she had been able to meet her expenses during the year after death without spending any of that amount, saying that she “didn’t go lacking in anything.” Court held that a judgment notwithstanding the verdict of a jury awarding the spouse additional property should have been granted. [A judgment notwithstanding the verdict, also known as j.n.o.v., may be granted when the verdict rendered by a jury is so contrary to the evidence that the judge trying the case rules that a different judgment should be entered.]

**Holland v. Holland**, 267 Ga. App. 251 (2004) – held that an award of year’s support is “transitional” in nature only and is not intended to compensate the surviving spouse for the death, support the spouse for many years to come, or provide a method for distributing the estate. The intent is to protect the family survivors from a reduction in their standard of living while the estate is being settled, at least for one year.


**Taylor v. Taylor**, 288 Ga. App. 334 (2007) – although evidence showed the spouse’s income and a decline in the couple’s standard of living after she suffered an injury, she failed

to present evidence of the income during the marriage, so the trial court had no basis upon which to measure the standard of living prior to decedent’s death.

Anderson v. Westmoreland, 286 Ga. App. 561 (2007) – court held that “where the surviving spouse’s income for the year following death exceeds the expenses shown for the year, the petition for year’s support must be denied.”

8.3 Support Pending Appeal

Although the statute makes a provision for support of the family by the personal representative of the estate pending an appeal of the year's support proceeding, there is no provision for such support when no personal representative has been appointed. Indeed, it is difficult to see how any such provision could be made, as there is no one legally authorized to take possession of the assets of the decedent or make any disposition of them.

8.4 Costs of Action

The costs of the year’s support proceedings are to be paid by the petitioner out of the fund set apart. It would appear logical that all other costs of setting apart a year’s support, such as any guardian-ad-litem fees, would also be paid out of such fund. If necessary, the judge of the probate court may issue a writ of fieri facias (fi.fa.) against the personal representative of the estate for the amount of such costs.

9. Certain Aspects of Year's Support Award

The judge of the probate court may award as a year’s support only property in which the deceased had an interest surviving death, and the judge can confer no better title than the decedent had. An attempted award of property no longer or never owned by the decedent is void.

Therefore, property in which the decedent’s interest passed by operation of law to someone else upon the death of the decedent cannot be awarded as year’s support. This is

54 O.C.G.A. §53-3-7(b).
55 O.C.G.A. §53-3-12(a). This Section actually refers to “the fees of the probate court,” without defining what is to be included in that amount.
56 O.C.G.A. §53-3-12(b).
because the award of year’s support is only from property of the estate of the decedent, and
the decedent’s interest ended with death. Examples would include: real property held by the
decedent and another as joint tenants with right of survivorship; insurance policies made
payable to a named beneficiary; accounts, including investment and retirement accounts, held
jointly with someone else or made payable to a named beneficiary upon the death of the
decedent; and any and all similar property in which the decedent’s interest does not survive
the decedent’s death.\textsuperscript{59}

Property which has previously been sold by the personal representative of the estate
under authority of a court order or under power in a will cannot be the subject of a
subsequent award of year’s support.\textsuperscript{60}

A judge of the probate court clearly has authority to award any property, real or
personal, in which the decedent had an interest located in any county in this state.\textsuperscript{61} Whether
or not an order awarding an interest in property outside the state of Georgia will be afforded
full faith and credit is uncertain.

The law now expressly contemplates that separate awards may be made to the spouse
and to the minor child(ren), whether or not the minor(s) is/are also children of the spouse.\textsuperscript{62}
That is to say that certain property may be awarded to the spouse, and certain other property
may be awarded to the children. It is not necessary that the court simply award all property
to the spouse and children together. For example, if a petition seeks an award of the
homeplace, two automobiles, and certain cash assets for a spouse and three minor children, it
may not be wise to have the automobiles titled in the names of the spouse and the children. It
might become difficult for the spouse to sell or trade an automobile titled jointly with the
children, and it would be costly to have to file a petition for leave to sell a used automobile.
The judge of the probate court might award the automobiles exclusively to the spouse, while
awarding everything else to the spouse and children jointly. Similarly, if the children were
from a different marriage, the judge might award cash to those children and award the other
property to the spouse.

\textsuperscript{60} O.C.G.A. §53-3-13.
\textsuperscript{61} O.C.G.A. §53-3-10.
\textsuperscript{62} O.C.G.A. §53-3-8.
Although anyone may petition for year's support on behalf of the decedent's minor children, the year's support can be set apart only to the surviving spouse and/or to the minor child(ren). When the award is solely of an interest in real property, there is usually no problem with the fact that the award has been made to someone not sui juris. There are provisions for the sale or encumbrance of real property which has been awarded to minor(s). See Section 14 below. However, when the award is in personal property, including cash or cash equivalents, awarded solely to the minor(s), a conservator may need to be appointed to manage, protect and control the property for the benefit of the minor(s), unless there is a natural guardian and the amount or value awarded is $15,000 or less. See Chapter 10, Section 2.

10. Title to Property Set Apart

Where property is awarded as a year's support for the surviving spouse alone, the spouse thereafter owns it in fee simple, without restriction as to use, encumbrance, or disposition.63 A surviving spouse to whom property has been awarded as a year's support may make a testamentary disposition of the unconsumed portion, provided it was set apart to such spouse alone.64

When the property is awarded for the joint benefit of the surviving spouse and minor children, the spouse and all children own it as tenants in common, share and share alike.65 However, the surviving spouse is entitled to control the property until it is consumed or until there are no longer any minor children and the spouse dies. Therefore, the children who are co-owners may not, even after attaining majority, force a partition of the property.66

The title to the property awarded as a year’s support is not to be administered as a part of the estate of the deceased spouse or parent.67 The foregoing notwithstanding, it may become necessary for the personal representative to secure assets which have been awarded as a year’s support in order to deliver them over. For example, stocks might have been awarded as year’s support, but the company or stock agent will not recognize the award of year’s support as sufficient authority to transfer the stock ownership. In such an event, the

63 O.C.G.A. §53-3-9(b).
65 O.C.G.A. §53-3-9(a).
67 O.C.G.A. §53-3-9(a).
personal representative will need either (1) to direct the transfer or (2) to liquidate the stock and pay the proceeds over to the spouse and/or guardian/conservator of the minor children.

11. **Certificate of Award of Real Property**

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

   1. Identify, in the manner provided in Code Section 53-3-5, those persons receiving the interest (the names and addresses of the spouse and/or minor children who are the beneficiaries of the award);
   2. Identify the interest received by each beneficiary of the award;
   3. Contain a sufficient legal description of the real property awarded; provided, when property in another or other counties was also awarded, the phrase "Also lands in __________ County(ies)" is sufficient to describe real property situated outside the county to which the certificate was sent;* and
   4. Contain a certification by the court that the information in the certificate is correct. 68

   [*NOTE: This oddly worded subsection means that, when real estate in more than one county has been awarded, a certificate may be filed in each county containing the legal description of the property in that county only but with a notation that property in another county or other counties was also awarded. This would avoid the necessity of filing for record one certificate containing all legal descriptions in each of the counties.]

   The certificate described above must be accompanied by the same fee required for the filing of deeds with the clerk of the superior court. The filing fee and any fee for the certificate may be taxed as costs to the estate, 69 but it might be a good practice to require a separate check or money order from the petitioner for the recording of each certificate. Some

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68 O.C.G.A. §53-3-11(a).
69 O.C.G.A. §53-3-11(b).
clerks will not record the certificate unless the form PT-61, required under Code Section 48-6-4, has been completed electronically and the printed certificate of such completion is provided at the time the certificate from the probate court is presented for recording. The better practice would be to require the petitioner or the petitioner’s attorney to complete the electronic form and to provide the probate court the certificate to be presented to the clerk of each superior court.

The clerk of any superior court receiving the certificate described above must file and record the certificate upon the deed records of that county, to be indexed as follows:

1. Grantor - name of decedent;
2. Grantee - name of individual or individuals to whom the award is made.\textsuperscript{70}

After recording, the certificate is returned to the probate court from which it was received, to be retained in the probate court's permanent file. The probate court is not required to record the certificate after its return but may choose to do so as proof of its recording by the clerk of the superior court.\textsuperscript{71}

12. **Nature of Interest in Property Set Apart**

The property set apart to the surviving spouse and minor children is intended for their joint support and maintenance. It continues after the expiration of the year and thereafter, so long as it lasts, to be subject to the support of the surviving spouse for life and for the children until their marriage or until they reach their majority.\textsuperscript{72} However, a minor's interest in property is not divested by his/her reaching majority.\textsuperscript{73}

Even though all minors have attained their majority, the surviving spouse may still have the entire interest sold for such spouse's maintenance and support under an order of the judge of the probate court.\textsuperscript{74}

Prior to the Revived Probate Code of 1998, the appellate courts limited certain actions of the surviving spouse with reference to property which had been awarded as year’s support in opinions issued long before 1998. It is uncertain whether these limitations still apply after January 1, 1998. The courts ruled that the surviving spouse: could not sell property set apart

\textsuperscript{70} O.C.G.A. §53-3-11(c).
\textsuperscript{71} O.C.G.A. §53-3-11(d).
\textsuperscript{72} Tribble v. Knight, 238 Ga. 84 (1976).
\textsuperscript{73} Id.
\textsuperscript{74} Tribble v. Knight, 238 Ga. 84 (1976).
as a year’s support for the family to pay the debts of the decedent,\textsuperscript{75} nor to pay the surviving spouse’s individual pre-existing debt,\textsuperscript{76} but can incur a debt for the support of the surviving spouse and minor children, either before or after the year's support is set aside, which may be enforced against property set aside.\textsuperscript{77}

13. **Priority of Year's Support**

13.1 **Debts of the Estate**

Generally speaking, the right of the surviving spouse and minor children to a year's support constitutes a first claim against the estate of the decedent, except when otherwise provided by law. The award is treated as a debt of the estate and is given priority over funeral expenses, costs of administration, expenses of the decedent’s last illness, unpaid taxes due the state or the United States, judgments and liens, and all other debts.\textsuperscript{78} Notwithstanding the foregoing provisions of Georgia law, federal law will control whether taxes due to the United States are subordinate to an award of year’s support.

13.2 **Taxes on Real Property**

Real property awarded as a year’s support is free from any taxes or liens for taxes accrued against the property for all years prior to the year of the death of the decedent, whether the entire title or only an equity of redemption\textsuperscript{79} is included in the year's support. Additionally, the petitioner may elect to have divested the real property taxes accrued in one of the following years:

1. The year of the decedent’s death;
2. The year in which the petition for a year’s support is filed; or
3. If the petition is filed in the year of the decedent’s death, the year following the filing of the petition.\textsuperscript{80}

\textsuperscript{75} Lunsford v. Kersey, 191 Ga. 738 (1941).
\textsuperscript{76} Id.
\textsuperscript{77} Anders v. First Nat'l Bank of Barnesville, 165 Ga. 682 (1928).
\textsuperscript{78} O.C.G.A. §§53-3-1(b) and 53-7-40.
\textsuperscript{80} O.C.G.A. §53-3-4.
Thus, if the property taxes have already been paid at the time of the death, the petitioner may still elect to have the taxes divested in a year following the death. Except as elected under this statute, real property set apart to the surviving spouse or minor children, or both, is not exempt from taxation accruing after the year's support has been awarded.

Hence, all taxes owed by the decedent prior to the date of death, together with one additional year, is divested by the award of the real property as a year’s support to a spouse and/or minor children of the decedent.

### 13.3 Judgments and Liens

The year's support award is superior to the lien of a judgment for alimony,\(^81\) a materialman's lien,\(^82\) and a prior recorded judgment.\(^83\) However, a year's support award is inferior to the lien of a vendor for the purchase price of land,\(^84\) a mortgage for the purchase price of personalty if it appears on the face of the mortgage,\(^85\) and the lien of a landlord for rent or supplies upon the crops made on the land in the year in which the rent accrued or the supplies were furnished.\(^86\) The year’s support award will be subordinate to a security interest (pledge or assignment) in stocks perfected prior to the award of the stock as a (or part of a) year’s support, but the year’s support award will be superior to such security interest if the award is made before the security interest is perfected.\(^87\)

### 14. Sale or Encumbrance of Year’s Support Property

When property has been set apart as a year's support for the joint benefit of the surviving spouse and a minor child(ren), a conveyance or encumbrance of the whole or any part thereof by the surviving spouse conveys or encumbers only the title and interest of the spouse and is binding and conclusive upon the spouse.\(^88\)

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82 Gleason v. Traynham & Ray, 111 Ga. 887 (1900).
84 O.C.G.A. §53-3-16.
85 O.C.G.A. §53-3-17.
86 O.C.G.A. §53-3-18.
88 O.C.G.A. §53-3-19(a).
However, a conveyance by the spouse will be binding and conclusive upon the child or children and persons claiming through and under them only when approved by the judge of the probate court of the county in which the year's support award was made. A child who becomes of age and *sui juris* may join with the surviving spouse in the execution of the conveyance or encumbrance.\(^{89}\)

To obtain the approval of the judge of the probate court the surviving spouse must file a petition stating the purposes of the proposed conveyance or encumbrance and:

1. Describe the property the spouse desires to convey or encumber;
2. The nature of the proposed conveyance or encumbrance and
3. The names, last known addresses, and ages of the children for whose benefit the year's support was set apart.\(^{90}\)

If the surviving spouse is not alive, such petition may be made by the guardian for any one or more of the children for whose benefit the year's support was set apart.

The judge of the probate court must set a date for a hearing on the petition and appoint a guardian-ad-litem to represent the minor children. Service upon or notice to the guardian-ad-litem constitutes service upon or notice to the party represented and no additional service upon or notice to such party is required.\(^{91}\)

Personal service must be made not less than ten days prior to the date set for hearing on each child for whose benefit the year's support was set aside who has attained age 18 at the time the petition is filed. If the spouse of the decedent does not know and cannot easily ascertain the addresses of any of the children, service must be made by publication once in the newspaper in which sheriff's sales for the county are advertised and posting a copy of the notice at the courthouse not less than ten days prior to the date set for such hearing. In addition to publication, the judge of the probate court must cause a copy of the notice to be sent by mail to the last known address of each child whose current address is unknown, not less than ten days prior to the date set for such hearing.

Objections, if any, must be made in writing.\(^{92}\)

\(^{89}\) O.C.G.A. §53-3-19(b).
\(^{90}\) O.C.G.A. §53-3-20.
\(^{91}\) O.C.G.A. §53-11-2(b).
\(^{92}\) O.C.G.A. §53-3-20.
This procedure places a responsibility upon the judge of the probate court to protect the interests of the minor(s). Therefore, in describing the “nature of the proposed sale or encumbrance,” the petitioner should give sufficient specifics about the transaction for the judge to determine the impact upon the minor(s) and the interest of the minor(s) in the property. If a sale is involved, the judge should require the appointment of a conservator to receive the portion of the net sales proceeds in accordance with the provisions of Chapter 3 of Title 29. The need of a conservator will depend upon whether there is a natural guardian who can receive an amount up to $15,000 for each minor child of the natural guardian. If an encumbrance of the property is proposed, including a refinancing of any existing loan, there should be evidence to show how the repayment of the loan is to be accomplished so that the minor's (minors’) interest in the property is not jeopardized.

Purchasers or lenders are not responsible for the proper use or application of the proceeds.\(^{93}\)

15. Appeal

The order making or denying, in whole or part, an award for year’s support is appealable in the same manner as other final judgments. The Court of Appeals has ruled that an appeal may be filed only by one having standing to do so, that is, someone having a direct interest in the estate of the decedent and/or in the property awarded.\(^{94}\)

\(^{93}\) O.C.G.A. §53-3-19(c).
Chapter 7
NO ADMINISTRATION NECESSARY
(DISPENSING WITH ADMINISTRATION)

The Revised
HANDBOOK FOR PROBATE
JUDGES OF GEORGIA
2010
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CHAPTER 7

NO ADMINISTRATION NECESSARY
(DISPENSING WITH ADMINISTRATION)

1. NO ADMINISTRATION, GENERALLY

It is not always necessary to have formal administration of an intestate estate, that is, to appoint a personal representative who will: gather and marshal the assets; liquidate assets if necessary; pursue claims in favor of or defend claims against the estate; pay all debts and expenses of administration; and distribute the remaining estate among the heirs in the proportions set by law. When there are no debts or when satisfactory arrangements have been made for all debts to be paid, the heirs of the decedent may, by unanimous action, agree upon a division and distribution of the assets of the estate.

Although Georgia law has contained a provision to that effect since 1883, there was no formal procedure for obtaining an order declaring that no administration is necessary until 1945. The procedure was created as a convenient and effective method of establishing a public record of the fact of such an agreement by means of a court order to give effect to the agreement, thereby permitting title to the assets of the estate to pass to the heirs in accordance with the agreement. The procedure is now set forth in and governed by Article 4 of Chapter 2 of Title 53.

There are, however, certain provisions of Georgia law which provide for the passage of title to certain types of property and/or the payment of certain funds without the necessity of a court order. These are discussed at the end of this Chapter.

1.1 When No Administration Necessary is not Appropriate

The procedure for obtaining an order declaring no administration necessary is not always appropriate and cannot be obtained in certain circumstances.

1.2 Decedent Died Testate

The heirs of a decedent may not ignore the will of the decedent. Intestacy is absolutely necessary before an order declaring no administration necessary may be entered. When there is a bona fide dispute about the validity of a will, there is a method by which
heirs and beneficiaries may agree upon a distribution contrary to the terms of a will. That process is discussed in Chapter 3, Section 5.8.4.

No administration necessary may never be granted in a testate estate.

1.3 Personal Representative Has Been Appointed in Georgia

A personal representative is charged with the duty of administering the estate. In order for a personal representative of an estate to be appointed, a petition had to have been filed alleging that administration of the estate was necessary; therefore, it cannot then be alleged that no administration is necessary.1 It is the duty of the administrator serving to fully administer the estate.

1.4 Insistence of a Creditor

Except by immediate payment in full, no creditor may be forced to consent to there being no administration of an estate. Creditors are entitled to payment and are under no obligation to accept someone other than the decedent as the obligor (debtor). See Section 2.3 below.

1.5 No Unanimous Consent of Heirs

There is no provision authorizing a majority of the heirs to force an agreement upon other heirs which results in a distribution of an estate other than in strict compliance with the rules of intestate inheritance.

Since unanimous agreement is necessary,2 an order declaring no administration is necessary can never be granted when there are unknown heirs.

2. Petition for Order Declaring No Administration Necessary [GPCSF 9]

When (1) there is an intestacy, (2) no personal representative has been appointed for the estate in Georgia, (3) all debts have been paid or all creditors have consented or withdrawn any objection, and (4) the heirs have unanimously agreed upon a division of the estate, any heir of the decedent may file a petition requesting an order that no administration

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1 O.C.G.A. §53-2-40.
2 O.C.G.A. §53-2-40(b).
is necessary. The petition is to be filed in the probate court of the county of the decedent's domicile, if a domiciliary of this state, or in any county where real property in which the decedent had an interest is located, if the decedent was not domiciled in this state.

2.1 Contents of the Petition

The petition must be verified by the oath of the petitioner,3 and set forth the following:

1. The name and domicile of the decedent and the fact of death intestate.

2. The names, ages (or majority status, if age 18 or over), and domiciles of all of the heirs. (See provisions below concerning any heir who has died since the decedent or is alive but not sui juris.)

3. The description of all real and personal property in Georgia which was owned by the decedent at the time of death.

4. That no personal representative has been appointed in Georgia.

5. That the estate owes no debts, or that all the creditors have consented to the order, or that the creditors not consenting will be served with notice.

6. That the heirs have reached a unanimous, written agreement for division of the estate amicably among themselves.

7. A request that an order declaring that no administration of the estate is necessary be entered.4

The agreement of the heirs providing for the division of the estate must be in writing and be signed by or behalf of each heir. The signatures of the heirs must be attested to by a clerk of the probate court or be notarized. The agreement of any heir who is not sui juris may be given by a guardian appointed under Chapter 11 of Title 53. The personal representative of an heir who died after the decedent's death may consent to the order on behalf of that heir.

The original of the agreement must be attached to the petition.5

It is possible that an heir of the decedent may have died intestate prior to the execution of the agreement and no personal representative of that heir’s estate has been appointed. If it is anticipated that no personal representative will be appointed, presumably,

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5 Id.
the heirs of the deceased heir, who will inherit the intestate estate of the deceased heir should be able to sign an agreement covering the disposition of the deceased heir’s interest in the decedent’s estate. However, if an heir of the decedent died testate, the disposition of the deceased heir’s interest in the decedent’s estate would be governed by the will. The appointment of a personal representative of the estate of the deceased heir will then be necessary, and the personal representative will enter into the agreement on behalf of the beneficiaries under the will.

2.2 Citation

If the petition discloses that there are creditors of the estate who have not consented to the entry of the order, the judge of the probate court issues a citation giving notice to those creditors to file any objection in writing by a designated date. Creditors are to be served in accordance with Chapter 11 of Title 53.

If there are creditors with unknown addresses, the notice is by publication once each week for four weeks.

If there are no creditors whose addresses are unknown, no publication is necessary. However, the judge may choose to order publication, as was required under the Pre-1998 Probate Code. Authority to do this is given by Code Section 53-11-5. If ordered, publication one time, as required under the prior law, should be considered sufficient. Publication of notice might alert creditors who have not been listed and may alert purported heirs who have not been listed.

2.3 Objections

If any creditor files an objection to the proceeding and does not withdraw that objection, whether the debt is due or not, the judge of the probate court must decline to grant the order declaring no administration necessary. The judge of the probate court has no authority to investigate whether a claim is a valid one. The mere fact that an objection is filed by a creditor and not withdrawn deprives the probate court of jurisdiction to pass an order declaring administration unnecessary. The only alternative at this point would be for

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6 O.C.G.A. §53-2-41(a).
8 O.C.G.A. §53-11-4(b).
9 O.C.G.A. §53-2-41(b).
an heir to file an application for administration.

However, if an order declaring no administration necessary has been granted, any creditor of the decedent may sue the heirs for the unsatisfied debt and recover from them to the extent of the value of property received by the heirs.10

The Code doesn’t seem to contemplate that an objection might be filed by someone claiming to be an heir but who has not joined in the agreement. For example, a person might file an objection claiming to be the common law spouse of the decedent, a child of the decedent born out of wedlock, a half sibling of the decedent who was not survived by issue or parents, etc. The Code Section states that the judge of the probate court “shall ascertain the heirs of the decedent.”11 Therefore, judge would be obliged to hear the objection and determine whether the claimant is, in fact, an omitted heir.

2.4 Hearing and Determination

If no objection is filed, or all objections are withdrawn, the judge of the probate court may grant the petition without holding a hearing, provided the citation stated that it might be granted without a hearing.12 However, before granting the petition, the judge should:

1. Ascertain the heirs of the decedent, and whether they are all of legal age and *sui juris* or, if not, are represented by a guardian or personal representative.

2. Determine that the estate of the decedent owes no debts or that all creditors have either filed no objection after service, consented or withdrawn any objection.

3. Determine whether there has been a personal representative of the estate appointed in Georgia.

4. Determine whether there is a properly executed and attested agreement among all the heirs for a distribution of the estate among themselves.

5. Determine that the decedent died intestate.13

If all of these factors are established by the petitioner in the sworn petition, and there is nothing to the contrary in the court's records, the judge enters an order declaring that no

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10 O.C.G.A. §53-4-42.  
11 O.C.G.A. §53-41(c).  
12 O.C.G.A. §53-11-9(a).  
13 O.C.G.A. §53-2-41(c). This Code section does not explicitly require a finding as to each of the items mentioned in the text, but the ones not mentioned in this Code section are implied from the requirements stated in Code Section 53-2-40.
administration of the estate is necessary. If those determinations cannot be made satisfactorily from the petition, the judge should set a hearing on the petition. This would be an uncontested hearing as described in Chapter 2.

If a person claiming to be an heir has filed an objection, a contested hearing will be necessary. In this case, all persons named as heirs in the petition and caveat should be given notice of the time and date of the hearing. If the court finds that the alleged heir is not an heir, an order denying the objection and granting the order declaring no administration is necessary is entered. The alleged heir would, of course, have the right to appeal as with any other final judgment in probate court.

If the court finds that the alleged heir is an heir, unless that heir also agrees with the others as to a division of the estate, an order declaring no administration necessary cannot be entered. However, an order should be entered declaring the status of the alleged heir as an heir, just as if a petition to determine heirs had been filed, which may be appealed by the other heirs as with any other final judgment in probate court.

2.4.1 Issuance of the Order

The issuance of an order finding that no administration is necessary confirms the vesting of title to the decedent's property in the heirs either in the amounts and proportions described in the laws of intestacy, or, if different, in the manner described in the agreement.\textsuperscript{14} If real property is itemized in the petition as being owned by the decedent, the order must be dated and must set forth:

1. The name and address of the decedent;
2. The name and address of all heirs who take title to or an interest in real property pursuant to the order; and
3. The interest in real property acquired by each heir.\textsuperscript{15}

The effect of a proceeding to dispense with administration is to protect a purchaser or lender acting in good faith in reliance upon the order in dealing with the heirs. In this case, the property of the decedent is discharged from claims, except as to such claims, liens, judgments, security deeds, mortgages, or encumbrances, as have been recorded or filed for record so as to constitute legal notice at the time of the conveyance or encumbrance of the

\textsuperscript{14} O.C.G.A. §53-2-41(d).
\textsuperscript{15} O.C.G.A. §53-2-40(d). The inclusion of these elements in the order becomes necessary because of the recording requirements in Section 2.4.2.
property by the heirs.\textsuperscript{16} Such a proceeding does not affect liens for taxes or liens arising under the bonds of public officers.\textsuperscript{17}

There is no authority under these Code Sections for the judge of the probate court to make any further orders or declarations regarding the estate of the decedent, such as directing taxing authorities to make transfers on their records or directing persons in possession of property of the estate to deliver it over to the heirs.

As stated above, if an order declaring no administration necessary has been granted, any creditor of the decedent whose debt was not paid may sue the heirs for the unsatisfied debt and recover from them to the extent of the value of property received by the heirs.\textsuperscript{18}

\textbf{2.4.2 Recording of Certified Copy of Order Concerning Real Property}

In any case involving real property in which the decedent owned any interest, within 30 days of the granting of the petition, the judge of the probate court shall cause a certified copy of the order declaring no administration necessary to be recorded on the deed records in each county in Georgia in which real property is located. The elements which must be contained in the order, as set forth above, must be shown in the certified copy to be recorded. The filing and recording fees for compliance with this provision are to be taxed as costs to the estate.\textsuperscript{19}

\textbf{3. Other Instances When Administration May Be Unnecessary}

\textit{(Assets which may be accessed without court intervention/order being necessary)}

Provisions under several different statutes permit the disposition of, access to, or transfer of property of certain types or under certain circumstances without administration of the estate and without the entry of an order declaring no administration necessary. The most common are discussed below.

\textbf{NOTE:} With exception of the transfer of a title certificate to a motor vehicle by a personal representative, the probate court is \textbf{NOT} involved in any of the processes discussed below.

\textsuperscript{16} O.C.G.A. §53-2-41(e).
\textsuperscript{17} O.C.G.A. §53-2-41(f).
\textsuperscript{18} O.C.G.A. §53-4-42.
\textsuperscript{19} O.C.G.A. §53-2-41(d).
4.1 Funds Under $10,000.00

[NOTE: The affidavits discussed in this Section are to be provided by the financial institutions, not by the probate courts. A judge of the probate court and/or staff should not participate in certifying any of the information set forth in the affidavits and should take no action which might be construed as making any such determinations. Except in connection with a proceeding properly filed in the court, with notice as required, the judge of the probate court has no authority or jurisdiction to declare the status of purported heirs or next of kin. It is the opinion of the author that a judge of the probate court and staff should not attest or notarize the affidavits since that might be construed as some manner of endorsement of the truth of the allegations.]

There are several provisions of Georgia law which concern funds of a decedent which amount to not more than $10,000.00. First is the situation in which the funds are already on deposit in a financial institution in the name of the decedent, and the decedent dies intestate. The institution is authorized to pay up to $10,000.00 to the surviving spouse or, if there is no surviving spouse to other relatives of the decedent in the following order of priority: the children, pro rata; if none, the father and mother, pro rata; if no parent living, the brothers and sisters, pro rata. Financial institutions will require the claimant(s) to complete an affidavit establishing the required facts. If no such application for the funds is made within 90 days after the death of the depositor, the financial institution may directly apply up to $10,000.00 in payment of the funeral expenses and expenses of last illness of the decedent, upon the presentation to the institution of itemized statements and affidavits from the providers of such services. Authorized claims are paid in the order received.

Second is the situation in which the decedent dies intestate, and some person is in possession of funds which do not exceed $10,000.00. In such a situation, the person having possession of those funds must deposit those funds into a savings account in the name of the decedent. Then, the same procedure discussed above is followed as if the decedent had deposited the funds.

Third is the situation in which there are checks or other instruments payable to an intestate decedent. The financial institution on which the check or instrument is drawn in the

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20 O.C.G.A. §7-1-239(a).
21 O.C.G.A. §7-1-239(g).
22 O.C.G.A. §7-1-239(b).
23 O.C.G.A. §7-1-239(e).
amount of $10,000.00 or less may redeem such check or instrument and pay the proceeds to the persons named above, in the same order. Application for such redemption is made by affidavit establishing the required facts, in the same manner as in the first situation. If the instrument is payable to more than one person, this procedure may be utilized only if the instrument has been endorsed by each payee other than the decedent.

The above provisions offer a simple and expeditious method of obtaining funds which may be needed by the family immediately. There is no limit as to the number of accounts (although there may be a $10,000.00 per institution limit) or checks which may be handled through this procedure. Payment in accordance with the statute relieves the financial institution of further liability. However, nothing in these Code Sections relieves the payee of such funds from liability for payment of debts of the decedent or of complying with the laws of intestacy or any will which subsequently is probated.

4.2 Death in Hospital or Nursing Home

Whenever any person dies in a hospital licensed under Chapter 7 of Title 31 of the Code or in any federal hospital in this state, or in any nursing home in this state, the hospital or nursing home is authorized, but not required, to transfer possession of any property, tangible or intangible, belonging to a patient to the person designated in writing by the patient upon admission. If the patient made no such designation, such property may be delivered to the following persons in this order of priority: the surviving spouse; if no spouse, any adult child of the patient; any person acting in loco parentis (in the manner of a parent) of any minor child of the patient; if no spouse or children, to either parent of the patient; if none of the above, any brother or sister of the patient; and if none of the above, the person who has assumed responsibility for the burial of the patient. There is no limit on amount or value, and there is no requirement of intestacy.

Any person who receives property in accordance with the preceding paragraph will be required to transfer the property in conformity with the laws of intestacy or a will or other instrument.

24 O.C.G.A. §§7-1-239.1(a), 7-1-239.1(e).
25 O.C.G.A. §7-1-239.1(b).
26 O.C.G.A. §§7-1-239(c), 7-1-239.1(c).
27 O.C.G.A. §31-7-13(a).
28 O.C.G.A. §31-7-13(d).
4.3 Income Tax Refunds

Any federal or Georgia income tax refund due to a person who is deceased at the time the refund is to be made becomes the sole and separate property of the decedent's surviving spouse, if any, irrespective of whether the decedent filed a joint or separate income tax return. There is, however, a limit of $2,500, presumably as to each of the federal and the state refunds. The refund directly to the surviving spouse operates as a complete acquittal and discharge to the United States or this state of liability.\(^{29}\)

The above refunds are authorized to be made without the necessity of administration of the estate of the decedent, or obtaining an order that no administration is necessary, or appointing a personal representative for the surviving spouse.\(^{30}\)

4.4 Motor Vehicles

If a decedent dies leaving as the sole asset an unencumbered motor vehicle, the state revenue commissioner is authorized to issue a new certificate of title for the vehicle to the person designated in the will of the decedent to receive the motor vehicle, upon application by such person accompanied by the required fee, the last certificate of title, if available, and an affidavit by the applicant stating: that the vehicle was owned by the decedent, is the sole asset and is not encumbered; that the applicant is entitled under the will to receive title to the vehicle; that no application for administration of the estate or probate of the will is to be made; that the estate is not indebted; and that the surviving spouse, if any, and the other heirs, if any, are sui juris and have amicably agreed that title to the vehicle is to be issued to the applicant.\(^{31}\) The affidavit should be made on Department of Revenue Form T-20, which requires that the form be accompanied by a copy of the will and a certified copy of the death certificate. See Appendix 4-1 for Form T-20.\(^{32}\)

In all other cases where title is in the name of the deceased, the state revenue commissioner is authorized to issue a new certificate of title for the vehicle to the applicant upon receipt the required fee, the last certificate of title, if available, together with: a certified copy of a will or Letters of Administration; a certified copy of an order awarding the motor vehicle to the applicant as a year's support; or an affidavit that no administration is to be had

\(^{29}\) O.C.G.A. §53-1-6.

\(^{30}\) Id.

\(^{31}\) O.C.G.A. §40-3-34(e)(1).

\(^{32}\) This form may be completed online and printed at http://motor. etax.dor. ga.gov/forms/motor.aspx.
on the estate, that the heirs have amicably agreed that the motor vehicle shall go to the applicant, and that the estate is not indebted. The affidavit should be made on Department of Revenue Form T-20, which requires that the applicant also submit a certified copy of the death certificate. This Code Section states that a certified copy of the will is necessary, but, in practice, certified copies of Letters Testamentary are generally accepted, it being assumed that the executor is making the transfer to the proper person.

4.5 Outstanding Wages

If an employer owes wages to a deceased employee, the employer may pay up to $2,500.00 (or an unlimited amount, if the employer is the state) to a beneficiary who was designated by the employee in writing to receive such sums. If the beneficiary is not sui juris, the amount is paid to the beneficiary's legal guardian (conservator). If no beneficiary has been named, the employer may pay the amount to the employee's surviving spouse, if any, or, if there is no surviving spouse, to the guardian (conservator) of the employee's minor children, without any administration of the employee's estate. With regard to the payments authorized to be paid to the “guardian” above, this probably should mean to the conservator, if a conservator has been appointed, since it is the conservator who is entitled to receive property for the minor or ward. A natural guardian of a minor may receive up to $15,000 for the minor. See Chapter 10 on Guardianship and Conservatorship of Minors. Funds that are payable under this statute are exempt from garnishment.

It is the joint responsibility of the employer and the employee to keep current the name and address of the employee's spouse or, if none, the employee's minor children. Also, if the employee decides to select a different beneficiary, the selection must be in a signed writing and the employer must notify the employee that the sums may be paid out to the selected beneficiary in the event of the employee's death. However, the employer is not subject to any penalty for failure to inform the employee of this option, to request the employee to keep the information current, or to pay sums over to the proper party. If the employer does pay wages to the proper party, the employer is released from all claims to such wages by the employee's estate, the creditors of the employee's estate, the employee's spouse or minor children, or any other person.

33 O.C.G.A. §40-3-34(d).
34 O.C.G.A. §34-7-4.
35 Id.
4.6 Transfer on Death Securities

Georgia has adopted the Uniform Transfer on Death Security Registration Act, although its provisions are strangely located in Chapter 5 of Title 53 which governs probate proceedings. This Act provides that upon the death of a sole owner or the last to die of all multiple owners, ownership of securities registered in “beneficiary form” passes to the beneficiary or beneficiaries who survive all owners. On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in “beneficiary form” may be reregistered in the name of the beneficiary or beneficiaries who survive the death of all owners. A security is registered in “beneficiary form” when the registration includes a designation of a beneficiary to take the ownership at the death of the owner or the deaths of all multiple owners. Registration in beneficiary form may be shown by the words ‘transfer on death’ (or the abbreviation “TOD”) or by the words “pay on death” (or the abbreviation “POD”) after the name of the registered owner and before the name of a beneficiary.

4.7 Intestate’s Real Property

See Chapter 5, Section 1.2.1 on the passage of title to real property owned by a decedent.

36 O.C.G.A. §53-5-60, et seq.
38 O.C.G.A. §53-5-64.
APPENDIX TO CHAPTER 7
NO ADMINISTRATION NECESSARY

A7-1. DOR Form T-20.................................................................7-14

Important Notice

Several sample orders and forms have been included in this Appendix. These sample orders and forms have not been officially sanctioned by the Georgia Council of Probate Court Judges. They have, unless otherwise noted, been prepared by the author. They are provided solely as samples. They should be modified or adapted to the specific court for the specific purpose, with any unnecessary material being deleted and any additional material being added.

William J. Self, II
APPENDIX A7-1  
Department of Revenue  
Motor Vehicle Division  

**Affidavit of Inheritance of a Motor Vehicle**  

State of Georgia, __________________________ County  

(Name of County)  

Except for the signature, this form must be typed, electronically completed and printed; or printed legibly by-hand in blue or black ink and signed. All applicable fields on this form must be completed without alterations.

Personally appeared before me, the undersigned person, who first being duly sworn, certifies that the deceased, ____________________________________________,  

(Full Legal Name of the Deceased)  

who at the time of his or her death was the owner of the motor vehicle described below, left no will; no application for the administration of the estate of the deceased is to be had; the estate is not indebted; and the surviving spouse, if any, and the heirs, if any, have amicably agreed among themselves upon a division of the estate that the certificate of title for said vehicle be issued to the person named below.

<table>
<thead>
<tr>
<th>Applicant Information</th>
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</thead>
<tbody>
<tr>
<td>Applicant’s/Inheritor’s Full Legal Name</td>
</tr>
<tr>
<td>Street Address</td>
</tr>
<tr>
<td>City, State &amp; Zip</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Vehicle Information</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vehicle’s Year Model &amp; Make</td>
</tr>
<tr>
<td>Vehicle’s Current Title Number</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Applicant’s Printed Name &amp; Signature</th>
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</thead>
<tbody>
<tr>
<td>(Applicant’s Printed Name)</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Notarization</th>
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</thead>
<tbody>
<tr>
<td>Sworn to and subscribed before me this day of ,</td>
</tr>
<tr>
<td>(Day) (Month) (Year)</td>
</tr>
<tr>
<td>(Notary Public’s Signature &amp; Notary Seal or Stamp)</td>
</tr>
</tbody>
</table>

**Important:** If the deceased left a Will that is not to be probated, a legible copy of the Will must accompany this completed form. A certified copy of the deceased’s death certificate and the vehicle’s original valid title, issued in the deceased name or properly assigned to the deceased, must also accompany this form. If the vehicle is currently titled in Georgia in the deceased’s name, the title should be submitted if it is available. All liens and security interests shown on the Motor Vehicle Division’s records must be released.

**Note:** Any correction or alteration will void this form.
Chapter 8

DECENT AND DISTRIBUTION, RULES OF INHERITANCE, AND JUDICIAL DETERMINATION OF HEIRS

The Revised
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Chapter 8
RULES OF INHERITANCE AND
JUDICIAL DETERMINATION OF HEIRS

1. Rules of Inheritance, Generally

The heirs of a decedent are those individuals who will inherit the decedent's property in the event that property is not disposed of by will. The laws of descent and distribution set forth the rules for determining the heirs of a decedent. See Section 2, below. As a legal term, the word "heir" has a specific meaning which may or may not match up to the use of the word in common parlance. Who the heirs of a decedent are is often the subject of confusion.

1.1 Time at which Heirs are Determined

A decedent's heirs are fixed at the moment of death and the complete list of the heirs never changes. If an heir dies, the successors in interest of that heir are not "heirs" of the first decedent, even though they may be entitled to the share of the deceased heir. This is true even if they would have been heirs of the first decedent if the "deceased heir" had predeceased the first decedent. This may best be understood by an example: a man dies survived by a wife and three children. At the moment of his death, his heirs are determined, and those four people are his heirs and his only heirs; that will never change. Should one of the children die after the man, the spouse, children or beneficiaries under a will may receive the share of the deceased child, but they do not become heirs of the decedent. This, of course, differs from when the child has predeceased the parent. In the example, had a child predeceased the man, the heirs of the child are heirs of the decedent.

1.2 Need for Determination of Heirs

In almost every proceeding in probate courts, at one time or another, identification of the heirs of the decedent is necessary. Because the heirs of a decedent inherit the estate by operation of law, the heirs are entitled to notice of any proceeding which might adversely affect that right of inheritance, whether or not it actually does alter that right. Therefore, in

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1 O.C.G.A. §53-1-2(9).
every proceeding to probate an alleged will in solemn form, every proceeding for the appointment of an administrator of an estate, every proceeding to establish the death of a missing person, and every proceeding for a year’s support (except, perhaps, when a personal representative has already been appointed), the heirs of the decedent will be entitled to notice and an opportunity to be heard. Proceedings to probate a will in common form and for the appointment of a temporary administrator do not require notice to the heirs, but the heirs must be identified and listed in the petitions.

1.3 Distinguishing Heirs and Beneficiaries and “Heirs of Heirs”

The terms “heirs” and “beneficiaries” are not legally synonymous and should not be used as though they are. As used in the context of probate proceedings, “beneficiaries” are those persons or entities who/which receive some devise or bequest (some “benefit”) under the lawful will of a decedent. Heirs may be beneficiaries and vice versa, but the two categories are entirely separate. This difference is analogous to the difference between an executor and an administrator; the same person might be one of each of those, but the two positions are not the same.

Because of the requirement of notice to the heirs of a decedent, additional confusion arises when an heir of the decedent has died after the decedent. Obviously, notice cannot be served upon the deceased heir, and some method of substituted service becomes necessary. If a personal representative has been appointed over the estate of the deceased heir, the substituted notice will be accomplished by service on the personal representative. However, when there has been no personal representative appointed for the estate of the deceased heir, substituted notice is accomplished by service on the heirs of the deceased heir. In practice, the “heirs of the heir” are shown in the probate petitions as heirs of the original decedent. This is technically not correct, but, when no personal representative has been appointed for the estate of the deceased heir, it is really of no consequence because it accomplishes the necessary purpose.

1.4 Distinguishing Descendents and Ancestors

In applying the rules of inheritance, it is often necessary to distinguish “descendants” and “ancestors.” The term “ancestor” is used in Code Section 53-2-1 but is not defined. The
term is generally accepted to refer to one from whom a person descended.\(^2\) “Descendents” is defined in the Code as “the lineal descendents of an individual including those individuals who are treated as lineal descendents by virtue of adoption.”\(^3\) In other words, when moving up the chain of inheritance, the persons are “ancestors,” and when moving down the chain, the persons are “descendents.” A person descends from his/her ancestors (parents, grandparents, great grandparents), and those who come after and through him/her are his/her descendents (children, grandchildren, great grandchildren).

1.5 Renunciation of Succession (Renouncing an Interest)

The probate courts have no real involvement with the process or effect of renunciation, except as may be necessary in connection with proceedings concerning the administration of an estate, especially interim and final settlements. Judges in the Article 6 Probate Courts might be called upon to adjudicate the effect of a renunciation in proceedings for construction of a will.

Any person\(^4\) to whom an interest in property\(^5\) is transferred or who succeeds to property by contract or by operation of law may renounce the property in whole or in part as provided in Code Section 53-1-20. A person may renounce even if a spendthrift\(^6\) or similar restriction applies to the property renounced. A person who has accepted property or any of its benefits may not renounce the property.\(^7\)

A renunciation must be made by a written instrument that describes the renounced property, declares the renunciation and the extent of it, and is signed by the person making the renunciation. The writing must be received by the transferor of the property, his/her legal representative, or other holder of title to the property not later than the date which is nine

\(^3\) O.C.G.A. §53-1-2(6).
\(^4\) Persons who may renounce include fiduciaries acting on behalf of an individual, such as personal representatives, trustees, conservators, or guardians, as well as duly authorized attorneys in fact, whether acting on behalf of an individual or fiduciary. O.C.G.A. §53-1-20(b).
\(^5\) For purposes of this section, the term “property” includes any interest in property and any power over or right with respect to the property. O.C.G.A. §53-1-20(a).
\(^7\) O.C.G.A. §53-1-20.
months after the later of: (1) the date of the transfer; or (2) the day on which the person making the renunciation reaches the age of 21. However, any renunciation that is otherwise valid which fails to meet the requirements of describing the property and/or the extent of the renunciation or is not delivered over to the transferor will operate as a transfer of the property to those persons who would have received it had the renunciation met those requirements.

The written renunciation may be filed in the probate court of the county in which any proceedings concerning the transferor's estate are pending or in which they could be commenced. When so filed, the writing will be conclusively presumed to have been received by the personal representative of the estate not later than the date of such filing, but earlier receipt may be shown. In the case of real property, it may also be recorded in the real property records of the county in which the real property is located.

Except as otherwise provided by the will or other governing instrument, a renunciation shall cause the renounced property to pass as if the person renouncing had predeceased the decedent or, in the case of property passing upon exercise of a power of appointment, as if the person renouncing had predeceased the holder of the power, even if the acceleration of a contingent remainder or other interest results. A will or other governing instrument may otherwise provide expressly or by implication, but the fact that a remainder or other future interest following a renounced interest is conditioned upon surviving the holder of such renounced interest shall not, without more, be sufficient to indicate that such conditioned interest should not accelerate by reason of such renunciation. Notwithstanding the foregoing, for purposes of decent and distribution, any individual renouncing who is the only sibling or the only aunt or uncle surviving the decedent shall not be deemed to have predeceased the decedent. In other words, the property or interest would pass to the heirs of the sibling, aunt or uncle, as though the person had renounced after receipt of the property.

Occasionally, the person renouncing will express an intent or desire, in the writing, that the property pass to certain persons. Such an expression will have no legal effect, unless the renunciation is declared to be condition on that intent or desire. In other words, the person renouncing cannot direct the manner of passing of the property; however, a person may state that if the expressed intent or desire is not the result of the renunciation, the renunciation will be considered void or withdrawn.

Renounced property that is the subject of an attempted outright gift shall be treated as
A person may also renounce a power over property given in a will or other instrument, in which case, the property shall pass as if the power had not been created with respect to the person renouncing the power.

In every case, a renunciation relates back for all purposes to the applicable date among the following:
(1) The date of death of the decedent;
(2) The date of the death of the holder of the power of appointment;
(3) The date the gift was attempted; or
(4) The date the power was created.

The Code Section does not abridge the right of any person to transfer or renounce any property under any other statute or common law.

Nothing in the Code Section alters the duties of any fiduciary to act in the best interests of the person the fiduciary represents; further it does not limit the power granted by the Code Section to a fiduciary to renounce property.\textsuperscript{8}

\textbf{1.6 Heirs Determination Sheet}

A very useful tool was developed many years ago in the Probate Court of Fulton County. If this sheet is completed, carefully following the instructions, the identification of the heirs of any decedent is easily accomplished, except when there are persons whose names are unknown or when it is unknown whether persons in the lines of inheritance are alive or deceased and/or survived by descendents. \textit{See Appendix A8-1 for the Heirs Determination Sheet.}

\textbf{2. Rules of Inheritance}

\textbf{2.1 Descent and Distribution}

The rules which determine who are the heirs of a decedent are as follows:

1. \textbf{Spouse Only:} If a decedent is survived by a spouse but no children or
descendants of children, the spouse is the sole heir.\(^9\) In such a case, it does not matter that the parties are separated and have lived apart for some length of time, since the status as a spouse has not changed.\(^10\) However, when a divorce action is pending at the time of the decedent’s death, the parties have entered into a separation agreement which settles all issues of alimony, and the agreement has been made the order of the court in which the divorce proceedings are pending, the surviving spouse will not be allowed to take as an heir.\(^11\)

2. **Spouse and Children/Descendants:** If the decedent is survived by a spouse and by children or other descendants, the surviving spouse shares equally with the children, with the descendants of a deceased child taking that child's share; provided, however, that the spouse's share is never less than one-third of the estate. The surviving spouse and children take *per capita* but the descendants of the children take *per stirpes*.\(^12\) See Section 3.1 below. Therefore, a spouse and two children as the sole heirs take 1/3 each; however, if there is a spouse and four children, the spouse takes 1/3 and the four children share 2/3 equally.

3. **Children and No Spouse:** If there is no surviving spouse, the decedent's children inherit equally, with the descendants of any child who died before the decedent taking that child's share *per stirpes*.\(^13\) Therefore, the only four children each take ¼; if one of the four had predeceased the decedent, the deceased child’s children (grandchildren of the decedent) equally share that child’s ¼. Furthermore, if a grandchild is deceased, his/her children would take the share of the decedent’s grandchild.

4. **No Spouse or Descendants:** If the decedent leaves no surviving spouse or

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\(^9\) O.C.G.A. §53-2-1(c)(1).  
\(^12\) O.C.G.A. §53-2-1(c)(1).  
\(^13\) O.C.G.A. §53-2-1(b)(3).
descendants, the surviving parents of the decedent share the decedent's estate equally. If only one parent survives, that parent inherits the entire estate.  

See Section 2.2 below on disinheritance of certain parents.

5. **No Spouse, Descendants, or Parents:** Next, the brothers and sisters of the decedent, of whole or half-blood, share the decedent's estate equally, with the descendants of deceased siblings taking *per stirpes* in the place of the deceased siblings. However, if all the siblings are in fact dead at the time of the decedent's death (and not merely treated as dead because of a renunciation filed under Code Section 53-1-20), then the nephews and nieces of the decedent share the decedent’s estate equally, with the descendants of any deceased nephew or niece taking *per stirpes* in the place of the nephew or niece. Therefore, if a decedent had five siblings, one of whom is deceased, leaving three children (nieces or nephews of the decedent), the four surviving siblings each take 1/5, and the three children of the deceased sibling share 1/5 equally. If all five of the siblings had predeceased the decedent leaving a total of fourteen children (nieces and nephews of the decedent), the nieces and nephews each inherit 1/14, with the share of any deceased niece or nephew taking that share.

**No Spouse, Descendants, Parents or Siblings:** The following subsections apply in order when there is no spouse, descendants, parents, siblings, or descendants of siblings:

6. Next, that is if there are no persons in the preceding categories, the decedent's surviving grandparents, both *maternal* and *paternal*, share the decedent’s estate equally. Only the grandparents surviving share the estate, so that, if three of the decedent’s grandparents predeceased the decedent, the one

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15 O.C.G.A. §53-2-1(b)(5).
16 O.C.G.A. §53-2-1(b)(6).
surviving grandparent inherits the entire estate.

7. Next, that is if there are no persons in the preceding categories, the surviving uncles and aunts, both maternal and paternal, share the decedent’s estate equally, with the children (not descendents) of any deceased uncle or aunt (first cousins of the decedent) inheriting in the place of their parents. However, if all the uncles and aunts are in fact dead at the time of the decedent's death (and not merely treated as dead because of a renunciation filed under Code Section 53-1-20), then the surviving first cousins of the decedent share the decedent’s estate equally. Note, that, at this level, there is no per stirpes passing to children of deceased cousins; only the surviving first cousins inherit.

8. The more remote degrees of kinship are determined by counting the steps from the claimant to the closest common ancestor of the claimant and the decedent and from the ancestor to the decedent. The sum of the two chains is the degree of kinship and the surviving relatives with the lowest sum are in the nearest degree and share equally.

2.2 Disinheritance of a Parent who has Abandoned a Minor Child

Except as provided in Code Sections 19-7-1 and 51-4-4 for the right of recovery for the wrongful death of a child, when a minor child dies intestate, a parent who willfully abandoned his/her minor child and has maintained such abandonment loses all right to any intestate inheritance of the minor's estate and has no to administer the minor's estate. A parent who has been deprived of the custody of his/her minor child under an order of a court of competent jurisdiction and who has substantially complied with the support requirements of the order shall not be deemed to have abandoned the minor for purposes of inheritance.

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17 O.C.G.A. §53-2-1(b)(7).  
18 O.C.G.A. §53-2-1(b)(8).
When abandonment is alleged, the moving party shall file a motion with the probate court requesting the judge to determine the issue of abandonment. All parties\(^9\) to such a motion shall be served in accordance with Chapter 11 of Title 53. If a parent cannot be personally served and the parent’s interest in an estate is subject to forfeiture pursuant to this provision of the law, the judge shall appoint a guardian-ad-litem for the parent. If a party cannot be personally served, the citation shall also be published in the legal organ in the county where the party was last known to reside.\(^{20}\)

In the event that a parent is disqualified from taking a distributive share in the estate of a decedent under this provision, the estate of the minor shall be distributed as though that parent had predeceased the decedent.\(^{21}\)

For purposes of this provision, the term: (1) abandonment means that a parent of a minor child, without justifiable cause, fails to communicate with the minor child, care for the minor child, and provide for the minor child’s support as required by law or judicial decree for a period of at least one year immediately prior to the date of the death of the minor; (2) abandonment means the act of abandoning; and Minor child means a person who is less than 18 years of age.\(^{22}\)

3. Special Rules of Interpretation

3.1 Per Capita vs. Per Stirpes

In determining the heirs of an estate or the distribution of an estate, the concepts of per capita and per stirpes will often apply, and it is important to understand the distinction. Per capita essentially is a “head count,” that is according to the number of individuals in the same category.\(^{23}\) Per stirpes essentially means “by representation,” that is one or more individuals who “stand in place of” (represent) a deceased ancestor.\(^{24}\) For example, if a decedent was survived by all five children ever born, their inheritance is shared in five equal

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\(^9\) The Code Section does not state who the “parties to the motion” are. It makes no sense to serve the moving parties, whoever they may be, but certainly the parent whose right of inheritance is being challenged and the other parent of the minor, if that parent is not a movant, should be served. If the minor is in the custody of anyone other than one of the parents, the custodian probably should also be served, if not a movant.

\(^{20}\) Presumably, this would be four insertions, the same as required for publication service on a known heir with an unknown address.

\(^{21}\) O.C.G.A. §53-2-2(d) through (g).

\(^{22}\) O.C.G.A. §53-2-2(a).


\(^{24}\) Id.
parts, or *per capita* (by the number of individuals). If one of those children had predeceased the decedent and left three children, those three children take *per stirpes* (by representation) their deceased parent’s share. These grandchildren of the decedent aren’t counted at the first level; their entitlement derives only from their right to “represent” their deceased parent.

### 3.2 After-born Children

A child of the decedent who is born after the decedent's death is considered to be alive on the date of the decedent's death and, therefore, counted as a surviving child, if the child was conceived prior to the decedent's death, was born within ten months of the decedent's death, and survived birth by at least 120 hours.\(^{25}\)

### 3.3 Relatives of Whole and Half Blood

Half-blood relatives are considered equally with whole-blood relatives so that the children of any common parent are treated as whole blood siblings to each other. It is irrelevant whether the half-blood relatives are on the maternal or paternal side of the decedent's family.\(^{26}\) For example, the children of a decedent who was married more than once with children of each marriage are all treated, for purposes of inheritance from the decedent, as “brothers and sisters” to each other, even though they are actually half-brothers and half-sisters. This should not be confused with “step-children,” who do not share a parent in common.

### 3.4 Adoption and Virtual Adoption

A decree of adoption, whether issued in this state or in another state, serves to establish full inheritance rights between the adopted child and the adoptive parents (and relatives of the adoptive parents).\(^{27}\)

It is possible for a child to prove that he/she was “virtually adopted.” The essential elements of virtual adoption are (1) an actual agreement between the persons having legal custody of the child and the “adopting” parent(s), and (2) severance of the first parenting

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\(^{25}\) O.C.G.A. §53-2-1(a)(1).

\(^{26}\) O.C.G.A. §53-2-1(a)(2).

\(^{27}\) O.C.G.A. §§19-8-19, 53-1-8.
relationship which is taken over by the new “parent(s).” The Supreme Court had held that proof of the agreement must be set out so clearly as to “leave no reasonable doubt as to the agreement” and clear and convincing proof of performance of the contract.\textsuperscript{28} In order for there to be an agreement, the parties, of course, must be competent to contract, and if one of the parents lacks the mental capacity to enter into an agreement, a virtual adoption cannot exist.\textsuperscript{29}

3.5 \textbf{Artificial Insemination}

An individual who was conceived through artificial insemination and who is presumed legitimate under Code Section 19-7-21 is considered to be the child of his parents and thus entitled to inherit from and through his parents and their relatives and, likewise, the parents and relatives may inherit from and through the child.\textsuperscript{30}

3.6 \textbf{Relationship through Two Lines}

If an individual is related to the decedent through two or more lines of relationship, the individual is entitled to only one share of the decedent's estate based on the relationship that entitles the individual to the larger share.\textsuperscript{31}

3.7 \textbf{Common Law Marriage}

For purposes of the rules of inheritance, it does not matter whether a marriage was ceremonial or common law. A valid common law marriage is treated the same under Georgia law as a ceremonial marriage. As of January 1, 1997, Georgia no longer recognizes common law marriages. However, any valid common law marriage entered into prior to July 1, 1997 remains valid.\textsuperscript{32} The person alleging a common law marriage has the burden of proving its existence prior to January 1, 1997.\textsuperscript{33}

\begin{itemize}
\item \textsuperscript{28} Morgan \textit{v.} Howard, 285 Ga. 512 (2009);
\item \textsuperscript{29} Walden \textit{v.} Burke, 282 Ga. App. 154 (2006).
\item \textsuperscript{30} O.C.G.A. §53-2-5.
\item \textsuperscript{31} O.C.G.A. §53-2-6.
\item \textsuperscript{32} O.C.G.A. §19-3-1.1.
\item \textsuperscript{33} In re Estate of Robert L. Smith, 298 Ga. App. 201 (2009).
\end{itemize}
3.8 Children Born out of Wedlock

3.8.1 Children Born of Void Marriage

A child born of a void marriage before it is annulled and declared void is a legitimate child, not a child born out of wedlock.\(^{34}\)

3.8.2 By or From Mother

A child born out of wedlock may inherit from and through the mother of the child and the maternal kin.\(^{35}\) Likewise, the mother and maternal kin of a child born out of wedlock may inherit from and through the child.\(^{36}\)

3.8.3 Inheritance BY Children Born out of Wedlock from Father and Kin

A child born out of wedlock may not inherit from or through his/her father, other children of the father, or any other paternal kin by reason of the paternal kinship unless:

1. A court of competent jurisdiction has entered an order declaring the child to be legitimate, under the authority of Code Section 19-7-22 or such other authority as may be provided by law.
2. A court of competent jurisdiction has otherwise entered a court order establishing paternity.
3. The father executed a sworn statement signed by him attesting to the parent-child relationship.
4. The father signed the birth certificate of the child.
5. There is other clear and convincing evidence that the child is the child of the father.
6. Proof of the rebuttable presumption of paternity described below is filed with the court, and the presumption is not overcome by clear and convincing evidence.

   a. There is a rebuttable presumption of paternity of a child born out of wedlock when parentage-determination genetic testing was performed.

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\(^{35}\) O.C.G.A. §53-2-3(1).
\(^{36}\) O.C.G.A. §53-2-4(1).
after the conception of the child, which establishes at least a 97 percent probability of paternity. Parentage-determination genetic testing is defined in the Code provisions, but the testing now most prevalently used is deoxyribonucleic acid (DNA) testing.

If one of the requirements above is fulfilled, or if the presumption of paternity set forth above has been established and has not been rebutted by clear and convincing evidence, a child born out of wedlock may inherit in the same manner as if legitimate from and through his/her father, other children of the father, and any other paternal kin.37

In distributions under the above rules, the children of a deceased child born out of wedlock represent their deceased parent, as in any other case.38

3.8.4 Inheritance FROM Children Born out of Wedlock from Father and Kin

The father of a child born out of wedlock, the other children of the father, and other paternal kin may inherit from and through the child born out of wedlock in the same manner as if the child were legitimate if:

1. A court of competent jurisdiction has entered an order declaring the child to be legitimate, under the authority of Code Section 19-7-22 or such other authority as may be provided by law.

2. A court of competent jurisdiction has otherwise entered a court order establishing paternity.

3. The father executed, during the lifetime of the child, a sworn statement signed by him attesting to the parent-child relationship.

4. The father signed, during the lifetime of the child, the birth certificate of the child.

5. The rebuttable presumption of paternity described in subparagraph 6. in the preceding Section has been established and has not been rebutted by clear and convincing evidence.39

37 O.C.G.A. §53-2-3(2).
38 O.C.G.A. §53-2-3(3).
39 O.C.G.A. §53-2-4(b).
3.9 Slayer Statute

The right to take from the decedent’s estate or serve as the personal representative of the decedent is denied to any individual who has feloniously and intentionally killed the decedent or conspired with another to kill the decedent or procured another to kill the decedent. A killing is felonious and intentional if the killing would constitute murder, felony murder, or voluntary manslaughter under the laws of Georgia.\footnote{O.C.G.A. §53-1-5(a); Rader v. Levenson, 290 Ga. App. 227 (2008); Slakman v. Continental Casualty Co., 277 Ga. 189 (2003).}

If there has already been a final judgment of conviction or a guilty plea for murder, felony murder, or voluntary manslaughter, this will be conclusive in the civil proceeding to establish that the killing was felonious and intentional. Otherwise, the felonious and intentional killing must be proved by clear and convincing evidence.\footnote{O.C.G.A. §53-1-5(d).}

This denial of inheritance includes any property which the slayer would otherwise have inherited, whether real or personal, belonging to the decedent at the time of death, or any property which the slayer would have taken by year's support, will, deed, power of appointment, or otherwise at the death of the decedent. All property passes as though the slayer had predeceased the decedent.\footnote{Id.}

The forfeiture of inheritance rights under this Code section will have no effect on the rights of the slayer's descendants to take by intestacy from the decedent's estate. However, the interest which the descendants can take is limited to the share to which the slayer would have been entitled.\footnote{O.C.G.A. §53-1-5(c). If the slayer of an individual who dies with a will is treated as having predeceased the testator, the provisions of O.C.G.A. §53-4-64, Georgia's anti-lapse statute, will apply to substitute the slayer's descendants as takers of the slayer's testamentary gift only if those descendants are also descendants of the decedent.}

4. Escheat

“Escheat” is the reversion of property to the state in want of persons capable of inheriting the estate.\footnote{Black’s Law Dictionary, Fifth Edition, West Publishing Co., St. Paul, MN, ©1979.} Escheat results when an individual dies and no heirs are found to claim the decedent's property for which no other disposition was provided by will or
otherwise. In such a case, the property reverts to the state, as explained below.\(^{45}\) Note that it is not a requirement that the decedent die completely intestate; a decedent might leave a valid will which fails to name beneficiaries for all of the decedent’s assets but leave no heirs to take the portion of the estate which would pass under the laws of intestacy.

If no individual has appeared and claimed to be an heir within four years from the date on which Letters of any kind were granted on the decedent's estate, and there is property which is not otherwise disposed of, the personal representative is required to petition the probate court of the county in which the Letters were granted for a determination that the property has escheated. The petition must set forth the decedent's full name and date of death, the fact that no one has appeared to claim as an heir, and that the property that may have escheated.\(^{46}\) The judge of the probate court then issues a citation requiring any heirs to file an objection to the petition by a date that is at least 60 days from the date of the citation and orders publication of the notice once a week for four weeks in the county legal organ.\(^{47}\) It might also be appropriate to appoint a guardian-ad-litem for the unknown heirs in accordance with Code Section 53-11-2.

If no individual who is entitled to take as an heir files an objection by the date set forth in the citation, the judge of the probate court orders that the proceeds of the estate are paid over to the county board of education to become a part of the education fund.\(^{48}\) If an individual files an objection as an heir on or before the date set forth in the citation, the claim must be tried by the court. No property is to be paid over to the county board of education unless it has been established that any individual making such a claim is not entitled to the property.\(^{49}\) When the proceeds of an escheated estate are paid over to a board of education, the administration of the estate is completed by the filing of a proper final return and the granting of a petition for discharge.\(^{50}\)

If the spouse of an intestate decedent dies intestate and without ascertainable heirs within six months after the decedent's death, any undistributed property of the decedent to which the spouse would have been entitled will not escheat. Instead, the persons who would

\(^{45}\) O.C.G.A. §53-2-50.
\(^{46}\) O.C.G.A. §53-2-51(a).
\(^{47}\) O.C.G.A. §§53-2-51(b), 53-11-4.
\(^{48}\) O.C.G.A. §53-2-51(c).
\(^{49}\) O.C.G.A. §53-2-51(d).
\(^{50}\) O.C.G.A. §53-2-51(e).
have been the heirs of the first decedent had the spouse predeceased the decedent will be entitled to the property. The nonexistence of heirs of the spouse may be ascertained by advertisement as in cases of escheats. If no heirs of the spouse appear, the property is to be paid over to the heirs (excluding the surviving spouse) of the first decedent, less the expenses of the proceeding. While there are relatively few cases of escheat, the judge of the probate court has original and exclusive jurisdiction over such cases.

5. **Petition for Judicial Determination of Heirs**

A petition to determine the identity or interest of any heir may be made to the probate court in the county which has jurisdiction of the pending administration, or which would have jurisdiction in the event of an administration of the estate. Any fiduciary having the duty of distributing property to those entitled to it under the laws of intestacy may file a petition for determination of heirs. Any individual claiming to be an heir or interested as a distributee under the laws of intestacy may also file such a petition to have the claim adjudicated. The person charged with the duty of distribution must be made a party.

The superior court in the same county has concurrent jurisdiction. The procedure in superior court is effected in the same manner as an equitable proceeding. Only the probate court procedure is covered in this Section.

This procedure will seldom be applicable to a testate estate. However, whenever in the distribution of property under the will it becomes necessary to ascertain the heirs of the testator or the heirs of a deceased beneficiary, this procedure is available to the personal representative if there is any uncertainty about those heirs.

5.1 **Petition Requirements**

The petition must be verified and must allege:

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51 O.C.G.A. §53-2-8(a).
52 O.C.G.A. §53-2-8(b).
54 The Code Section refers to any “personal representative, guardian, conservator, committee, trustee, fiduciary, or other person having a status which by operation of law or written interest devolves upon such person a duty of distributing property to heirs.”
57 O.C.G.A. §53-2-23.
1. The names, ages, addresses, and relationships of all parties at interest, except creditors, so far as known to the petitioner.

2. The nature and character of such interests.

3. Whether the petitioner has reason to apprehend that there may be others entitled to participate whose names are unknown to the petitioner.\(^{59}\)

A petitioner should name and identify all who are believed to be the heirs and any others who have made known to the petitioner a claim to be an heir. Petitioners should have researched thoroughly, using all modern means, to identify and locate potential heirs. Those means might include government agencies providing benefits, such as the Social Security or Veteran’s Administration, state vital records, known or former employers, the internet, family search firms, and extended relatives.

5.2 Citation, Objection or Intervention, and Hearing

When a petition to determine heirs is filed with the probate court, citation is issued and all parties in interest are served in accordance with the general rules of procedure for the probate courts set forth in Chapter 11 of Title 53.\(^{60}\)

Any individual not named in the petition but claiming to be an heir or otherwise interested as a distributee may file a motion to intervene in the proceedings.\(^{61}\)

There is no presumption as to who are the heirs of a decedent.\(^{62}\) Therefore, persons claiming an interest in the decedent’s estate as heirs have the burden of proving:

1. That the decedent died intestate.

2. The relationship of the intestate to the alleged heirs.

3. The nonexistence of persons whose degree of relationship to the intestate would be closer than that of the claimants.\(^{63}\)

\(^{58}\) O.C.G.A. §53-11-8.

\(^{59}\) O.C.G.A. §53-2-21.


\(^{61}\) O.C.G.A. §53-2-25.


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

1. The deaths of such persons, or
2. Facts from which such persons' deaths may legally be inferred.\(^{64}\)

One claiming an interest in a decedent's estate as an heir has no burden of proving the absence of a will or administration.\(^{65}\) Pedigree, including descent, relationship, birth, marriage, and death, may be proved by the declarations of deceased persons related by blood or marriage, by general repute in the family, or by genealogies, inscriptions, family trees, and similar types of evidence.\(^{66}\)

### 5.3 Citing Unknown Heirs

Code Section 53-2-24 directs that the citation to unknown heirs must proceed in accordance with the provisions of Chapter 11 of Title 53. These provisions require the judge to appoint a “guardian” to represent the interests of unknown persons and provide that service upon the guardian constitutes service upon the unknown party.\(^{67}\) If the petition alleges that there may be unknown heirs, or the petitioner is uncertain whether there may be unknown heirs, the better practice would be to appoint a guardian-ad-litem and also to publish a notice directed to any unknown heirs of the deceased once a week for four weeks,\(^{68}\) since one of the goals is to locate any unknown heirs. The Pre-1998 Probate Code provided that the failure of unknown persons and persons whose whereabouts are unknown, served by publication, “shall authorize the finding that there are no known heirs.”\(^{69}\) That provision was upheld by the Supreme Court.\(^{70}\) The language was not carried over into the Revised Probate Code of 1998; however, the Sheehan case may serve as precedence when publication has been ordered.

---

\(^{64}\) Id.

\(^{65}\) Payne v. Nix, 193 Ga. 4, 10 (1941).

\(^{66}\) O.C.G.A. §24-3-12.

\(^{67}\) O.C.G.A. §53-11-2(b).

\(^{68}\) See O.C.G.A. §53-11-4(b).

\(^{69}\) Former Code Section 53-4-35(c).

5.4 Motion for Disinterment and DNA Testing

When the kinship of any party in interest to a decedent is in controversy in any such proceeding, an Article 6 Probate Court or a superior court may order the removal and testing of deoxyribonucleic acid (DNA) samples from the remains of the decedent and from any party in interest whose kinship to the decedent is in controversy for purposes of comparison and determination of the statistical likelihood of such kinship. The court may order the disinterment of the decedent’s remains if reasonably necessary to obtain such samples. If the proceeding to determine heirs is pending in a probate court without enhanced jurisdiction, the motion must be transferred to the superior court.71

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

1. The factual basis for a reasonable belief that the party in interest whose kinship to the decedent is in controversy is or is not so related; and
2. If disinterment of the decedent’s remains is sought, the factual basis for a reasonable belief that reliable DNA samples from the decedent are not otherwise reasonably available from any other source.72

Upon request, the movant must deliver to all parties in interest a copy of a detailed written report of the tester and of any other expert involved in the determination of such statistical likelihood setting out his or her findings, including the results of all tests made and conclusions or opinions based thereon.73 The costs of obtaining and testing of such samples, including the costs of disinterment and reinterment of the remains of the decedent, if necessary, as well as the costs of providing the report, must be paid by the moving party.74

71 O.C.G.A. §§15-9-127(7) and 53-2-27(a).
72 O.C.G.A. §53-2-27(b).
73 O.C.G.A. §53-2-27(c).
74 O.C.G.A. §53-2-27(d).
5.5  Judgment and Effect of Proceeding

In the absence of fraud, the findings of the court are binding and conclusive as to every person and every issue that is decided.\textsuperscript{75} It may be appealed as in the case of any other final order.

After the determination, the personal representative should proceed with the administration of the estate in accordance with the general rules of administration, including discharge upon completion.

\textsuperscript{75} O.C.G.A. §53-2-26.
APPENDIX TO CHAPTER 8

1. Heirs Determination Sheet ......................................................... A8-1
2. Table of Consanguinity ................................................................. A8-2

Important Notice

Several sample orders and forms have been included in this Appendix. These sample orders and forms have not been officially sanctioned by the Georgia Council of Probate Court Judges. They have, unless otherwise noted, been prepared by the author. They are provided solely as samples. They should be modified or adapted to the specific court for the specific purpose, with any unnecessary material being deleted and any additional material being added.

William J. Self, II
Heirs of a decedent are determined in accordance with O.C.G.A. §53-2-1. “Heirs” of a decedent are those persons who would inherit the estate of a Georgia domiciled decedent who died without a will (intestate). The term is not synonymous with the term “beneficiaries,” a term which refers to those persons who receive a benefit under a lawful will of a decedent (although “heirs” certainly may be “beneficiaries,” and vice versa). This form may help you properly and completely determine the heirs of a decedent for purposes of notice requirements in a probate court in Georgia.

For purposes of inheritance under Georgia law and for purposes of identifying the legal heirs of a decedent, the following rules apply:

A. The legal spouse of a decedent who is in life at the time of the decedent's death is always an heir of the decedent. Although common law marriages were abolished in Georgia as of January 1, 1997, any common law marriage in legal existence on December 31, 1996 remains valid under Georgia law. There is no common law divorce under Georgia law, and a simple separation of the parties, no matter for what length of time, will not dissolve a legal marriage, whether a ceremonial and licensed marriage or a common law marriage. The death of a spouse or the entry of a final decree of divorce by a court of competent jurisdiction prior to the death of the decedent terminates the spousal relationship for purposes of inheritance, and the deceased or divorced spouse is not an heir of a decedent.

B. Children of a decedent who are born after the death of the decedent are considered children in being at the decedent's death, provided they were
conceived prior to the decedent's death, were born within ten months of the decedent's death, and survived 120 hours or more after birth.

C. The half-blood, whether on the maternal or paternal side, are considered equally with the whole-blood, so that the children of any common parent are considered brothers and sisters to each other.

D. Legally adopted children are considered equally with natural born children. The legal adoption of a child by someone other than the natural parents ends the parental relationship and such child is no longer an heir of either natural parent. Children born out of wedlock are the heirs of their mother, and vice versa. Children born out of wedlock are the heirs of their father, and vice versa, provided paternity has been established in accordance with law. For purposes of notice requirements in a probate court in Georgia, children believed to be the offspring of a decedent father should be listed as “heirs,” except when paternity has already been disproved in a court of competent jurisdiction. All children born within wedlock or within the usual period of gestation thereafter who have been conceived by artificial insemination are irrebuttably presumed legitimate if both spouses have consented in writing to the use and administration of artificial insemination.
Determination Inquiries:

Name of Decedent: ________________________________
Date of Death: ________________________________
Legal Residence: ________________________________

1. Was the decedent survived by a spouse? If yes, please provide the name and age of the spouse:

   Spouse: ________________________________    Age: _______

2. Was the decedent survived by children or descendants of any deceased children? If not, you may STOP. If a decedent is survived by a spouse but not by any children or descendants of deceased children, the surviving spouse is the sole heir. If yes, please provide the names and ages of each child ever born to adopted by the decedent:

   (b) Children of decedent born as issue of any marriage:

   Living Children                          Deceased Children
   Name           Age                   Name          DOD
   __________________   __________________________
   __________________   __________________________
   __________________   __________________________
   __________________   __________________________
   __________________   __________________________

   (b) Children of decedent born out of wedlock:

   Living Children                          Deceased Children
   Name           Age                   Name          DOD
   __________________   __________________________
   __________________   __________________________
   __________________   __________________________

Revised Handbook   Ch. 8, pg. 24               January, 2010
3. Were any of the deceased children of the decedent survived by a child or children (grandchildren of the decedent)? If yes, please give the names and ages of each child ever born to or adopted by the deceased child of the decedent:

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<th>Name</th>
<th>Age</th>
<th>Parent's Name</th>
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**NOTE:** IF ALL OF THE CHILDREN OF DECEDED ARE ALIVE, YOU MAY STOP. The spouse, if any, and all the children are the heirs of the decedent.

**NOTE:** IF ALL OF THE GRANDCHILDREN OF THE DECEDED ARE ALIVE, YOU MAY STOP. The spouse, if any, the surviving children and the surviving grandchildren who are the children of deceased children of the decedent are the heirs of the decedent.
4. Were any of the deceased grandchildren of the decedent survived by a child or children (great-grandchildren of the decedent)? If yes, please give the names and ages of each child ever born to or adopted by the deceased grandchild of the decedent:

<table>
<thead>
<tr>
<th>Living Great-grandchildren</th>
<th>Age</th>
<th>Parent's Name</th>
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<th>Deceased Great-grandchildren</th>
<th>DOD</th>
<th>Parent's Name</th>
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NOTE: IF ALL OF THE GREAT-GRANDCHILDREN OF THE DECEDENT ARE ALIVE, YOU MAY STOP. IF THERE ARE ANY DECEASED GREAT-GRANDCHILDREN, YOU MUST ATTACH AN ADDITIONAL SHEET FOR THEIR CHILDREN. If the decedent was survived by a spouse and/or any lineal descendants, there is no need to proceed further on this form. The persons in the categories below are not “heirs” of a decedent who is survived by a spouse and/or lineal descendants.

5. Was the decedent survived by a parent? If yes, please provide the names and ages of the parents:

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<thead>
<tr>
<th>Name</th>
<th>Age</th>
<th>Date of Death, if Deceased</th>
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<tbody>
<tr>
<td>Mother: __________________________</td>
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<td>Father: __________________________</td>
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NOTE: IF ANY PARENT IS ALIVE, YOU MAY STOP. If both parents survived, they are the sole heirs of the decedent; if only one parent survived, that parent is the sole heir of the decedent.
6. Did the decedent ever have any brothers or sisters (of whole or half blood)? If yes, please give the names and ages of all brothers and sisters of the decedent:

<table>
<thead>
<tr>
<th>Living Brothers and Sisters</th>
<th>Age</th>
<th>Deceased Brothers and Sisters</th>
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</thead>
<tbody>
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<td>Name</td>
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**NOTE:** IF ALL OF THE BROTHERS AND SISTERS OF THE DECEDED ARE ALIVE, YOU MAY STOP. The brothers and sisters are the heirs of the decedent.

7. Were any of the deceased siblings of the decedent survived by a child or children (nieces or nephews of the decedent)? If yes, please give the names and ages of each child ever born to or adopted by the deceased sibling of the decedent:
### Living Nieces and Nephews

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<th>Name</th>
<th>Age</th>
<th>Parent's Name</th>
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### Deceased Nieces and Nephews

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**NOTE:** IF ALL OF THE NIECES AND NEPHEWS OF THE DECEDENT ARE ALIVE, YOU MAY STOP. The surviving brothers and/or sisters, if any, and the children of deceased siblings are the heirs of the decedent.

8. Were any of the deceased nieces and/or nephews of the decedent survived by a child or children (grand-nieces or grand-nephews of the decedent)? If yes, please give the names and ages of each child ever born to or adopted by the deceased niece or nephew of the decedent:

### Living grand-nieces and grand-nephews

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<th>Name</th>
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Revised Handbook       Ch. 8, pg. 8-28       January, 2010
Deceased grand-nieces and grand-nephews

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NOTE: IF ALL OF THE GRAND-NIECES AND GRAND-NPHEWS OF THE DECEDENT ARE ALIVE, YOU MAY STOP. IF THERE ARE ANY DECEASED GRAND-NIECES OR GRAND-NPHEWS, YOU MUST ATTACH AN ADDITIONAL SHEET FOR THEIR CHILDREN. If there are any persons in the above categories, there is no need to proceed further with this form.

9. Who were the decedent's grandparents? Please provide the names and ages of the grandparents:

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<tr>
<th>Name</th>
<th>Age</th>
<th>Date of Death, if Deceased</th>
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NOTE: IF ANY GRANDPARENT OF THE DECEDENT IS ALIVE, YOU MAY STOP.

10. Was the decedent survived by aunts or uncles (maternal and/or paternal)? If yes, please provide the names and ages of the aunts and/or uncles:
### Living aunts and uncles

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<th>Name</th>
<th>Age</th>
<th>Parent's Name</th>
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### Deceased aunts and uncles

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**NOTE:** IF ALL OF THE AUNTS AND UNCLES OF THE DECEDENT ARE ALIVE, YOU MAY STOP.

11. Were any of the deceased aunts and/or uncles of the decedent survived by a child or children (first cousins of the decedent)? If yes, please give the names and ages of each child ever born to or adopted by the deceased aunt or uncle of the decedent:

#### First Cousins of the decedent who are alive:

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<thead>
<tr>
<th>Name</th>
<th>Age</th>
<th>Parent's Name</th>
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Revised Handbook Ch. 8, pg. 8-30 January, 2010
NOTE: IF THERE ARE NO PERSONS IN ANY OF THE ABOVE CATEGORIES, THE HEIRS OF
THE DECEDENT ARE DETERMINED UNDER O.C.G.A. §53-2-1(b)(8).
Instructions
Place the subject/decedent for whom you need to establish relationships in the blank box. The labeled boxes will then list the relationship by
Chapter 9

ESTATES OF MISSING PERSONS
AND PRESUMPTION OF DEATH

The Revised
HANDBOOK FOR PROBATE
JUDGES OF GEORGIA
2010
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Chapter 9

ESTATES OF MISSING PERSONS
AND PRESUMPTION OF DEATH

1. IN GENERAL

Many situations arise in which individuals who own property disappear under circumstances which create an inference of death or which, at the least, necessitate the need for temporary protection of the individual's estate. In general, Georgia law provides two methods of handling these situations. One provides for the appointment of a conservator of the estate of a missing individual,\textsuperscript{1} and the other provides for appointment of a personal representative of the estate of an individual who is presumed to be dead.\textsuperscript{2}

If an individual has disappeared without some reasonable explanation or under circumstances which might indicate foul play or accident or prolonged absence, and the person has property which must be protected until the return of the person or the proof or presumption of death of the person, a conservator of the property may be appointed after 60 days of unexplained absence. This procedure anticipates a reasonable possibility that the missing individual will reappear. Like a temporary administration, a conservatorship in this circumstance is transitory in nature. When the unexplained absence is prolonged and the likelihood of reappearance becomes more remote, it may become necessary for a personal representative to be appointed for the estate of the person when a presumption of death has been established, unless, for example, the entire estate is set apart as year’s support following the declaration of the presumption of death. This appointment of a personal representative in this situation is analogous to the appointment of a personal representative in the event of the known death of a person.

Exclusive, original jurisdiction over the estates of all missing persons is in the probate courts.\textsuperscript{3}

Even though there may be no other estate to be administered, life insurance companies likely will not pay death benefits to the named beneficiaries until, pursuant to

\textsuperscript{1}O.C.G.A. §53-9-10.
\textsuperscript{2}O.C.G.A. §§53-9-1 through 53-9-4.
\textsuperscript{3}O.C.G.A. §53-9-10.
Code Sections 53-9-3 and 53-9-4, an order establishing the presumption of death has been entered, whether or not a personal representative is actually appointed.

2. APPOINTMENT OF A CONSERVATOR⁴

A conservator may be appointed for the estate of a person domiciled in this state who has been missing for at least 60 days or an even shorter period if the individual is missing under emergency circumstances that dictate a need for immediate conservation of the estate. The law deems a person to be "missing" if:

1. The person has been missing from the usual place of abode and the whereabouts of the person are unknown to those persons who are likely to know; or
2. The person is a member of the armed forces during a period of hostilities between the United States and another nation and has been listed as missing in action, as interned in a neutral country, or as captured by the enemy; or
3. The person has been kidnapped or taken hostage or is otherwise detained and thus unable to maintain control of his estate, whether or not the whereabouts of the person are known.⁵

A petition for the appointment of a conservator of the missing individual's estate may be filed in the county where the missing individual was domiciled at the time of the disappearance by:

1. An individual who would be an heir of the missing individual if the missing individual were dead;
2. A creditor; or
3. A person having legal custody of minors or incompetents who would be heirs of the missing individual.⁶

Similar provisions for the appointment of conservators apply in the case of a person domiciled outside of Georgia who has any interest in or claim to property or a cause of action located in Georgia. If the person would be deemed missing under Code Section 53-9-10 or if

---

⁴ Until the new Title 29 (Guardian and Ward) became effective on July 1, 2005, the title "conservator" was given to a fiduciary only under Chapter 9 of Title 53.
⁵ O.C.G.A. §53-9-10(a).
⁶ O.C.G.A. §53-9-10(b).
a conservator has been appointed in the jurisdiction of the individual's domicile, the judge of the probate court may appoint a conservator of all property interests or claims or causes of action located in Georgia. The judge further may give directions as to the conservation and use of the property in the best interest of the person and/or dependents, creditors and/or successors in interest of the person. The judge must mold the order in aid of any similar order from a court in the person's state of domicile. The judge may appoint the domiciliary conservator as the conservator of the Georgia property and may authorize delivery of the property to the domiciliary conservator.\footnote{O.C.G.A. §53-9-21.}

\section{Contents of Petition}

The petition for appointment of a conservator must show:

1. Name of the missing person;
2. The place of domicile;
3. The circumstances of disappearance;
4. The length of time the person has been missing;
5. What inquiry has been made as to the whereabouts of the person;
6. That such person would probably have communicated with the petitioner or with another person of whom inquiry has been made;
7. The names, addresses and ages or majority status of those individuals who would be the heirs of the missing person if such person were dead;
8. A description of the property owned by the missing person;
9. An estimated value of the property;
10. The circumstances which necessitate a need for appointment of a conservator; and
11. Whether any other arrangements exist for management of the missing person’s estate (e.g., powers of attorney or trusts).\footnote{O.C.G.A. §53-9-12.}
2.2 Subsequent Proceedings

After the petition is filed, the procedure is the same as in petitions for administration of estates of decedents. Those persons who would be heirs of the missing person, if dead, will be treated as heirs for the purpose of notice.\(^9\) Before appointing a conservator, the judge of the probate court must determine whether arrangements for the management of the missing person’s property already exist and that they are sufficient for the protection of the property of the person. If so, there should be no need for the appointment of a conservator.\(^10\)

If the judge of the probate court finds that a conservator is needed, the judge must select that person who will best serve the interests of the estate, taking into consideration the following preferences:

1. The missing person's surviving spouse, unless there was a divorce or separation action pending at the time of the disappearance;
2. Other heirs-apparent of the person;
3. Any eligible corporation, partnership, or other business association; or
4. A creditor.

The judge may not appoint as conservator anyone who would be ineligible to serve as personal representative of the missing person's estate if that person were dead.\(^11\)

The conservator is required to take the same oath as an administrator and give bond with security as is required of guardians (conservators) of living adults.\(^12\) The conservator must conform to all legal requirements established for administrators of estates, except when there is a conflict with the provisions of Chapter 9 of Title 53.\(^13\)

Within 60 days after appointment, the conservator must make a written report to the judge of the probate court showing:

1. The condition of the estate;
2. A schedule of debts owed by the missing person;
3. An estimate of income from the estate and expenses necessary for its preservation;

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\(^9\) O.C.G.A. §53-9-13(a).
\(^10\) O.C.G.A. §53-9-11(a).
\(^11\) O.C.G.A. §53-9-11(b).
\(^12\) O.C.G.A. §53-9-13(c).
\(^13\) O.C.G.A. §53-9-13(b).
4. A statement showing the names, ages and condition of any dependents of the missing person; and

5. A recommendation as to how the estate should be distributed.\textsuperscript{14}

After making such further investigation as is deemed necessary, the judge makes such order as will most effectively tend to provide for the support of any dependents of the missing person and the management of all property, including any business or business interests owned by such person. The judge may also order the payment of those debts of the missing person which the judge deems just and proper. An Article 6 Probate Court or a superior court may allow the conservator to engage in estate-planning dispositions of the missing person’s property as are authorized in Code Sections 29-3-36 and 29-5-36.\textsuperscript{15}

The judge of the probate court may modify the order upon petition by the conservator, by any dependent of the missing person, by the guardian of any dependent, or by any person who has an interest in the property or business of the missing person.\textsuperscript{16} Prior to entertaining a motion to modify, it would be good practice to give notice to all interested parties, at least by first class mail.

In determining the condition of any dependents, all factors should be considered, including their financial, physical and mental status. The statute clearly gives priority to the support of the missing person’s dependents and the handling of the missing person’s property or business interests over payment of the person’s debts. The judge of the probate court may order the payment only of such debts as the judge, in his/her discretion, finds to be just and proper.

When a conservator has been appointed, there is nothing in the law which indicates any right in the spouse, or spouse and minor children, or minor children alone, to claim a year's support, as in cases of known decedents. Since this right is created only by statute, there seems to be no possibility for the surviving spouse to claim a year’s support against the conservator. Also, the law gives no specific consideration, during the term of the conservatorship, to any will which the missing person may have executed other than to the extent that the will might be indicative of other already-existing arrangements for the management of the missing individual's property.

\textsuperscript{14} O.C.G.A. §53-9-14.
\textsuperscript{15} Id.
\textsuperscript{16} Id.
If a missing individual is declared legally dead and there is administration on his estate or probate of his will, the conservator must, within 60 days of the personal representative's demand, make a final return to the probate court that has jurisdiction over the conservator and deliver all of the missing individual's property to the personal representative.\textsuperscript{17}

2.3 Procedure upon Reappearance of Missing Individual

A missing individual for whose estate a conservator has been appointed may petition for the termination of the conservatorship at any time. Upon finding that the petitioner is in fact the missing individual, the judge enters an order terminating the conservatorship, directing the conservator to make a final return to the court, and ordering the delivery of all property in the conservator’s hand to the person.\textsuperscript{18}

3. DECLARATION OF DEATH AND ESTATE PROCEEDINGS

3.1 Establishment of Presumption of Death

The death of a domiciliary of this state whose death has not otherwise been conclusively proved\textsuperscript{19} may be established by:

1. A rebuttable presumption of death arises when the individual has been missing from the last known place of domicile for a continuous period of four years;

2. The death of an individual may be proved by a preponderance of the evidence when the individual has been missing from the last known place of domicile for a continuous period of twelve months; or

3. The death of an individual may be proved by clear and convincing evidence that the individual was exposed to a specific peril or tragedy.\textsuperscript{20}

The date of death, in the first instance, will be the end of the four-year period, unless it is proved by a preponderance of the evidence that death occurred earlier, or in the second instance, will be at the end of the twelve-month period.\textsuperscript{21} The date of death, in the last

\textsuperscript{17} O.C.G.A. §53-9-16.
\textsuperscript{18} O.C.G.A. §53-9-15.
\textsuperscript{19} The issuance of a death certificate would be conclusive proof.
\textsuperscript{20} O.C.G.A. §53-9-1.
\textsuperscript{21} This is presumed from the text, since there is no specific language setting the date of death in the twelve-
instance, will be as proved by the clear and convincing evidence. However, for purposes of inheritance, regardless what date is established with the four years since the individual became missing, the missing individual will be presumed to have predeceased any other individual who has died prior to the date of the filing of a petition for action on the estate of the missing individual.\textsuperscript{22}

3.2 Estate Proceedings

A petition may be filed for administration of the estate, for probate in common or solemn form of the will, for an order granting year's support, or an order that no administration is necessary on the estate of any Georgia domiciliary whose death will be established as asset forth in the preceding Section. The petition may be filed by any person who would be entitled to file a similar petition on the estate and is filed in the probate court of the county in which the estate would be administered if the supposed decedent were known to be dead.\textsuperscript{23} The petition must contain all the information required in any other petition pertaining to the administration, probate or distribution of an estate and also must set forth the following:

1. The circumstances of the individual's disappearance.
2. What inquiry has been made about the individual's whereabouts.
3. Any evidence to be offered, if necessary, for the purpose of proving death by a preponderance of the evidence.\textsuperscript{24}

3.2.1 Notice

Upon the filing of a petition that contains all the appropriate information, the judge orders notice to be published once a week for four weeks that on a day stated, which must be at least 90 days after the first publication, evidence will be heard concerning the absence of the supposed decedent and the circumstances and duration of the absence. The notice must also require the missing individual, if alive, or any other person to produce evidence that the

\textsuperscript{22} O.C.G.A. §53-9-1.
\textsuperscript{23} O.C.G.A. §53-9-2(a).
\textsuperscript{24} O.C.G.A. §53-9-2(b).
individual is still alive. This notice may be combined with any notice required for the issuance of the letters or other order requested in the petition. The notice must be served on those individuals who would be heirs of the missing individual if the missing individual were in fact dead, in the manner provided in Chapter 11 of Title 53. In the order for notice the judge may also direct the petitioner to conduct a search for the missing individual. If a search is ordered, the judge shall specify the manner of the search in order to ensure that a diligent and reasonable effort is made, under the circumstances of the particular case, to locate the missing individual. The judge may prescribe particular methods of investigation that the judge deems to be adequate and appropriate, including, but not limited to, the publication of notices in newspapers in appropriate places (such as in the place where the missing individual was last seen if different from the place of domicile); inquiry of government agencies; inquiry of the individual's friends and relatives; and inquiry at the individual's last place of abode and other appropriate places. Certainly, with modern technology, an Internet search, using an appropriate service or application, should be ordered, and, if deemed appropriate and there are sufficient funds to justify same, the services of a professional search firm or service might also be considered.

3.3 Hearing; Finding of Death; Final Order

At the hearing the judge of the probate court considers such evidence as may be offered for the purpose of ascertaining whether a diligent and reasonable search has been conducted for the individual and, if appropriate, whether the individual is dead or alive. No person is disqualified to testify by reason of his relationship as spouse of the supposed decedent or of his interest in the estate of the person believed to be dead.

If satisfied that a reasonable and diligent search has been made and (1) that a presumption of death has been established and not rebutted (in the case of an individual missing for four years or more), (2) that death has been proved by a preponderance of the evidence (in the case of an individual missing for one year or more), or (3) that death has

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25 Presumably, this would require notice pursuant to Chapter 11 of Title 53 even if the type of notice otherwise required for the proceeding might be different. For example, if the petition for presumption of death is combined with a petition for year’s support, the combined notice must be served in accordance with Chapter 11, as opposed to by first-class mail as usually required in year’s support proceedings.

26 O.C.G.A. §53-9-2(c).

been proved by clear and convincing evidence that the missing individual was exposed to a specific peril or tragedy, the judge issues an order finding the missing individual to be dead and specifying the date of death as appropriate to the evidence pursuant to Code Section 53-9-1.28

At any time after the entry of the order that finds the missing individual to be dead, Letters of Administration, Letters Testamentary, an order awarding a year's support, or an order declaring that no administration is necessary may be issued. Actions taken upon the authority of such Letters or order, unless revoked, are as valid as if the missing individual were known to be dead.29

3.4 Nondomiciliaries

If an individual who is not domiciled in Georgia but who owns or who has a claim to real or personal property or a cause of action located in Georgia has been declared dead pursuant to a final decree issued by a court of competent jurisdiction in the state of domicile, the individual will be treated in all respects as if he/she had in fact died. If a nondomiciliary has been absent for four or more years but has not been declared dead in the domiciliary jurisdiction, that individual may be declared dead for purposes of any Georgia property in accordance with the above-described provisions.30

3.5 Reappearance of Supposed Decedent

If the supposed decedent reappears, files a petition, and gives satisfactory proof that he/she is the missing individual, the judge shall revoke any Letters which have been issued. Upon such revocation, the powers of the personal representative cease, but all receipts and disbursements of assets and other acts previously done by the personal representative remain valid. The personal representative must then make an accounting and transfers all assets remaining in his/her hands to the formerly missing individual or to such individual’s duly authorized agent or attorney.31

28 Id.
31 O.C.G.A. §53-9-5.
In the two-year period following the issuance of the letters or the granting of an order for year's support or that no administration is necessary, the supposed decedent can recover from the spouse or children or other heirs or beneficiaries any property received by them from the personal representative, or the amount of money or property received by such spouse or children or other heirs or beneficiaries from a bona fide purchaser to whom property received from the personal representative has been transferred. Property transferred to a bona fide purchaser for adequate consideration cannot be recovered from the transferee. No property can be recovered from a spouse or children or other heirs or beneficiaries after the two-year period expires unless the missing individual is a minor, in which case the recovery period is extended to two years from the date the minor reaches majority.\(^{32}\)

### 3.6 Distribution of Assets

Before the personal representative distributes any assets within the two-year period described above to the persons who would be entitled to the estate were the supposed decedent known to be dead, those persons must give security approved by the judge of the probate court. Such security must be at least equal to the estimated value of the property to be distributed. The security is conditioned upon the return of the assets distributed if the supposed decedent is in fact alive and makes demand within the two-year period or, if the assets have been transferred to a bona fide purchaser, the return of any consideration received, without interest. If any person who would be entitled to receive the assets is unable to give such bond, the personal representative continues to hold the assets until the first of these events to occur:

1. Security is given.
2. The judge orders the delivery of the assets to the persons.
3. The two-year period expires.\(^{33}\)

If security cannot be given, the assets are to be invested in legal investments or investments authorized by the supposed decedent's will, with the interest paid to the persons entitled to the assets.\(^{34}\)

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\(^{32}\) O.C.G.A. §53-9-6.
\(^{33}\) O.C.G.A. §53-9-7.
\(^{34}\) Id.
Practically speaking, the giving of security before the personal representative may distribute any assets of the estate will likely be quite difficult, if not impossible, since the surety must undertake to guarantee the return of property in the event of the reappearance of the missing person.
Chapter 10

GUARDIANS AND CONSERVATORS OF MINORS; PROBATE JUDGES AS CUSTODIANS OF CERTAIN FUNDS; VA GUARDIANS; TRANSFERS TO MINORS; AND EMANCIPATION OF MINORS

The Revised
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2010
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GUARDIANS AND CONSERVATORS OF MINORS; PROBATE JUDGES AS CUSTODIANS OF CERTAIN FUNDS; VA GUARDIANS; TRANSFERS TO MINORS; AND EMANCIPATION OF MINORS

PART I. GUARDIANS AND CONSERVATORS OF MINORS

1. GUARDIANSHIPS AND CONSERVATORSHIPS IN GENERAL

The Guardianship Code of Georgia (Title 29) was revised extensively, effective July 1, 2005.\(^1\) Under this revision, the term “guardian” replaces the term “guardian of the person,” which was used in the former Code, and the term “conservator” replaces the term “guardian of the property.” Generally, conservators are appointed to handle an individual’s financial affairs while guardians are appointed to handle the personal affairs of an individual. An individual may have both a guardian and a conservator, and the guardian and conservator may or may not be the same person. In Georgia, the probate court\(^2\) has exclusive, original jurisdiction in matters relating to the appointment, supervision, and discharge of guardians and conservators, except as otherwise provided by law.\(^3\)

Guardians of minors\(^4\) fall into the following general classifications:

1. Natural guardians;
2. Testamentary guardians;
3. Temporary guardians;
4. Standby guardians; and
5. Permanent guardians.

Conservators of minors fall into the following classifications:

1. Testamentary conservators; and
2. Conservators.

\(^1\) All references in this Handbook to Title 29 are to the 2005 version unless otherwise noted.
\(^2\) In all of Title 29, “court” means the probate court, and the term is so used in this Chapter, except in Sections 2.2 and 2.3 below wherein there are references to trial courts.
\(^3\) O.C.G.A. §15-9-30.
\(^4\) A “minor” is an individual who is under age 18 and is not emancipated. O.C.G.A. §29-1-1(11).
A guardian of a minor must be a natural person while a conservator may be a natural person or an entity. No person who is a minor, a ward,\(^5\) or a protected person\(^6\) may be appointed as a guardian or conservator of a minor. No person who has a conflict of interest with the minor may be appointed guardian or conservator of that minor unless the court determines that the conflict of interest is insubstantial or that the appointment would be in the minor’s best interest.\(^7\)

In addition to the guardians and conservators discussed above, whenever a minor is interested in any litigation pending in any court in this state, and the minor has no guardian or conservator or the interest of such guardian or conservator is adverse to that of the minor, the trial court may appoint a guardian-ad-litem who is responsible to the minor in the same manner as if he/she were a legally qualified guardian or conservator.\(^8\) The guardian-ad-litem is liable to the minor for any damages which may result from any culpable omission or negligence on his/her part.\(^9\) The authority to appoint a guardian-ad-litem exists in every court, not just in the probate court.

### 2. NATURAL GUARDIANS

Unless otherwise provided by law, if both parents\(^10\) are alive, each parent is the natural guardian of the minor child. If the parents are divorced, the parent who has sole custody\(^11\) of the minor is the sole natural guardian. If the parents have joint legal custody,\(^12\) both parents are the natural guardians. If one parent dies, the surviving parent is the sole

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\(^5\) A “ward” is an adult for whom a guardian or conservator has been appointed. O.C.G.A. §29-1-1(27).
\(^6\) “Protected person” is not a defined term in Title 29. It has been used in Title 29 because the term is used in some other states to refer to an adult who is not sui juris.
\(^7\) O.C.G.A. §§29-2-2, 29-3-4.
\(^8\) O.C.G.A. §9-11-17(c). But see Dee v. Sweat, 224 Ga. App. 285 (1997), holding that the mother of a minor may represent the minor in litigation when the mother has no interest adverse to that of the minor.
\(^10\) “Parent” is defined in Title 29 as a biological or adoptive father or mother whose parental rights have not been surrendered or terminated and, in the case of a child born out of wedlock, the individual(s) who is/are entitled to have custody of and exercise parental power over the child pursuant to Code Section 19-7-25. O.C.G.A. §29-1-1(13). See Section 5, below.
\(^11\) “Sole custody” is defined in O.C.G.A. §19-9-6(4) as the person, including a parent, who has been awarded permanent custody of a minor by court order. Therefore, there cannot be more than one person with “sole custody.”
\(^12\) “Joint legal custody” is defined in O.C.G.A. §19-9-6(2) as meaning that both parents have equal rights and responsibilities for major decisions concerning the minor; however, a judge granting joint legal custody may designate one parent to have the sole power or authority to make certain decisions.
natural guardian, regardless of whether that parent had sole custody when the other parent was alive.\footnote{13}{O.C.G.A. §29-2-3.}

2.1 Property Valued not in Excess of $15,000

Generally, a natural guardian (parent) cannot receive property for or on behalf of a minor until the natural guardian becomes the legally qualified conservator. However, in cases in which the value of all personal property\footnote{14}{For purposes of this rule, the value of the minor’s “personal property” does not include the value of property that is held for the minor’s benefit in trust or by a custodian under Article 5 of Chapter 5 of Title 44 (the Georgia Transfers to Minors Act). O.C.G.A. §29-3-1(a).} of the minor is $15,000.00 or less, the natural guardian may receive, hold, and use such personal property for the benefit of the minor and is accountable for same.\footnote{15}{O.C.G.A. §29-3-1(b).} Any person indebted to or holding personal property of a minor in an amount of $15,000 or less is authorized to deliver such property to the natural guardian of the minor upon receipt of an affidavit from the natural guardian (1) that no conservator has been appointed for the minor and (2) that the value of all personal property of the minor will not exceed $15,000 after payment or delivery of the personal property held by the person receiving the affidavit.\footnote{16}{O.C.G.A. §29-3-1(c).} Likewise, such an affidavit will support the transfer of stocks, bonds, or other personal property to or in the name of the natural guardian for the benefit of the minor.\footnote{17}{Id.} The natural guardian of a minor who has no conservator may also release the debtor and compromise a debt when the collection of the debt is doubtful if the amount of the debt is $15,000 or less.\footnote{18}{O.C.G.A. §29-3-2.}

2.2 Personal Injury and Tort Claims of Minors

\textbf{NOTE: If a conservator has been appointed for the minor, only the conservator may compromise a personal injury or tort claim of the minor.}\footnote{19}{O.C.G.A. §29-3-3(b).}

In the application of this authority of natural guardians, there are special rules which apply to personal injury and tort claims of minors. In order to ascertain the authority of the natural guardian in these claims, it is important and necessary to distinguish the “gross

\begin{footnotesize}
\begin{enumerate}
\item[14] For purposes of this rule, the value of the minor’s “personal property” does not include the value of property that is held for the minor’s benefit in trust or by a custodian under Article 5 of Chapter 5 of Title 44 (the Georgia Transfers to Minors Act). O.C.G.A. §29-3-1(a).
\item[15] O.C.G.A. §29-3-1(b).
\item[16] O.C.G.A. §29-3-1(c).
\item[17] Id.
\item[18] O.C.G.A. §29-3-2.
\item[19] O.C.G.A. §29-3-3(b).
\end{enumerate}
\end{footnotesize}
settlement” and the “net settlement.” “Gross settlement” means the total present value of all amounts to be paid in settlement of the claim, including cash, medical expenses, expenses of litigation, attorney’s fees, and any amounts to be paid to purchase an annuity or similar financial arrangement.20  “Net settlement” is the gross settlement less (1) attorney’s fees, expenses of litigation, and medical expenses to be paid from the settlement and (2) the present value of amounts to be received by the minor after reaching the age of majority.21

**Gross Settlement of $15,000 or less:** If the minor has no conservator and the gross settlement is $15,000 or less, the natural guardian may compromise the claim and receive the funds without court approval being required, provided the receipt of the funds does not cause the value of all personal property of the minor in the hands of the natural guardian to exceed $15,000. This is true whether or not legal action has been initiated. 22  No conservator is necessary in this situation if there is a natural guardian available to act.

**Gross Settlement over $15,000:** If the minor has no conservator and the gross settlement exceeds $15,000, the compromise of the claim must be approved by a court. The court which grants such approval depends on whether or not legal action has been initiated, that is, that a lawsuit has been filed. If no legal action has been filed, the approval must be obtained from the judge of the probate court of the county of the minor’s domicile.23  If legal action has been filed, the approval must be obtained from the judge of the court in which the action is pending. The pending legal action may not be dismissed so that the settlement may be presented to the judge of the probate court for approval without the consent of the judge of the court in which the action is pending.24

If the gross settlement exceeds $15,000 but the net settlement is $15,000 or less and no conservator has been appointed for the minor, the natural guardian may seek approval of the compromise from the appropriate court (the probate court or the court in which legal action is pending) without becoming conservator, provided the receipt of the net settlement does not cause the value of all personal property of the minor in the hands of the natural

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20 O.C.G.A. §29-3-3(a).
21 O.C.G.A. §§29-3-3(f) and 29-3-3(g).
22 O.C.G.A. §29-3-3(c).
23 O.C.G.A. §29-3-3(d).
24 O.C.G.A. §29-3-3(e).
guardian to exceed $15,000. Court approval is necessary in this situation, but a conservator is not necessary if there is a natural guardian available to act.

If both the gross settlement and the net settlement exceed $15,000, a natural guardian may not seek approval of the compromise, and a conservator must be appointed (by the probate court) for the minor, who may seek such approval from the appropriate court (the probate court or the court in which legal action is pending). Therefore, a conservator is necessary in this situation.

When court approval has been obtained (from the probate court or the court in which legal action is pending), a natural guardian or conservator may compromise a claim of the minor without receiving the full consideration in a lump sum payment. This means that a compromise may be in exchange for an arrangement which defers receipt of all or part of the settlement proceeds until after the minor reaches the age of majority. This may involve a “structured settlement” or the creation of a trust for the benefit of the minors with terms approved by the court (the probate court or the court in which legal action is pending). “Structured settlement” does not appear to be defined anywhere in the Code. However, it is generally accepted as referring to a settlement which involves the purchase of an annuity contract with all or part of the settlement proceeds. An annuity contract is one by which one party in return for a stipulated payment or payments promises to pay periodic installments for a stated certain period of time or for the life or lives of the person or persons specified in the contract. The annuity contract is usually issued by an insurance company and is usually purchased by the liability insurer involved in the minor’s personal injury or tort claim. For purposes of determining the “net settlement” referred to above, if no payments are to be received before the minor’s 18th birthday, the cost of the annuity contract (the amount paid to purchase the annuity) is the “present value of amounts to be received by the minor after reaching the age of majority.”

When considering whether to approve a “structured settlement,” it is important for the judge of the probate court or the trial judge to ascertain that the annuity is being issued by an insurance company with an A.M. Best rating of not less than “A” (“A+” or better should be

25 O.C.G.A. §29-3-3(f).
26 O.C.G.A. §29-3-3(g).
27 O.C.G.A. §33-28-1.
Example: All of the above may better be understood by an example. A minor was injured in an automobile accident. A settlement has been reached with the liability insurer for the policy limits of $100,000. Out of the settlement, the minor’s sole living parent, the mother, will receive $5,000 for loss of services and for anticipated future medical expenses; the attorney will receive fees of $38,000 (the attorney will get $2,000 in fees from the mother, for a total of $40,000 or 40%) and expenses of litigation of $2,000; a Medicaid lien will be paid off in a reduced amount of $10,000; an annuity will be purchased for $38,000, which provides for 4 annual payments to the minor beginning on the minor’s 18th birthday; and the remaining $7,000 will be paid in cash. In this example, the $5,000 being paid to the mother is not a part of the minor’s settlement but is for the mother’s separate claim. Therefore, the gross settlement to the minor is $95,000. The net settlement to the minor is $7,000, the cash to be received immediately. The net settlement is computed by subtracting from the gross settlement: $38,000 in attorney’s fees; $2,000 in litigation expenses; $10,000 paid to Medicaid; and the $38,000 cost of the annuity; or $95,000 - 38,000 - 2,000 - 10,000 – 38,000 = $7,000. Therefore:

1. The settlement must be approved by a court, whether or not a conservator must be appointed;

2. A conservator will not be required if there is a natural guardian available and eligible to act, and the receipt of the $7,000 does not cause the natural guardian to possess personal property valued in excess of $15,000;

3. A conservator will be required if there is no natural guardian available and eligible to act.

2.3 Recovery for wrongful death of a minor

The right to seek and recover for the wrongful death of an unmarried, unemancipated minor with no surviving spouse or children is in the parents jointly if they are living together and are not divorced. If only one parent survives, that parent has the right to pursue the cause of action. Even if the parents are both living but are divorced, separated or not living

28 To check the rating of an insurance company, go to www.ambest.com.
together, the right to pursue the cause of action is in both parents. However, if one parent refuses to proceed or cannot be found, the other parent has the right to contract representation (hire an attorney) of both parents, thereby binding both parents; any recovery will be received and shared by both parents. 29 In any case in which the parents are divorced, separated or not living together, either parent may file a motion prior to the trial requesting the judge to fairly apportion the recovery, in which case the judge must hold a post-judgment hearing to determine whether and how to apportion the amount of the judgment. The decision of the judge will not be disturbed on appeal absent an abuse of discretion. 30 If the minor had no surviving spouse, descendent or parents, the right to recover for the wrongful death of the minor will be in the personal representative of the estate of the minor. 31

The right to recover for a wrongful death of a minor is a cause of action which belongs to someone other than the minor (usually, the parents). Therefore, the amount received, whether by trial or settlement, is not property of the minor’s estate, and a conservator will only be necessary when the person having the right to recover is not sui juris (a minor or incapacitated adult). This should not be confused with the situation in which a minor is to receive all or a portion of a wrongful death recovery for the death of a parent, spouse or child; in such a case, the rules regarding the amount of the recovery by a natural guardian set forth above will apply.

3. TESTAMENTARY GUARDIANS AND CONSERVATORS

3.1 Testamentary Guardians

Every parent, by will, may nominate a testamentary guardian for that parent’s minor child. Unless the minor has another living parent, upon probate of the parent’s will, Letters of Testamentary Guardianship shall be issued to the individual nominated in the will, and that individual shall serve as testamentary guardian without notice or hearing. Of course, the individual must be willing to serve as such. A testamentary guardian is not required to give bond or security. In all other respects a testamentary guardian has the same rights, powers, and duties as a permanent guardian appointed by the court. 32

29 O.C.G.A. §§51-4-4 and 19-7-1(c)(2).
30 O.C.G.A. §19-7-1(6).
31 O.C.G.A. §19-7-1(3).
guardianship of a minor, when both parties are fit and proper persons to have custody, a testamentary guardian appointed in the will of the second parent to die will prevail over a temporary guardian appointed by the probate court.33

The Code does not provide for any notice or hearing if it is uncertain whether the minor “has another living parent.” If a parent other than the deceased whose probated will nominates the testamentary guardian is named on the birth certificate of the minor, a copy of a death certificate for such other parent or a certified copy of an order permanently terminating the parental rights of such other parent should be required by the judge of the probate court before the issuance of Letters of Testamentary Guardianship. If it is alleged by the nominated testamentary guardian that the whereabouts of the other parent and, therefore, his/her living status, are unknown, the authority of the probate court to issue, and the validity of, Letters of Testamentary Guardianship become questionable. The same would be true when no father is listed on the minor’s birth certificate, and the nominated testamentary guardian alleges that the child was born out of wedlock and has not been legitimated by the father. Without notice to the father and an opportunity for him to be heard on the issue, the authority of the probate court to issue, and the validity of, Letters of Testamentary Guardianship likewise become questionable. Therefore, the judge of the probate court should require a copy of the minor’s birth certificate, certified within the preceding 90 days, as evidence that the minor has not been legitimated, and the Putative Father Registry34 should be checked to ascertain whether a person has registered as the minor’s putative father. If the father of a minor who was born out of wedlock is known to be in life but is alleged to have failed to legitimate the minor, perhaps the judge of the probate court should order that notice issue and be served upon the putative father35 before the issuance of Letters of Testamentary Guardianship. Since a testamentary guardianship is the equivalent of a permanent guardianship,36 and since the judge of the probate court may not appoint a permanent guardian of a minor having a living parent whose rights have not been terminated or

34 The Georgia Putative Father Registry may be accessed at: http://health.state.ga.us/programs/vitalrecords/fatherreg.asp.
35 The judge of the probate court may order such additional service or notice as deemed proper in the interest of due process and reasonable opportunity to be heard with respect to any proceedings under Titles 29 and 53. O.C.G.A. §§29-9-7 and 53-11-5.
36 O.C.G.A. §29-2-4(c).
surrendered, if Letters of Testamentary Guardianship are issued upon the belief that the minor does not have a living parent, and a living parent later appears, presumably the testamentary guardianship can be terminated at the request of a parent who can prove that he/she is the natural guardian of the minor.

The request for the issuance of Letters to a testamentary guardian may be made in the petition to probate the will of the decedent. The petition should show that the minor has no other living parent.

The form for the Letters of Testamentary Guardianship is a part of GPCSFs 4, 5, and 7.

3.2 Testamentary Conservators

Every parent, in his/her will, may nominate a testamentary conservator for that parent’s minor child for the property that passes to the minor under that parent’s will, even if the minor has another living parent. Upon probate of the will, Letters of Testamentary Conservatorship must be issued to the individual nominated in the deceased parent’s will and that individual will serve as testamentary conservator without notice or hearing, if willing to serve as such. A testamentary conservator is not required to give bond for the value of the property that passes to the minor under the parent’s will, except that, in the case of waste committed or apprehended, the judge of the probate court may require a bond. Should the testamentary conservator fail to give bond as required, the judge may dismiss the conservator and appoint another conservator. In all other respects a testamentary conservator shall have the same rights, powers, and duties as other conservators appointed by the court.

If property accrues or has accrued to the minor from sources other than the parent’s will, the judge may appoint a different conservator for such property or may appoint the testamentary conservator as conservator for such property and require the testamentary conservator to give bond for the property coming from sources outside of the will. In order for the judge to appoint the testamentary conservator as conservator to receive property from sources outside the will, the testamentary conservator must file a petition showing the

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38 O.C.G.A. §29-3-5.
amount and the source of the property in order to furnish the information needed by the judge to fix the amount of the bond.

Although the law contemplates the possibility of having two conservators when property accrues or has accrued to the minor from sources other than through the will, such an arrangement could result in confusion. If the testamentary conservator is unwilling to accept the full responsibility of conservatorship of all property of the minor (regardless of the source), it may be preferable for the testamentary conservator to resign and permit some other person to be appointed as conservator to manage all of the minor's property.

As indicated above, a testamentary conservator cannot act as to property coming to the minor from sources outside of the will without giving bond. This requirement of bond is mandatory upon the judge of the probate court. However, if the judge does not require a bond, anyone dealing in good faith with the conservator in reliance upon the order of the probate court and the Letters of Conservatorship will be protected, based upon the theory that its orders are presumed to have been entered only after compliance with all prerequisites.

The request for the issuance of Letters to a testamentary conservator may be made in the petition to probate the will of the decedent.

The form for the Letters of Testamentary Conservatorship is a part of GPCSFs 4, 5, and 7.

4. **JURISDICTION TO APPOINT GUARDIANS AND/OR CONSERVATORS**

Except as otherwise provided by law, probate courts have authority to exercise original, exclusive and general jurisdiction regarding the appointment and removal of guardians and conservators of minors and in all controversies as to the right of guardianship or conservatorship. However, the probate court has no jurisdiction concerning loss of custody by a parent or guardian due to cruel treatment, abandonment, or immoral conditions under Code Section 19-7-4.

Except for temporary guardianships, the probate court of the county in which the minor is found or of the domicile of the proposed guardian or conservator has authority to

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39 O.C.G.A. §§29-3-5, 29-3-21(b)(6), and 29-3-40(a)
42 See Section 8.
appoint a permanent guardian and/or conservator of such minor.\textsuperscript{43} Also, in the case of a permanent guardianship, the judge of the probate court may transfer the case to another county if the transfer would best serve the minor’s interest.\textsuperscript{44} If a nonresident minor has property in Georgia, the probate court of the county in which the property is located may appoint a conservator who will have control only over that property.\textsuperscript{45}

The judge of the probate court has no authority to remove or terminate the parental rights of a natural guardian of a minor. Thus, the judge cannot appoint a permanent guardian of a minor with living parents, unless the parents’ rights have been permanently terminated or surrendered.\textsuperscript{46} The judge may, however, appoint a conservator for a minor who has living parents.

The Code allows the judge of the probate court to appoint a permanent guardian for a minor who has no “natural guardian, testamentary guardian, or other permanent guardian.”\textsuperscript{47} In order to be a “natural guardian,” the parent must be one whose parental rights have not been “terminated or surrendered.”\textsuperscript{48} Thus, if a parent has surrendered all his/her parental rights and there is no other living parent, the minor has no “natural guardian,” and a permanent guardian may be appointed in such a case.

Our courts have held that a child who is born alive after an injury sustained at any time after conception has a cause of action.\textsuperscript{49} The judge of the probate court would clearly have the authority to appoint a guardian and/or conservator after the birth of the child. However, there appears to be no authority for the appointment of either a guardian or conservator for an unborn child. Obviously, in the case of a claim for an injury, proper evidence could not be presented which would enable the judge to determine whether any proposed settlement was adequate. The appointment of a guardian-ad-litem might be proper when the interests of an unborn child need to be represented and protected in litigation which might occur before the child’s birth.

\textsuperscript{43} O.C.G.A. §§29-2-14, 29-3-6.
\textsuperscript{44} O.C.G.A. §29-2-14.
\textsuperscript{45} O.C.G.A. §29-3-6(b).
\textsuperscript{47} O.C.G.A. §29-2-14.
\textsuperscript{48} O.C.G.A. §29-1-1(13).
5. RIGHTS OF UNWED FATHERS

A “child born out of wedlock” is one whose parents were not married at the time of the child’s birth and who do not subsequently get married or one who is the issue of an adulterous intercourse by a wife during marriage. However, a child born to parents whose marriage was believed to be valid but is void because of an inability to contract, an unwillingness to contract, or a fraudulent inducement to contract is deemed legitimate if the child was born prior to the marriage being annulled or declared void.

The 2005 Code defines a “parent” as “a biological or adoptive father or mother whose parental rights have not been surrendered or terminated and, in the case of a child born out of wedlock, the individual or individuals who are entitled to have custody of and exercise parental power over the child pursuant to Code Section 19-7-25.” Code Section 19-7-25 provides that only the mother of a child born out of wedlock is entitled to custody of the child unless the father has legitimated the child. Thus, the father of a child born out of wedlock is not the “parent” of his child under the 2005 Code unless he has legitimated the child. Legitimation is governed by Article 2 of Chapter 7 of Title 19 of the Code. While there is a judicial proceeding for legitimation, Georgia law now permits legitimation by means of a voluntary acknowledgement of paternity and a voluntary acknowledgement of legitimation. Additionally, a father may intervene in proceedings to establish paternity filed by the Georgia Department of Human Services for the benefit of a minor for whom public services are received by the custodian of the minor and seek legitimation of the minor.

Nonetheless, the Georgia Supreme Court has recognized certain constitutional rights of unwed fathers. In the case of In re Baby Girl Eason, the court described the unwed father's rights as follows:

“We conclude ... that unwed fathers gain from their biological connection with a child an opportunity interest to develop a relationship with their children which is constitutionally protected. This opportunity interest begins at

50 O.C.G.A. §19-7-23.
52 O.C.G.A. §29-1-1(13).
53 O.C.G.A. §19-7-22.
54 O.C.G.A. §19-7-22.
55 O.C.G.A. §19-7-22.
56 O.C.G.A. §19-7-21.1. Such voluntary acknowledgements must be made by the mother and father before the child’s first birthday.
57 O.C.G.A. §19-7-22(g).
conception and endures probably throughout the minority of the child. But it is not indestructible. It may be lost... It is, then, an interest which can be abandoned by the unwed father if not timely pursued. On the other hand it is an interest which an unwed father has a right to pursue through his commitment to becoming a father in a true relational sense as well as in a biological sense. Absent abandonment of his interest, a state may not deny a biological father a reasonable opportunity to establish a relationship with his child.\(^{58}\)

In recognition of the “opportunity interest” of unwed fathers set forth in In re Baby Girl Eason, the 2005 Code grants these fathers the opportunity to object when someone else is attempting to be appointed as permanent guardian of the child. The unwed father who timely objects to a petition for permanent guardianship is given 30 days in which to file a petition to legitimate the minor. If he is successful in doing so, the child then has a natural guardian (the father) so the petition for permanent guardianship must be dismissed.\(^{59}\)

Because of that “opportunity interest,” unless proof of death of the biological father or a certified copy of an order permanently terminating his parental rights is provided to the probate court, notice should be given to the biological father even if the petition alleges that the father is unknown.

Furthermore, it is the opinion of the author that notice to the putative (alleged) father should be required by the court in every case of guardianship and/or conservatorship of a minor, including temporary guardianships. By relying solely on the sworn petition that the child was born out of wedlock, that the father has not legitimated the child, or that the father is unknown, the judge of the probate court affords no opportunity for the father of a minor to prove otherwise. Unfortunately, people have been known to mislead or intentionally lie to the court, especially when there is some motive on the part of the mother or other petitioner to keep the proceedings secret from the father.

6. PRIORITY OF APPOINTMENT

The judge of the probate court may not appoint a permanent guardian for a minor who has a natural guardian, a testamentary guardian or another permanent guardian.\(^{60}\)

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\(^{58}\) Id. at 296.

\(^{59}\) O.C.G.A. §29-2-15(c).

\(^{60}\) O.C.G.A. §29-2-14.
Otherwise, in the appointment of a permanent guardian or conservator of a minor, no person is entitled to be appointed, and the judge must select and appoint that person who best serves the minor’s interest.\textsuperscript{61} In making the selection, the judge must consider, but is not bound by, the following preferences:

1. The adult who is the preference of a minor age 14 or older;\textsuperscript{62}
2. The minor’s nearest adult relative;\textsuperscript{63}
3. Other adult relatives of the minor;
4. Adults related to the minor by marriage;
5. A person whom the minor’s natural guardian named in a notarized or witnessed document;
6. A person who has provided care and support for the minor; or
7. For conservator, the county guardian.\textsuperscript{64}

7. PROCEDURE FOR APPOINTMENT OF A PERMANENT GUARDIAN AND/OR CONSERVATOR OF A MINOR

7.1 Procedure in General

The procedures explained in this Section govern the appointment of a permanent guardian and/or a conservator of a minor, which is commenced by the filing of a petition. The petition is filed in the probate court of the county of the minor's domicile or of the domicile of the proposed guardian or conservator. If the minor is not domiciled in Georgia but has property or a cause of action in Georgia, the petition is filed in any county in which any property of the minor is located.\textsuperscript{65} The petition must:

1. State the facts upon which the court’s jurisdiction is based;
2. Give the name, address, and date of birth of the minor;
3. Give the name, address, and county of domicile of the petitioner and the petitioner’s relationship to the minor, if any, and, if different from the petitioner, the name, address, and county of domicile of the person nominated

\textsuperscript{61} O.C.G.A. §§29-2-16, 29-3-7.
\textsuperscript{62} The judge is also allowed to consider statements of a minor who is under the age of 14. O.C.G.A. §§29-2-16(b) and 29-3-7(b).
\textsuperscript{63} The nearest relative is determined by examining Georgia’s intestacy statute, O.C.G.A. §53-2-1. O.C.G.A. §§29-2-16(a)(2), 29-3-7(a)(2).
\textsuperscript{64} O.C.G.A. §§29-2-16 and 29-3-7.
\textsuperscript{65} See Section 4, above.
by the petitioner to serve as guardian\textsuperscript{66} or conservator\textsuperscript{67} and that person’s relationship to the minor, if any;

4. State whether, to the petitioner’s knowledge, there exists any notarized or witnessed document made by a parent of the minor that deals with the guardianship or conservatorship of the minor and the name and address of any designee named in the document; and

5. State the reason for any omission if full particulars required by the petition are lacking.

In addition to the petitioner and the nominated guardian and/or conservator, the petition must also state the names and addresses of the following relatives of the minor whose whereabouts are known:

1. In a petition for conservatorship, the minor’s parents; if there is a living parent, no other names and addresses are required;

2. The adult siblings of the minor; provided, however, that not more than three adult siblings need to be listed;

3. If there is no adult sibling of the minor, the grandparents of the minor; provided, however, that not more than three grandparents need to be listed;

4. If there is no grandparent of the minor, any three of the nearest adult relatives of the minor determined according to Code Section 53-2-1 (the intestacy statute).

In a petition for permanent guardianship [GPCSF 29], the following information must also be included:

1. A statement that the minor has no natural guardian, testamentary guardian, or permanent guardian;

2. A statement of whether the child was born out of wedlock and, if so, the name and address of the biological father, if known; and

3. Whether a temporary guardian has been appointed for the minor or a petition for the appointment of a temporary guardian has been filed or is being filed.

\textsuperscript{66} Only an individual may be appointed as guardian of a minor. O.C.G.A. §29-2-2(a).

\textsuperscript{67} Although the words “person” and “individual” are used in O.C.G.A. §§29-3-4 and 29-3-7, the Code clearly contemplates that the court may appoint as a conservator a corporate fiduciary, specifically including a financial institution, trust company, national or state bank, savings bank, or savings and loan association described in Code Section 7-1-242. See O.C.G.A. §§29-3-31, 29-3-34(c), and 29-3-40(b).
In a petition for conservatorship [GPCSF 30], the following information must also be included:

1. A description of all known assets, income, other sources of funds, liabilities, and expenses of the minor;
2. A disclosure of any financial interest that would cause the proposed conservator to have a conflict of interest with the minor; and
3. A specific listing of any of the additional powers, as described in subsections (b) and (c) of Code Section 29-3-22, that are requested by the conservator and a statement of the circumstances that would justify the granting of such powers.

7.2 Notice and Hearing

Notice of a petition for permanent guardian must be given to the biological father of a child born out of wedlock. Notice of the petition, whether for guardianship or conservatorship or both, must be also given to anyone designated by the minor’s parent as guardian or conservator and to the minor’s relatives who are listed above. Service of notice will be by personal service for those who reside in Georgia at a known address; by first-class mail for nonresidents who have known addresses; and by publication for two weeks in the official county newspaper for those with unknown addresses. The notice will state that any objections to the petition must be filed within 10 days of personal service, 14 days of the date of mailing, or 10 days of the date of the second publication.

After notice and any hearing, the judge may issue an order granting the guardianship or conservatorship and appointing the person who best serves the minor’s interest. In the case of a permanent guardian, a hearing is required. Peculiarly, a hearing is discretionary with the judge in the case of a petition for conservatorship. However, the judge should consider whether a hearing should be held for the purposes of determining that all notice requirements have been met and the setting of the appropriate bond. At the hearing, the judge or a staff member could explain to the conservator the duties of the office, the limitations on authority, and the reporting requirements. If not previously done, the

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68 See Section 5. above.
70 O.C.G.A. §29-3-9.
The conservator should be required to view the video on Conservators of Minors in Georgia and should be given a copy of the Handbook for Conservators for Minors in Georgia.\textsuperscript{71}

If the judge deems it necessary, a temporary guardian or conservator may be appointed under the same rules that apply to the appointment of a temporary administrator.\textsuperscript{72} Presumably, this means without further notice to anyone provided the person is qualified and eligible to be appointed.

Whenever there is a contest over the appointment of a guardian or conservator of a minor, and there is no natural guardian or living parent, the sole consideration of the judge of the probate court should be the best interests of the minor, to be determined from the evidence presented. In determining what is in the best interests of the minor, the judge may consider any statement of the minor, including one under the age of 14.\textsuperscript{73} The judge may hear from the minor in private without counsel or any of the other parties being present. In determining what is in the best interest of the minor, the judge may use as a guideline the degree of interest either or both of the contending parties would have in the minor if there were no financial benefits which could possibly accrue to the guardian or conservator. A person whom the judge determines to have a genuine, wholesome interest in the welfare of the minor, apart from any financial interest, should be preferred for appointment.

7.3 Requirements of the Order

An order appointing a permanent guardian for a minor must specify:

1. The name of the permanent guardian and the basis for the selection of the guardian;
2. A specific listing of any of the additional powers which are granted to the permanent guardian as provided in subsection (b) of Code Section 29-2-22;
3. If only a guardian is appointed or if the guardian and conservator appointed are not the same person, the reasonable sums of property to be provided the guardian to provide adequately for the minor’s support, care, education,

\textsuperscript{71} The video and handbook are produced and distributed by the Georgia Council of Probate Court Judges and the Administrative Office of the Courts. Both may be viewed, read or downloaded at www.gaprobate.org.

\textsuperscript{72} O.C.G.A. §§29-2-17(d) and 29-3-8(d).

\textsuperscript{73} O.C.G.A. §§29-2-16(b) and 29-3-7(b).
health, and welfare are subject to modification by subsequent order of the court; and

4. Such other and further provisions of the guardianship order as the court shall determine to be in the best interest of the minor.\(^74\)

An order appointing a conservator of a minor must specify:

1. The name of the conservator and the basis for the selection of the conservator;
2. A specific listing of any of the additional powers, as provided in subsections (b) and (c) of Code Section 29-3-22;
3. If a guardian is also appointed and if the guardian and conservator are not the same person, the reasonable sums of property to be provided the guardian to provide adequately for the minor’s support, care, education, health, and welfare, subject to modification by subsequent order of the court;
4. If the minor has an interest in real property, the name of the county in which the real property is located; and
5. Such other and further provisions of the conservatorship order as the court shall determine to be in the best interest of the minor, stating the reasons therefor.\(^75\)

In any case involving the appointment of a conservator, if the minor has an interest in real property, the court shall file, within 30 days of granting the petition for conservatorship, a certificate with the clerk of superior court of each county in which the minor owns real property, which shall be recorded in the deed records of the county and indexed under the name of the minor in the grantor index. The certificate shall set forth the name of the minor, the expiration date of the conservatorship, the date of the order granting the conservatorship, and the name of the conservator. The certificate shall be accompanied by the same fee required for filing deeds with the clerk of superior court, which filing fee and any fee for the certificate shall be taxed as cost to the estate of the minor.\(^76\)

\(^74\) O.C.G.A. §29-2-19.
\(^75\) O.C.G.A. §29-3-10(a).
\(^76\) O.C.G.A. §29-3-10(b).
8. **APPOINTMENT OF TEMPORARY GUARDIAN [GPCSF 28]**

The judge of the probate court of the county in which the petitioner is domiciled has the power to appoint a temporary guardian of a minor; however, if the petitioner is not a domiciliary of this state, the petition may be filed in the probate court of the county where the minor is found. The petition for appointment is to be filed by the individual having actual physical custody of such minor.\(^{77}\) However, no temporary guardian may be appointed unless proper notice as explained below is given or if any objection is filed by a natural guardian.\(^{78}\)

If a temporary guardian assumes in writing the obligation to support the minor while the guardianship is in effect, then for purposes of obtaining medical insurance coverage for the minor, the temporary guardianship is deemed to be a permanent guardianship, that is, the minor will be considered a dependent of the temporary guardian for so long as the guardianship is in effect.\(^{79}\)

The petition for appointment as temporary guardian must include the following information:

1. The name, address and date of birth of the minor;
2. The name and address of the petitioner and the petitioner’s relationship to the minor, if any;
3. A statement that the petitioner has physical custody of the minor and:
   a) Is domiciled in the county in which the petition is being filed; or
   b) Is not a domiciliary of this state and the petition is being filed in the county where the minor is found
4. The name, address, and county of domicile of any living parent of the minor and a statement of whether one or both of the parents is the minor’s natural guardian;
5. A statement of whether one or both of the parents have consented in a notarized writing to the appointment of the petitioner as temporary guardian and, if so, that the consents are attached to the petition;

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\(^{77}\) O.C.G.A. §29-2-5.

\(^{78}\) O.C.G.A. §29-2-6.

\(^{79}\) O.C.G.A. §29-2-7(b).
6. If the sole parent or both parents have not consented to the appointment of the temporary guardian, a statement of the circumstances that give rise to the need for the appointment of a temporary guardian; and

7. The reason any particulars are lacking.\textsuperscript{80}

\textbf{8.1 Consent by Parents; Granting without Hearing or Referral}

If the sole parent or both parents of the minor have consented to the appointment of the temporary guardian, as evidenced by notarized written consents attached to the petition, or if no parent who is entitled to notice files a timely objection to the petition after notice, the judge of the probate court must grant the petition without further notice or hearing and must issue Letters of Temporary Guardianship to the petitioner; provided, however, the judge may refer the petition to the juvenile court which must, after notice and hearing, determine whether temporary guardianship is in the best interest of the minor.\textsuperscript{81}

\textbf{8.2 Notice, Objection, Hearing or Referral}

If one or both of the parents of the minor have not consented to the appointment of the temporary guardian, notice of the petition must be given to any parent who has not consented. The notice must be by personal service if the parent resides in this state at a known address; by first-class mail if the parent resides outside this state at a known address; or by publication for two weeks in the official legal organ for the county in which the petition is filed if a parent’s address is unknown. The notice will state that the parent is entitled to object either to the establishment of a temporary guardianship or to the selection of the petitioner as temporary guardian, or both. The notice must require that any objection be filed in writing with the court within ten (10) days of the personal service, within fourteen (14) days of the mailing of the notice, or within ten days of the date of the second publication of the notice.\textsuperscript{82}

A petition may be filed which alleges that the minor was born out of wedlock and that the biological father is not a “parent” entitled to notice or a right to object. Since the

\textsuperscript{80} O.C.G.A. §29-2-5.
\textsuperscript{81} O.C.G.A. §29-2-6(a), (c) and (f). There is no discretion in the probate court to deny the petition when the sole or both parents have consented. The probate court must either grant the petition or refer it to juvenile court.
\textsuperscript{82} O.C.G.A. §29-2-6(b).
acceptance of the allegation of the petitioner without notice and an opportunity to be heard being afforded to the putative father would deny him due process of law, notice should always be given to the putative father of the minor. If the father files an objection, upon a hearing of the matter, he must show that he is a “parent,” or he will not be entitled to object either to the appointment or the selection of the temporary guardian.

Objections may be filed both to the establishment of the temporary guardianship or to the selection of the petitioner as the temporary guardian. If a natural guardian of the minor files a timely objection to the establishment of the temporary guardianship, the judge of the probate court must dismiss the petition. If a natural guardian files a timely objection to the selection of the petitioner as temporary guardian, the judge must hold a hearing to determine who will serve as temporary guardian. If a parent who is not a natural guardian files a timely objection to the establishment of the temporary guardianship or to the selection of the petitioner as temporary guardian, the judge must hold a hearing to determine all matters at issue.

Code Section 29-2-6(f) provides that in “all proceedings under this Code section, the (probate) court has the option to refer the petition to the juvenile court which shall, after notice and hearing, determine whether the temporary guardianship is in the best interest of the minor.” Therefore, when the judge of the probate court has concerns about whether a temporary guardianship is in the best interest of a minor, including those cases where the judge is otherwise directed by the statute to grant or deny the petition, the judge may exercise this option and refer the case to the juvenile court.

8.3 Petition by Parent

On occasion, the probate court may have a temporary guardianship in which the petition is filed by a parent who is not the natural guardian (e.g., a petition by one divorced parent where the other was awarded sole custody or by the father of a child born out of wedlock). Although not specifically contemplated by the Code, this typically involves some

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83 See Section 5. above.
84 Unlike the procedure for appointment of a permanent guardian, there is no provision for delaying the temporary guardianship proceeding in order to allow the biological father to legitimize the minor. The father may still seek legitimation, but, in order to file to terminate the temporary guardianship, he must also become a natural guardian of the minor. See O.C.G.A. §29-2-8(b).
85 O.C.G.A. §29-2-6(d),(e).
need for temporary placement of the minor. Perhaps the natural guardian is joining the Armed Forces and will report to basic training, has been assigned temporary duty for work at a distant location, or is embarking on an extended vacation, or perhaps the natural guardian has fallen on hard financial times or is experiencing a problem with drugs, alcohol, or a mental illness. In those circumstances, the parent who is not the natural guardian may be the appropriate choice for selection as temporary guardian. However, it will be important for both parents to understand that an order of the judge of the probate court does not amend, modify or suspend an order of a superior or juvenile court granting custody or an order of a superior or state court requiring the payment of child support.

8.4 Powers of a Temporary Guardian

Except as otherwise provided by law, a temporary guardian shall be entitled to exercise any of the powers of a natural guardian. If a temporary guardian assume in writing the obligation to support the minor while the temporary guardianship is in effect, to the extent that no other sources of support are available, the for the purposes of obtaining medical insurance coverage for the minor, the temporary guardianship shall be deemed to be a permanent guardianship (i.e., the minor will be considered a dependent of the temporary guardian). 86

8.5 Termination of Temporary Guardianship or Referral

A temporary guardianship will terminate upon the earliest of the following events: (1) the minor reaches age 18, (2) the minor is adopted, (3) the minor is emancipated, (4) the minor dies, (5) the temporary guardian dies, (6) Letters of Guardianship are issued to a permanent or testamentary guardian, or (7) a court order terminating the temporary guardianship is entered. 87

Either natural guardian may petition to terminate the temporary guardianship at any time. Notice of the petition to terminate must be provided to the temporary guardian, unless the consent of the temporary guardian to the termination is included in the petition. The notice must be by personal service if the temporary guardian resides in this state at a known

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87 O.C.G.A. §29-2-8(a).
address; by first-class mail if the temporary guardian resides outside this state at a known address; or by publication for four weeks if the temporary guardian’s address is unknown.

If no objection is filed by the temporary guardian within ten days of such notice, the judge of the probate court must order the termination of the temporary guardianship. If an objection is filed within ten days, the judge has the option to hear the objection or to transfer the records relating to the temporary guardianship to the juvenile court, which must determine, after notice and hearing, whether a continuation or termination of the temporary guardianship is in the best interest of the minor and issue an order accordingly.

There is no standard form for the petition to terminate a temporary guardianship. See Appendix A10-1 for a sample form Petition to Terminate.

9. STANDBY GUARDIANS

This new category of guardians of minors was created in 2002 and carried over in the 2005 Code. As will be seen, the involvement of the probate court occurs first only when the appointment of a standby guardian becomes effective after the expiration of a period of time. The ability to appoint a standby guardian was created so that a parent or other custodian of a minor could nominate a standby guardian to serve for a limited period of time in the event of the incapacity of the parent or custodian. This is somewhat like a parent or custodian giving a limited power of attorney to another to act in place of the parent or custodian over the minor under a certain set of circumstances.

The following definitions apply to this procedure:

1. “Designating individual” means a parent or guardian who appoints a standby guardian. A “designating individual” may only be:
   a. A parent of a minor; provided that he/she has physical custody of the minor and his/her parental rights are not terminated; and provided, further, that the other parent of the minor is deceased, has had his/her parental rights terminated, cannot be found after a diligent search has been made, or has consented to the designation of and service by the

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88 O.C.G.A. §29-2-8(b) simply states that “notice of such petition shall be provided to the temporary guardian.” However, since no specific manner of service of notice is given, presumably O.C.G.A. §§29-9-4 and 29-9-5 would apply.
89 O.C.G.A. §29-2-8(b).
90 There are no corollary provisions in the Code for standby conservators.
standby guardian; or

b. A guardian of the minor who is duly appointed and serving pursuant to court order.

2. “Health care professional” means a person licensed to practice medicine under Chapter 34 of Title 43, or a person licensed as a registered professional nurse under Chapter 26 of Title 43 and authorized by the Georgia Board of Nursing to practice as a nurse practitioner.

3. “Health determination” means the dated, written determination by a health care professional that a designating individual is unable to care for a minor due to the designating individual’s physical or mental condition or health including a condition created by medical treatment.

4. “Standby guardian” means an adult who is named by a designating individual to serve as standby guardian of a minor.91

9.1 Designating a Standby Guardian; Form

A “designating individual” may designate a standby guardian.92 The designation must be in writing and be signed by or at the express direction of the designating individual and must be witnessed by two or more competent witnesses. Neither a witness nor someone who signs at the direction of the designating individual may be named as the standby guardian. The designation must be in substantially the form contained in the Code and contain all of the information set forth in the Code and the standard form. The designation must include a statement of consent, signed by the standby guardian, to serve in that capacity.93

While the Code does not state that a single designating document may be used for more than one minor, the form contained in the Code does indicate that the names of multiple minors may be entered. See Appendix A10-2 for the statutory form.

9.2 Invoking the Designation; Duties of Standby Guardian; Filing Designation

Upon the “health determination” being made and without the necessity of any judicial intervention, the standby guardian assumes all the rights, duties, and responsibilities of

92 O.C.G.A. §29-2-10(a).
93 O.C.G.A. §29-2-11.
guardianship of the person of the minor. Consistent with the designating individual’s condition, he/she may confer with the standby guardian concerning the care and welfare of the minor.94 No bond is required of a standby guardian.95 The appointment of a standby guardian does not relieve any parent of a duty to support the minor. 96

When and if a standby guardian assumes responsibility, he/she must file a “notice of the standby guardianship” in the probate court of the county of domicile of the minor, together with a copy of the standby guardianship designation and a copy of the health determination.97 This is the first step at which the judge of the probate court is involved in this process. The law does not grant the judge any jurisdiction to make a determination as to the validity of the designation, of the credentials of the health care professional who makes the determination that the designating individual cannot care for the minor, or of the propriety of the designation of the standby guardian. The statute does not provide any suggested form for the health determination or for the notice to be filed with the probate court. As long as there are documents attached to the notice which appear to be the designation of a standby guardian and a statement signed by a health care professional indicating the inability of the designating individual to care for the minor, the judge should accept and file the notice. Although not expressly stated in the Code, the probate court should record the notice or maintain some other verifiable record of the filing. The court may open an estate based upon the notice in the name of the minor; alternatively, a file or docket may be created for the recording of all designations. See Appendix A10-3 for a sample form of the notice.

9.3 Revocation

At any time before the health determination is made, a standby guardianship may be revoked without notice to anyone by destruction or obliteration of the designation done by the designating individual with an intent to revoke, or by a written revocation signed by the designating individual or by some other individual in his/her presence and at his/her express direction. The signature must be attested to and subscribed by two or more competent

94 O.C.G.A. §29-2-10(b).
95 O.C.G.A. §29-2-10(d).
96 O.C.G.A. §29-2-10(e).
97 O.C.G.A. §29-2-10(c).
witnesses. After the health designation is made, the standby guardianship can be revoked by
the designating individual filing a notice of revocation with the probate court and by mailing
a copy to the standby guardian.98

9.4 Filing of Temporary Guardianship within 120 Days; Termination of Designation

Unless the “designating individual” has regained the ability to properly care for the
minor(s), within 120 days of the health care determination being made, the standby guardian
must file a petition in the probate court to be appointed as temporary guardian of the minor.
The standby guardianship shall automatically terminate 120 days after the making of the
health determination unless the standby guardian has filed a petition for temporary
guardianship of the minor, in which case the standby guardianship shall remain in effect,
unless otherwise revoked, until the petition is ruled upon.99

If the designating individual dies prior to the entry of an order on a petition for
temporary guardianship of the minor, the standby guardianship will be terminated. If the
designating individual dies subsequent to the entry of an order on such a petition, the
guardianship created pursuant to that order will terminate in favor of any testamentary
designation of a guardian of the minor or, if there is no testamentary designation, to an order
on a petition for guardianship brought thereafter.100

The law does not grant the judge of the probate court any jurisdiction over the
standby guardian during the 120-day period of the standby guardianship. In the case of any
misconduct or neglect by a standby guardian, presumably some other person or agency could
seek the appointment of a temporary or permanent guardian, who would then become a
“designating individual” with authority to revoke the standby guardianship designation.101

10. QUALIFICATION AND BOND OF GUARDIAN OR CONSERVATOR

10.1 Oath of Guardian or Conservator

Every guardian or conservator appointed by the judge of the probate court, before
entering upon the duties of the appointment, must take an oath to well and truly perform the

98 O.C.G.A. §29-2-12.
99 O.C.G.A. §29-2-13(a),(b).
100 O.C.G.A. §29-2-13(c).
101 O.C.G.A. §§29-2-9(1)(B) and 29-2-12.
duties required as guardian or conservator and to faithfully account for the estate of the minor. The oath or affirmation of an appointed guardian or conservator may be subscribed before the judge or clerk of any probate court of this state, without the necessity of a commission. The judge of the probate court who appoints the guardian or conservator may grant a commission to a judge or clerk of any court of record of any other state to administer the oath or affirmation.\textsuperscript{102} While the Code Section does not specify the language of the oath, the standard forms provide the following oath:

“I/We do solemnly swear or affirm that I/we will well and truly perform all the duties required of me/us as (guardian) (and) (conservator) and faithfully account to my ward for my ward’s estate.” [GPCSF 35]

10.2 Bond [GPCSF 21]

Every guardian or conservator appointed by the judge of the probate court, before entering upon the duties of the appointment, must give bond with good security payable to and approved by the judge, whenever required by law or court order. Bond is not required by law for a guardian but may be required by the judge in such amount as the judge may determine.\textsuperscript{103} Bond is required for a conservator, unless the minor’s estate consists solely of real property in the estate of the minor. If the bond is signed by a corporate surety, the amount must be equal to the value of all personal property, unless there is real property to be sold, in which case the bond amount should include the anticipated proceeds of the sale. If a personal surety signs the bond, the amounts are doubled.\textsuperscript{104} A financial or other similar institution with combined capital, surplus, and undivided profits of $3 million appointed as guardian or conservator is not required to give bond.\textsuperscript{105}

The responsibility of assuring that the bond is adequate to protect the interests of the minor falls upon the judge of the probate court. Personally endorsed bonds should be discouraged. However, if a personal bond is proposed, the personal surety should:

\textsuperscript{102} O.C.G.A. §§29-2-24, 29-3-24.
\textsuperscript{103} O.C.G.A. §29-2-25. If a guardian is to receive any funds for the benefit of the minor, such as Social Security benefits or some allowance from a conservator of the minor, the requirement of a bond for the estimated annual amount to be received might be appropriate, if not preferred.
\textsuperscript{104} O.C.G.A. §29-3-41.
\textsuperscript{105} O.C.G.A. §29-3-40.
1. Show that he/she is the sole owner in his/her own right of real estate which is returned for tax purposes or appraised at more than the amount of the bond required; and

2. Show that the property is not subject to a mortgage, lien, or security deed, or that the equity over any such debt exceeds the amount of the bond.

A lien or deed to secure debt should be given by the surety and be recorded on the deed records of the county where the property is located as a manner of protecting the bond and the minor.

While bond is mandatory for the conservator, if the judge of the probate court does not require a bond, anyone dealing in good faith with the conservator in reliance upon the order of the judge and the Letters of Conservatorship will be protected, based upon the theory that its orders are presumed to have been entered only after compliance with all prerequisites.\(^{106}\)

Bonds must be recorded in a book “kept for that purpose” and the original is kept on file in the probate court.\(^{107}\) While bonds traditionally may have been separately recorded in separate books, there would appear no reason why bonds cannot be recorded together with the entire proceeding in the general Minutes.\(^{108}\)

The judge of the probate court may increase or reduce the amount of the bond when there has been an increase or reduction in the value of the ward's estate; a reduction does not affect the liability of the surety for any waste or misconduct occurring prior to the approval of the reduction.\(^{109}\)

Whenever it comes to the attention of the judge of the probate court by the annual returns or otherwise that the bond of any conservator is not sufficient, it becomes the duty of the judge to give notice to such conservator to appear and give additional security or an additional bond. Notice must be given by first-class mail to the conservator and the surety.


\(^{107}\) O.C.G.A. §§29-2-25(b) and 29-3-40(c).

\(^{108}\) Some probate courts now record all proceedings and all parts of proceedings, excepting those proceedings which are confidential and not available for public inspection, in general Minutes, a book of all proceedings in the court.

\(^{109}\) O.C.G.A. §29-3-42.
Upon the conservator’s failure to give additional bond and security, the court may revoke the Letters of Conservatorship.\textsuperscript{110}

The bonding requirement places a serious responsibility upon the judge of the probate court and the probate court staff. In effect, it requires that whenever a conservator’s inventory and asset management plan or annual return is filed, the judge or staff must compare the amount of the minor's estate as shown to the amount of the bond in the court records and should require such adjustment in the amount of the bond as is proper.

If a surety dies, becomes insolvent, or removes himself/herself/itself from this state, or if, for any other reason, the security becomes insufficient the judge may (should) require the conservator to give other and sufficient security. Upon a failure to do so, the judge may revoke the Letters of Conservatorship.\textsuperscript{111}

The judge of the probate court may order a conservator who is required to give bond to post such bond for a period in excess of one year, if appropriate in the circumstances. This will likely be used more often in conservatorships for minors; the judge may wish, and some sureties may require, the posting and payment of the bond for the entire period remaining before the minor’s majority. Sureties will generally discount the premiums for prepayment for the entire term, and the minor is protected for the whole period. It should be noted, however, that a surety is not relieved of liability solely because of the expiration of the term of the bond but is subject to the provisions of law for the discharge of a surety.\textsuperscript{112}

11. TERMINATION OF GUARDIANSHIP OR CONSERVATORSHIP

11.1 Automatic Termination

Both guardianships and conservatorships terminate when the minor reaches the age of majority, is emancipated, or dies.\textsuperscript{113} Adoption of the minor also terminates a guardianship but not a conservatorship.\textsuperscript{114}

No action is required to terminate the guardianship or conservatorship. However, in order for the conservator and the surety on the bond to be discharged from further liability, a

\textsuperscript{110} O.C.G.A. §29-3-43(a)(1),(2).
\textsuperscript{111} O.C.G.A. §29-3-43(b).
\textsuperscript{112} O.C.G.A. §29-3-41(b).
\textsuperscript{113} O.C.G.A. §§29-2-30 and 29-3-64.
\textsuperscript{114} O.C.G.A. §29-2-30.
petition for final settlement of accounts and for discharge must be filed.\textsuperscript{115} While the filing of the petition seems to be discretionary under the Code, it would appear to be the best practice for the judge of the probate court to require a final settlement and discharge of a conservator of a minor. A guardian or conservator may also file a petition seeking dismissal from office only.\textsuperscript{116}

### 11.2 Filing for Adult Guardianship/Conservator prior to Age 18

The Code now contains provisions which allow for the establishment of an adult guardianship and/or conservatorship in advance of the minor’s attaining age 18, when it is probable that the minor will be an incapacitated adult upon reaching the age of majority. Code Sections 29-2-30(b) and 29-3-64(b) allow the guardian or conservator or another interested person to file a petition for the appointment of a guardian or conservator for the minor to become effective when the minor reaches adulthood. This petition can be filed in the six-month period prior to the time the minor reaches age 18.\textsuperscript{117} While this procedure seems to infer the existence of a guardianship or conservatorship, that might not necessarily be true. First, a minor whose parents are alive can be considered to be under a “natural guardianship.” Further, it would likely be considered a denial of equal protection if a petition for a minor with a court-appointed guardian and/or conservator could be “pre-filed” but such a petition could not be filed for a minor not under formal guardianship or conservatorship.\textsuperscript{118}

### 11.3 Formal Dismissal and Discharge

#### 11.3.1 Guardians

There would appear no reason, in the ordinary case, for a guardian to seek formal dismissal and discharge. However, the Code permits a guardian to file a petition for an order dismissing the guardian.\textsuperscript{119} The petition must include a final personal status report. Notice of the petition must be published one time and must state a date, not less than 30 days after the date of publication, on or before which objections must be filed. If no objection is filed, the judge of the probate court enters an order dismissing the guardian, but the order does not bar

\textsuperscript{115} See Section 20.5.2 below.

\textsuperscript{116} Id. O.C.G.A. §§29-2-31 and 29-3-70. See Section 20.5.3 below.

\textsuperscript{117} O.C.G.A. §§29-2-30(b) and 29-3-64(b).

\textsuperscript{118} See also Chapter 11 on Guardians and Conservators of Adults.

\textsuperscript{119} O.C.G.A. §29-2-31.
an action against the guardian. If an objection is filed, the judge of the probate court is to hear the objection and determine whether the guardian is entitled to dismissal.120

11.3.2 Conservators

On the other hand, although the filing seems optional under the Code, a conservator probably should, and may be required by the court, to file a petition for final settlement of accounts and discharge. [GPCSF 34] The formal discharge will be necessary to relieve the surety from liability and to end the premiums for the bond. Citation is served upon the minor, the minor’s personal representative, or a successor conservator, and notice must also be given by first-class mail to the surety on the conservator’s bond.121

A conservator may seek discharge from office only, in which case, the notice requirements, filing of objections, and determinations are the same as in the case of a guardian above.122

12. RESIGNATION AND REMOVAL OF GUARDIANS OR CONSERVATORS; APPOINTMENT OF SUCCESORS

12.1 Petition to Resign

A guardian or conservator or the duly authorized guardian, conservator, or attorney in fact of a guardian or conservator, acting on behalf of the guardian or conservator, may resign upon petition to the court, showing to the satisfaction of the court that:

1. The guardian or conservator is unable to continue to serve due to age, illness, infirmity, or other good cause;
2. Greater burdens have devolved upon the office of the guardian or conservator than those that were originally contemplated or should have been contemplated when the guardian or conservator was qualified and the additional burdens work a hardship upon the guardian or conservator;
3. Disagreement exists between the minor and the guardian or between the guardian and the conservator in respect to the guardian’s care of the minor, which disagreement and conflict appear to be detrimental to the minor;

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120 Id.
121 O.C.G.A. §29-3-71.
122 O.C.G.A. §29-3-70. A conservator is permitted also to seek dismissal of the conservatorship only under the same procedure as applies to dismissal of guardians. O.C.G.A. §29-3-70.
4. Disagreement exists between the minor and the conservator or between the guardian and the conservator in respect to the conservator’s management of the minor’s property, which disagreement and conflict appear to be detrimental to the minor;

5. The resignation of the guardian or conservator will result in or permit substantial financial benefit to the minor; or

6. The resignation would not be disadvantageous to the minor.\textsuperscript{123}

In all instances where a guardian or conservator has petitioned the court for an order allowing resignation, the petition must include the name of a suitable person who is willing to accept the guardianship or conservatorship.\textsuperscript{124}

In connection with a petition for resignation, personal service of the petition must be made on the minor and a guardian-ad-litem appointed by the judge of the probate court. Service must be made by first-class mail to the parents of the minor in the event of the resignation of a temporary guardian, to the conservator of the minor, if any, to the guardian of the minor, if any, and, in the following order of preference, to the following relatives of the minor whose whereabouts are known and who must be persons other than the resigning guardian or the proposed successor guardian:

1. The adult siblings of the minor; provided, however, that not more than three adult siblings need be served;

2. If there is no adult sibling of the minor, the grandparents of the minor; provided, however, that not more than three grandparents need be served; or

3. If there is no grandparent of the minor, any three of the nearest adult relatives of the minor determined according to Code Section 53-2-1.\textsuperscript{125}

If, after such hearing as the court deems appropriate, the judge finds that the petition for resignation of the guardian and/or conservator and the appointment of the proposed successor guardian and/or conservator should be granted, the judge enters an order accepting the resignation and appointing the successor guardian and/or conservator in accordance with the provisions of Code Sections 29-2-51 and 29-3-91, subject to the resigning guardian

\textsuperscript{123} O.C.G.A. §§29-2-40(a) and 29-3-80(a).
\textsuperscript{124} O.C.G.A. §§29-2-40(a) and 29-3-80(a).
\textsuperscript{125} O.C.G.A. §§29-2-40(c) and 29-3-80(c)
and/or conservator turning over to the successor guardian and/or conservator all property held by that guardian or conservator.\textsuperscript{126}

### 12.2 Removal of Guardian or Conservator

Upon the petition of any interested person or whenever it appears to the court that good cause may exist to revoke or suspend the Letters of a guardian or conservator to impose sanctions, the court shall cite the guardian or conservator to answer the charge. The judge of the probate court shall investigate the allegations and may require such accounting as the judge deems appropriate. The judge may appoint a temporary substitute guardian for the ward during the investigation.

Upon investigation, the judge may, in his/her discretion:

1. Revoke or suspend the guardian's letters;
2. Require additional security;
3. Require the conservator to appear and submit to a settlement of accounts, whether or not the conservator has first resigned or been removed and whether or not a successor conservator has been appointed;
4. Reduce or deny compensation to the guardian or impose any other sanction(s) as the court deems appropriate; and
5. Issue any other order as in the court's judgment is appropriate under the circumstances of the case.

The revocation or suspension of Letters of Guardianship or Conservatorship shall not abate any action pending for or against the guardian or conservator. The successor guardian or conservator shall be made a party to the action against the guardian or conservator in the manner provided in Code Section 9-11-25.\textsuperscript{127} See also Section 20.4 below.

### 12.3 Death of Guardian or Conservator

The judge of the probate court may appoint a successor guardian or conservator on the court’s own motion, on the petition of an interested person, or if the guardian or

\textsuperscript{126} O.C.G.A. §§29-2-40(d) and 29-3-80(d).
\textsuperscript{127} O.C.G.A. §§29-2-42 and 29-3-82.
conservator dies, resigns, or is removed. The court will personally notify the minor and any guardian-ad-litem (mandatory for conservatorships) appointed for the minor of such proposed action. Notice will also be given by mail to the guardian and conservator, if any, to the guardian’s or conservator’s personal representative if the guardian or conservator is dead, to the minor’s parent and any surety (in the case of a successor conservator), and if there is no living parent whose parental rights have not been terminated, up to three nearest adult relatives of the minor in this order: siblings, grandparents, other relatives. After any hearing the court deems appropriate, the court may appoint the successor guardian or conservator. The resigning guardian or conservator or, in the case of a deceased guardian or conservator, that person’s personal representative, must deliver the minor’s property to the successor guardian or conservator. In the case of a conservator, the predecessor conservator or the personal representative of a deceased conservator must also submit a final return covering the period since the conservator’s last annual return. The predecessor conservator’s surety is liable for all acts of the conservator up until the time that all of the minor’s property is delivered to the successor conservator.

13. TEMPORARY SUBSTITUTE GUARDIAN OR CONSERVATOR

A temporary substitute guardian or conservator may be needed if there is some reason to temporarily suspend the Letters of Guardianship or Conservatorship without rescinding or revoking the Letters; this would be done in circumstances where the guardian or conservator may be able to resume service. Upon its own motion or on the petition of any interested party, including the minor, the judge of the probate court may appoint a temporary substitute guardian or conservator if it appears to the court that some immediate action is required to protect the minor’s interests.

The judge, in his/her discretion, will select the person who will serve as the temporary substitute guardian or conservator. Notice of the appointment of a temporary substitute guardian or conservator will be served personally on the minor and on the guardian or

128 For the procedure for resignation by a guardian or conservator, see O.C.G.A. §§29-2-40 and 29-3-80. Note that a guardian or conservator who seeks to resign is required to name a suitable person willing to accept the guardianship or conservatorship. O.C.G.A. §§29-2-40(b), 29-3-80(b).
129 O.C.G.A. §§29-2-41, 29-2-51, 29-3-81, 29-3-91.
130 Id. O.C.G.A. §29-3-92.
131 O.C.G.A. §§29-2-50 and 29-3-90.
132 In the case of a conservatorship, the judge may appoint the county guardian. O.C.G.A. §29-3-90(c).
conservator whose powers are being suspended and by mail to the other fiduciary (guardian or conservator) of the minor, if any. During the term of service, the temporary substitute guardian or conservator will have the powers “set forth in the order of appointment,” and the powers of the previously appointed guardian or conservator will be suspended. The judge should make clear in the order exactly what powers the temporary substitute guardian has.

The position of substitute guardian or conservator is, by its nature, “temporary”. The substitute will serve until the earlier of (1) the lapse of 120 days from the date of appointment or (2) removal by the court. The temporary substitute guardian or conservator must give any report the court requires as well as comply with all other provisions relating to guardians or conservators. A temporary substitute conservator will receive only that reasonable compensation that is determined by the judge.\footnote{O.C.G.A. §29-3-54.}

14. COUNTY GUARDIANS

The county administrator\footnote{See Chapter 4, Section 9 concerning appointment of the County Administrator.} is \textit{ex-officio} county guardian and must serve as guardian or conservator when so appointed by the judge of the probate court.\footnote{O.C.G.A. §29-8-1.} Separate Letters of Guardianship or Conservatorship are issued on all appointments, and the county guardian occupies the same position as any regularly appointed guardian or conservator.\footnote{O.C.G.A. §29-8-3.} There are, however, special rules which apply only when the county guardian serves as conservator of a minor who dies \textit{intestate}. In that case, the conservator proceeds to distribute the minor’s estate in the same manner as if the conservator had been appointed administrator of the estate. The sureties on the conservator’s bond remain bound for the conservator’s faithful administration and distribution of the estate.\footnote{O.C.G.A. §29-3-71(e).} The county guardian’s (conservator’s) final return will cover the post-death period and the distribution of the intestate estate of the minor. Prior law permitted any guardian of the property (now conservator) to serve as \textit{ex officio} administrator of the estate of an intestate minor or ward. Under present law, only the county guardian serving as a conservator may proceed to administer and distribute the estate of an \textit{intestate} minor or ward.
The county administrator is required to post an additional bond of $5,000.00 as county guardian.\textsuperscript{138} Such bond must be attested by the judge or clerk of the probate court, and the condition of the bond is the faithful performance of all duties of county guardian as required by law.\textsuperscript{139} Any person damaged by the misconduct of the county guardian may bring suit on the bond in the same manner that suits are brought on bonds of other guardians. The judge has the duty to require additional security or an additional bond whenever considered to be in the best interest of any conservatorship.\textsuperscript{140} It is good practice to require a separate bond in each estate, just as though the county guardian were an ordinary conservator.

For good cause, the judge of the probate court may revoke the Letters of Guardianship or Conservatorship of the county guardian, require additional security on the county guardian’s bond, or issue any other order as may be expedient and necessary for the good of any particular guardianship or conservatorship in the hands of the county guardian.\textsuperscript{141}

There are special rules which apply when a county guardian serves as guardian for one or more VA beneficiaries and ceases to serve as county guardian.\textsuperscript{142} See Chapter 11, Part III, Section 20.

15. G UARDIANS APPOINTED BY OTHER COURTS OR AGENCIES

Georgia law gives to the probate court "original, exclusive, and general jurisdiction" in the appointment and removal of guardians of minors except as otherwise provided by law.\textsuperscript{143} In fact, there have been legislative enactments which allow other courts or entities to appoint guardians. For example, the juvenile court has jurisdiction to appoint a “guardian of the person or property” of a minor. Such appointment is to be made pursuant to the same notice and hearing requirements that apply to the appointment of guardians of the person (guardians) and property (conservators) of minors by the probate court.\textsuperscript{144}

With respect to workers’ compensation benefits, except as explained below, the only person capable of representing a minor or legally incompetent claimant entitled to such benefits

\textsuperscript{138} O.C.G.A. §29-8-2.
\textsuperscript{139} Id.
\textsuperscript{140} O.C.G.A. §29-8-4.
\textsuperscript{141} O.C.G.A. §29-8-5.
\textsuperscript{142} O.C.G.A. §29-7-16(b).
\textsuperscript{143} O.C.G.A. §15-9-30(a).
\textsuperscript{144} O.C.G.A. §15-11-30.1.
benefits is a conservator appointed by the judge of the probate court of the county of domicile of the claimant or by a court of competent jurisdiction outside the State of Georgia. Such guardian (conservator) is required to file with the State Board of Workers’ Compensation (“Board”) a copy of the guardianship returns filed annually with the probate court or with a court of competent jurisdiction outside the state of Georgia and give notice to all parties within 30 days of any change in status.\footnote{O.C.G.A. §34-9-226(a).} The Board does have authority in, and must establish procedures for, appointing temporary guardians for purposes of administering workers’ compensation rights and benefits without such guardian becoming the legally qualified guardian (conservator) of any other property, without such guardian’s actions being approved by a court of record, and without the posting of a bond, in only the following circumstances:

1. The Board may, in its discretion, authorize and appoint a temporary guardian of a minor or legally incompetent person to receive and administer weekly income benefits on behalf of and for the benefit of said minor or legally incompetent person for a period not to exceed 52 weeks unless renewed or extended by order of the Board;

2. The Board may, in its discretion, authorize and appoint a temporary guardian of a minor or legally incompetent person to compromise and terminate any claim and receive any sum paid in settlement for the benefit and use of said minor or legally incompetent person when the net settlement amount approved by the Board is less than $50,000.00; and

3. If a minor or legally incompetent person does not have a duly appointed representative or guardian, the Board may, in its discretion, appoint a guardian-ad-litem to bring or defend an action under the Workers’ Compensation Act in the name of and for the benefit of said minor or legally incompetent person to serve for a period not to exceed 52 weeks, unless renewed or extended by order of the Board. However, no such guardian-ad-litem will be permitted to receive the proceeds from any such action except where the guardian-ad-litem becomes guardian (conservator) appointed by the judge of the probate court or the
temporary guardian appointed by the Board. The Board shall have the authority to
determine compensation, if any, for any such guardian ad litem.\textsuperscript{146}

16. FOREIGN GUARDIANS OR CONSERVATORS

Generally speaking, a foreign guardian or conservator of a minor may transact
business in Georgia on behalf of the minor without transferring the guardianship or
conservatorship to Georgia. However, a foreign guardian or conservator who desires to sell
or convey property of the minor located in Georgia must seek authority to sell and convey the
minor’s property in the same manner that conservators in Georgia seek such authority, that is,
by filing a petition for leave to sell.\textsuperscript{147} At the time the petition for leave to sell is filed, the
foreign guardian or conservator must file with the court an authenticated copy of the
guardian’s or conservator’s Letters and must post an appropriate bond.

A foreign guardian or conservator may also institute an action in Georgia to enforce a
right or recover property of the minor. A foreign guardian or conservator submits to the
personal jurisdiction of the Georgia courts when the guardian or conservator receives money
or personal property of the minor in Georgia or does any act that would have given a Georgia
court jurisdiction over the guardian or conservator acting as an individual.\textsuperscript{148}

The 2005 Code contains provisions for the receipt and acceptance of a foreign
guardianship or conservatorship in Georgia and for transfer of a Georgia guardianship or
conservatorship to another jurisdiction. \textit{See Section 21, below.}

17. POWERS AND DUTIES OF A GUARDIAN OF A MINOR; RIGHTS OF
MINOR

\textbf{NOTE:} It is unclear the extent to which the rights of the minor and powers and
authority of the guardian as discussed in this Section apply to temporary guardians. It
probably should be assumed that all of these provisions apply even to temporary
guardianships, except to the extent inconsistent with any of the specific provisions governing
temporary guardians. \textit{See Section 8, above.}

\textsuperscript{146} O.C.G.A. §34-9-226(b).
\textsuperscript{147} O.C.G.A. §§29-2-74, 29-3-115.
\textsuperscript{148} O.C.G.A. §§29-2-75, 29-2-77, 29-3-116 and 29-3-118.
17.1 Rights of Minor under Guardianship

In every guardianship, the minor has the right to:

1. A qualified guardian who acts in the best interest of the minor;
2. A guardian who is reasonably accessible to the minor;
3. Have his/her property utilized as necessary for his/her support, care, education, health, and welfare; and
4. Individually or through the minor’s representative or legal counsel, bring an action relating to the guardianship.

Further, the appointment of a guardian is not a determination that a minor 14 years of age or older lacks testamentary capacity. 149

17.2 Powers and Authority of a Guardian of a Minor

The power of a guardian over the minor is the same as that of a parent over a child, the guardian standing in place of the parent. A guardian must, at all times, act as a fiduciary in the minor’s best interest and exercise reasonable care, diligence, and prudence. 150

A guardian must:

1. Respect the rights and dignity of the minor;
2. Arrange for the support, care, education, health, and welfare of the minor considering the minor’s available resources;
3. Take reasonable care of the minor’s personal effects;
4. Expend money of the minor that has been received by the guardian for the minor’s current needs for support, care, education, health, and welfare;
5. Conserve for the minor’s future needs any excess money of the minor received by the guardian; provided, however, that if a conservator has been appointed for the minor, the guardian must pay to the conservator, at least quarterly, money to be conserved for the minor’s future needs;
6. If necessary, petition to have a conservator appointed;
7. Endeavor to cooperate with the conservator, if any;

150 O.C.G.A. §29-2-21(a)
8. Within 60 days after appointment and within 60 days after each anniversary date of appointment, file with the court and provide to the conservator, if any, a personal status report\textsuperscript{151} concerning the minor, which must include:
   (a) A description of the minor’s general condition, changes since the last report, and the minor’s needs;
   (b) All addresses of the minor during the reporting period and the living arrangements of the minor for all addresses; and
   (c) Recommendations for any alteration in the guardianship order;
9. Promptly notify the court of any conflict of interest between the minor and the guardian when the conflict arises or becomes known to the guardian and take such action as is required by Code Section 29-2-23;
10. Keep the court informed of the guardian’s current address; and
11. Act promptly to terminate the minor guardianship when the minor dies, reaches age 18, is adopted, or is emancipated.\textsuperscript{152}

Since the guardianship of a minor terminates automatically and immediately upon any of the occurrences in 11. above, it is unclear what 11. means. Perhaps it is intended to instruct the guardian to cease all activities as guardian, to surrender any property in the hands of the guardian to the minor, and to permit the minor to manage his/her affairs without the intervention of the guardian. See Section 11. above.

A guardian, solely by reason of the guardian-minor relationship, is not personally liable for the minor’s expenses, contracts entered into in the guardian’s fiduciary capacity, the acts or omissions of the minor, obligations arising from ownership or control of property of the minor, or other acts or omissions occurring in the course of the guardianship.\textsuperscript{153}

The appointment of a guardian vests in the guardian the exclusive power, without court order, to:

   1. Take custody of the person of the minor and establish the minor’s place of dwelling within this state;

\textsuperscript{151} See Section 20.1 below.
\textsuperscript{152} O.C.G.A. §29-2-21(b).
\textsuperscript{153} O.C.G.A. §29-2-21(c).
2. Subject to Chapters 9, 20, and 36 of Title 31 and any other pertinent law, give any consent or approval that may be necessary for medical or other professional care, counsel, treatment, or services for the minor;

3. Bring, defend, or participate in legal, equitable, or administrative proceedings, including alternative dispute resolution, as are appropriate for the support, care, education, health, or welfare of the minor in the name of or on behalf of the minor;

4. Execute a surrender of rights to enable the adoption of the minor pursuant to the provisions of Chapter 8 of Title 19 or the adoption laws of any other state; and

5. Exercise those other powers reasonably necessary to provide adequately for the support, care, education, health, and welfare of the minor.\textsuperscript{154}

At the time of the appointment of the guardian or at any time thereafter, any of the following powers may be specifically granted by the judge of the probate court to the guardian upon such notice, if any, as the judge determines, provided that no disposition of the minor’s property shall be made without the involvement of a conservator, if any:

1. To establish the minor’s place of dwelling \textit{outside this state};

2. To change the jurisdiction of the guardianship to another county in this state that is the county of the minor’s place of dwelling, pursuant to Code Section 29-2-60;

3. To change the domicile of the minor to the minor’s or the guardian’s place of dwelling, in the determination of which the court must consider the tax ramifications and the succession and inheritance rights of the minor and other parties;

4. To consent to the marriage of the minor;

5. To receive reasonable compensation from the estate of the minor for services rendered to the minor; and

6. If there is no conservator, to disclaim or renounce any property or interest in property of the minor in accordance with the provisions of Code Section 53-1-20.\textsuperscript{155}

\textsuperscript{154} O.C.G.A. §29-2-22(a).
Before granting any of the powers described immediately above, the judge must appoint a guardian-ad-litem for the minor and shall give notice to any natural guardian of the minor. The judge must consider the property rights of the minor and the views of the conservator, if available, or, if there is no conservator, of others who have custody of the minor’s property. The guardian must act in coordination and cooperation with the conservator or, if there is no conservator, with others who have custody of the minor’s property.

18. POWERS AND DUTIES OF A CONSERVATOR OF A MINOR; RIGHTS OF MINOR
18.1 Rights of a Minor under Conservatorship
In every conservatorship, the minor has a right to:
1. A qualified conservator who acts in the best interest of the minor;
2. A conservator who is reasonably accessible to the minor;
3. Have his/her property utilized as necessary for his/her support, care, education, health, and welfare; and
4. Individually or through the minor’s representative or legal counsel, bring an action relating to the conservatorship.

Further, the appointment of a conservator is not a determination that a minor 14 years of age or older lacks testamentary capacity.

18.2 Powers and Authority of a Conservator of a Minor
A conservator must receive, collect, and make decisions regarding the minor’s property, except as otherwise provided by law or by the court. See Section 18.3 below. A conservator must at all times act as a fiduciary in the minor’s best interest and exercise

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155 O.C.G.A. §29-2-22(b).
156 O.C.G.A. §29-2-22(c). This reference to notice to a natural guardian must apply only to temporary guardianships.
157 O.C.G.A. §§29-2-22(d) and (e). The author finds it peculiar that a guardian may allow the minor to be adopted without a court order but must obtain authority from the court, after the appointment of a guardian-ad-litem, to change the minor’s domicile or consent to the marriage of the minor.
158 O.C.G.A. §29-3-20.
A conservator must:

1. Respect the rights and dignity of the minor;
2. Be reasonably accessible to the minor and maintain regular communication with the minor;
3. Petition to have a guardian appointed if necessary;
4. Endeavor to cooperate with the guardian, if any;
5. Provide for the support, care, education, health, and welfare of the minor, considering available resources;
6. Give such bond as required by Code Section 29-3-40;
7. Within two months of appointment, file with the court and provide to the guardian, if any, an inventory of the minor’s property and a plan for managing the property, pursuant to the provisions of Code Section 29-3-30; See Section 18.4 below.
8. Take into account any estate plan of the minor known to the conservator in the administration of the conservatorship;
9. Keep accurate records including adequate supporting data and file annual returns as required by Code Section 29-3-60;
10. Promptly notify the court of any conflict of interest between the minor and the conservator when the conflict arises or becomes known to the conservator and take such action as is required by Code Section 29-3-23;
11. Keep the court informed of the conservator’s current address; and
12. Act promptly to terminate the minor conservatorship when the minor reaches the age of majority.\(^{160}\)

A conservator, solely by reason of the conservator-minor relationship, is not personally liable for the minor’s expenses, contracts entered into in the conservator’s fiduciary capacity, the acts or omissions of the minor, obligations arising from ownership or control of property of the minor, or other acts or omissions occurring in the course of the

\(^{159}\) O.C.G.A. §29-3-21(a).
\(^{160}\) O.C.G.A. §29-3-21(b).
Without court order, the appointment of a conservator vests in the conservator the exclusive power to:

1. Make reasonable disbursements from the annual income or, if applicable, from the annual budget amount that has been approved by the court pursuant to Code Section 29-3-30 for the support, care, education, health, and welfare of the minor;

2. Enter into contracts for labor or services upon such terms as the conservator may deem best, but only to the extent that the annual compensation payable under such contracts when combined with other anticipated disbursements does not exceed the amount of the annual income or, if applicable, the annual budget amount which has been approved by the court pursuant to Code Section 29-3-30;

3. Borrow money for one year or less and bind the minor or the minor’s property, but only if the amount of the annual payments when combined with other anticipated disbursements does not exceed the amount of the annual income or, if applicable, the annual budget amount that has been approved by the court pursuant to Code Section 29-3-30 and only if done for purposes of paying the minor’s debts, providing for the support, care, education, health, or welfare of the minor, or repairing the minor’s dwelling place;

4. Receive, collect, and hold the minor’s property, additions to the minor’s property, and all related records;

5. Retain the property received by the conservator upon the creation of the conservatorship in accordance with the provisions of Code Section 29-3-31;

6. Bring, defend, or participate in legal, equitable, or administrative proceedings, including alternative dispute resolution, as are appropriate for the support, care, education, health, or welfare of the minor in the name of or on behalf of the minor;

7. Fulfill, as far as possible, or, to the extent permitted by law, disaffirm the executory contracts and comply with the executed contracts of the minor.\footnote{O.C.G.A. §29-3-21(c).}
8. Examine the will and any other estate planning documents of the minor;
9. Appoint an attorney-in-fact to act for the conservator when the conservator is unable to act; provided, however, that the conservator and the conservator’s sureties will be bound for the acts of the attorney as if the acts were the personal acts of the conservator;
10. Invest the minor’s property pursuant to the provisions of Code Sections 29-3-32 and 29-3-33;
11. Sell the minor’s stocks and bonds pursuant to the provisions of subsection (b) of Code Section 29-3-35;
12. Compromise any contested or doubtful claim for or against the minor if the proposed gross settlement as defined in Code Section 29-3-3 is in the amount of $15,000.00 or less; and
13. Release the debtor and compromise all debts in the amount of $15,000.00 or less when the collection of the debt is doubtful.  

In the petition for appointment, or at any time during the conservatorship, the conservator may request the continuing power to:

1. Invest the minor’s property in investments other than those authorized in Code Section 29-3-32, pursuant to the provisions of Code Section 29-3-34, without further court approval of any investment;  
2. Sell, rent, lease, exchange, or otherwise dispose of any or all of the minor’s real or personal property without complying with the provisions of Code Section 29-3-35, other than the provisions for additional bond set forth in subsection (e) of Code Section 2-3-35; or
3. Continue the operation of any farm or business in which the minor has an interest.

Unless the request for the powers is made in the petition for the initial appointment of the conservator, the judge must appoint a guardian-ad-litem and order such hearing as the

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162 An “executory contract” is one in which something remains to be done by one or more parties. An “executed contract” is one in which all the parties thereto have performed all the obligations which they have originally assumed. O.C.G.A. §13-1-2. It is assumed that the phrase “comply with the executed contracts of the ward” is intended to refer to binding contracts where there is an ongoing obligation, such as a lease.
163 O.C.G.A. §29-3-22(a)
164 Note that this gives the conservator blanket authority to make any investments without court approval.
165 Note that this gives the conservator blanket authority to make any sales of property without court approval.
court deems appropriate. Notice must be given by personal service to the minor and a guardian-ad-litem appointed for the minor. Notice must be given by first-class mail to the guardian of the minor, if any; the surety on the conservator’s bond; and to the following relatives of the minor whose whereabouts are known: (1) Any parent of the minor whose parental rights have not been terminated; (2) If there is no parent of the minor whose parental rights have not been terminated, the adult siblings of the minor; provided, however, that not more than three adult siblings need to be notified; (3) If there is no adult sibling of the minor, the grandparents of the minor; provided, however, that not more than three grandparents need to be notified; (4) If there is no grandparent of the minor, any three of the nearest adult relatives of the minor determined as set forth in Code Section 53-2-1.166

After appointment of a guardian-ad-litem for the minor and such hearing as the court deems appropriate, in granting the petition for appointment of conservator or at any time during the conservatorship, the court may grant the conservator any of the following powers on a case-by-case basis:

1. To make disbursements that exceed by no more than a specific amount the annual income or, if applicable, the annual budget amount which has been approved by the court pursuant to Code Section 29-3-30 for the support, care, education, health, and welfare of the minor;

2. To enter into contracts for labor or services for which the compensation payable under the contracts when combined with other disbursements from the estate exceeds the annual income or, if applicable, the annual budget amount which has been approved by the court pursuant to Code Section 29-3-30;

3. To make specific investments of the minor’s property that do not comply with the provisions of Code Section 29-3-32, pursuant to the provisions of Code Section 29-3-34;167

4. To sell, rent, lease, exchange, or otherwise dispose of specific items of the minor’s real or personal property without complying with the provisions of

166 O.C.G.A. §29-3-22(b)(1) and (2).
167 Note: Unlike the blanket authority, this requires a specification of the actual investments in which the conservator wishes to invest the minor’s funds.
Code Section 29-3-35 other than the provisions for additional bond set forth in subsection (e) of Code Section 2-3-35;

5. Pursuant to the provisions of Code Section 29-3-3, to compromise a contested or doubtful claim for or against the minor if the proposed gross settlement as defined in Code Section 29-3-3 is more than the amount of $15,000.00;

6. To release the debtor and compromise a debt which is in the amount of more than $15,000.00 when the collection of the debt is doubtful;

7. To establish or add property to a trust for the benefit of the minor; provided, however, that the trust must provide that the minor may revoke the trust at any time after reaching the age of majority and, unless otherwise provided by court order pursuant to Code Section 29-3-36, the trust must terminate upon the minor’s death and any property remaining in the trust must be paid to the minor’s estate;

8. To disclaim or renounce any property or interest in property of the minor in accordance with the provisions of Code Section 53-1-20 of the Revised Probate Code of 1998;

9. To engage in estate planning for the minor pursuant to the provisions of Code Section 29-3-36; and

10. To perform such other acts as may be in the best interest of the minor.\textsuperscript{168}

In granting any of the powers on a continuing or case-by-case basis as described immediately above, the judge must consider the views of the guardian, if available, or, if there is no guardian, of others who have custody of the minor. In performing any of the acts described in this Code section, the conservator must endeavor to cooperate with the guardian or, if there is no guardian, with others who have custody of the minor.\textsuperscript{169}

18.3 Collection and Retention of Assets by Conservator

After qualification, one of the first duties of the conservator is to ascertain and collect all of the assets belonging to the minor.\textsuperscript{170} The Letters of Conservatorship evidence the conservator’s authority to demand and receive funds or property due to the minor or to which

\textsuperscript{168} O.C.G.A. §29-3-22(c).
\textsuperscript{169} O.C.G.A. §29-3-22(d),(e).
\textsuperscript{170} Note that a guardian also has some duties with regard to property. See Section 17.2 above.
the minor is entitled to possession and enjoyment. The conservator may need to provide certified copies of the Letters of Conservatorship to the person or entity against whom the claim or demand is being asserted. The conservator should transfer all funds on deposit and all stocks or bonds or corporate securities into the name of the conservator for the benefit of the minor. All such accounts must be properly titled and be registered in the Social Security number of the minor for the protection of the property and the minor. A conservator should collect the proceeds of any insurance policies payable to the minor and should institute any legal action necessary to secure and protect the rights of the minor.

A conservator who represents more than one minor must keep separate accounts for each of them, and, in an accounting with the minors, the conservator's accounts must disclose activities with each minor's funds and property separately. If accounts are co-mingled, the conservator must prove each charge to have been made for one particular minor.171

A conservator may retain the property received by the conservator on the creation of the conservatorship, including, in the case of a corporate fiduciary, stock or other securities of its own issue, even though the property may not otherwise be a legal investment and will not be liable for such retention, except for gross neglect. In the case of corporate securities, the conservator may likewise retain any securities into which the securities originally received may be converted or which may be derived therefrom as a result of merger, consolidation, stock dividends, splits, liquidations, and similar procedures; and the conservator may exercise by purchase or otherwise any rights, warrants, or conversion features attaching to any such securities.172

It is the duty of the conservator to collect all assets of the minor of which the conservator has knowledge.173 The conservator can be held liable for breach of fiduciary duty, including a failure to take all reasonable steps to marshal and collect all funds, assets and property of the minor, using the same degree of diligence he/she would use in the management of his/her own affairs.174

172 O.C.G.A. §29-3-31(a).
174 O.C.G.A. §§29-3-21(a) and 29-3-83.
18.4 Inventory and Asset Management Plan

Within two months of appointment, the conservator must file with the court and provide a copy to the minor’s guardian, if any, an inventory of the minor’s property and a plan for managing, expending, and distributing the property. The inventory must describe all the assets and liabilities of the minor, shall include a list of all the personal and real property owned by the minor, and describe how the property is titled. When the inventory is filed, the conservator must swear or affirm, in addition to the usual oath on making returns, that the inventory contains a true statement of all the assets and liabilities of the minor which are known to the conservator.

The plan for managing, expending, and distributing the minor’s property (Asset Management Plan or AMP) must be based on the actual needs of the minor and take into consideration the best interest of the minor. The conservator must include in the AMP projections for expenses and resources and any proposals to change the title of any of the assets in the conservatorship estate. The AMP and any proposed budget for the expenditure of funds in excess of the anticipated income from the property must be approved by the judge of the probate court.

With each annual return filed thereafter, the conservator must file with the court and provide to the minor’s or ward’s guardian, if any, an updated inventory and AMP.\footnote{O.C.G.A. §29-3-30, 29-5-30.}

There is no standard form for the inventory and AMP for a minor. \textit{See Appendix A10-4 for a sample form.}

18.5 Support of the Minor and Encroachments

Conservators are authorized to make reasonable disbursements from the annual income or, if applicable, from the annual budget amount that has been approved by the probate court pursuant to Code Sections 29-3-30 for the support, care, education, health and welfare of the minor.\footnote{O.C.G.A. §29-3-22(a)(1).} There is no specific provision for expenditures for the support and welfare of anyone who is entitled to be supported by the minor (as there is in the case of an adult ward). However, the minor may have a child whom the minor is obligated to support. It seems that expenditures for the support and welfare of the minor’s child would be
authorized under Code Section 29-3-22(c)(10).

Conservators may not expend in excess of the annual income without authority to do so from the judge of the probate court. Authority to expend in excess of the annual income may be sought (1) in the original petition for conservatorship, (2) by the filing thereafter, on a case-by-case basis, of a petition for leave to encroach,\textsuperscript{177} \textbf{[GPCSF 20]} or (3) by proposing a budget in excess of the anticipated annual income in an AMP filed pursuant to Code Sections 29-3-30. Whenever such authority is sought, a \textit{guardian-ad-litem} must be appointed for the minor, and the judge of the probate court may, if deemed appropriate, hold a hearing.\textsuperscript{178} An AMP proposing a budget in excess of the anticipated annual income must be approved by the judge of the probate court in order for the conservator to gain the authority in that manner.\textsuperscript{179}

When considering the expenditure of income and encroachments upon corpus by a conservator for a minor, the judge should take into account the legal obligation of the parents of a minor to provide for the maintenance, protection and education of the minor.\textsuperscript{180} It is the duty of parents having the ability to do so to support, educate and maintain their children even if the children have property of their own.\textsuperscript{181} Where the situation and circumstances are such that the parents are not financially able to properly support and educate their children, the judge may authorize expenditures for those purposes from the separate estates of the children; regard should be given to the peculiar circumstances of each case.\textsuperscript{182} When the parents believe that their income is not sufficient to properly support and educate a minor with an estate under the control of a conservator, the parents must work with the conservator to put together an AMP which will clearly show to the court the income and resources of the parents and others in the household and the monthly expenses of supporting, maintaining and educating the minor.

The discretion given to the judge of the probate court with regard to expenditures of the assets of minors, especially those in excess of current income, is quite broad, and the judge may refuse to approve returns which reflect disbursements not authorized by law or

\textsuperscript{177} O.C.G.A. §29-3-22(c)(1).
\textsuperscript{178} O.C.G.A. §29-3-22(c).
\textsuperscript{179} O.C.G.A. §29-3-30(c).
\textsuperscript{180} O.C.G.A. §19-7-2.
18.6 Sales and Other Dispositions/Uses of Property Generally [GPCSF 14]

A conservator may petition the court to sell, rent, lease, exchange, or otherwise dispose of property of a minor, whether real or personal or mixed. The petition must set forth the property involved and the interests therein, the specific purpose of the transaction, the proposed price, the anticipated net proceeds of the sale, and all other terms or conditions proposed for the transaction and that the proposed transaction is in the best interest of the minor. The judge of the probate court must appoint a guardian-ad-litem for the minor, and the petition and notice must be served personally on the minor and the guardian-ad-litem. Note that publication is not required unless ordered by the judge.

The judge may direct any additional service or notice or extend the time to respond with respect to any proceedings covered by Title 29 as the judge may determine to be proper in the interest of due process and reasonable opportunity for any party or interest to be heard.

If no written objection is filed by a person entitled to notice within 30 days following the mailing of notice or service upon the guardian-ad-litem, the judge must order the sale summarily in the manner and under the terms petitioned; provided, however, that if real property is to be converted to personal property, the judge must order the conservator to post additional bond to cover the amount of the anticipated net proceeds of the sale prior to the closing of the sale. If an objection is filed, the judge must hear the matter and grant or deny the petition for sale or make such other order as is in the best interest of the minor, which may require the sale to be private or at public auction, including confirmation of the sale by the court or otherwise. An appeal will lie as in other cases.

A conservator must make a full return to the court within 30 days of every sale, specifying the property sold, the purchasers, and the amounts received, together with the

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183 Id.
184 O.C.G.A. §§ 29-3-35(c)(d). The GAL may not waive service on the minor in this case, there being a specific requirement that the minor be personally served. See O.C.G.A. §29-9-2(a).
186 It is unclear to whom notice might be sent by mail unless this reference is intended to cover those whom the judge might order to be so served in addition to the minor and GAL, both of whom must be served personally.
187 O.C.G.A. § 29-3-35(e).
terms of the sale.\textsuperscript{188} The recital in the conservator’s deed of a compliance with legal provisions is prima-facie evidence of the facts recited.\textsuperscript{189} Where a conservator sells real property under the provisions of this Code section, liens thereon may be divested and transferred to the proceeds of the sale as a condition of the sale.\textsuperscript{190}

The Code Section seems to contemplate, and it is probably the best practice, to require that a contract for sale, exchange, or other disposition which has been made subject to court approval. If a conservator lists the property with a broker, the listing contract and any sales contract should specify that any sale is subject to court approval. A copy of the contract should be attached to the petition. However, in unusual circumstances, it certainly seems to be within the authority of the court to approve a private sale at not less than a certain price and to specify the terms (usually cash, so that the credit of the particular purchaser will not be an issue) even before there is a contract.

An emergency or temporary substitute conservator is authorized to petition the court for leave to sell or otherwise deal with the property of the estate only if good cause is shown for not waiting until a different type of conservatorship is created or the conservatorship is terminated.\textsuperscript{191}

### 18.7 Sales of Perishable Property [GPCSF 15]

A conservator may sell perishable property of the minor, property of the minor that is liable to deteriorate from keeping, or property of the minor that is expensive to keep as early as practicable and in such manner as the judge of the probate court determines is in the best interest of the minor, after such notice and opportunity for hearing, if any, as the judge deems practicable under the circumstances.\textsuperscript{192} Items of tangible personal property, such as furniture and automobiles, are usually sold under this procedure, as being expensive to keep, maintain or store.

A conservator must make a report of every sale to the court within 30 days after each sale, specifying the property sold, the purchasers, the amounts received, and the terms of the

\textsuperscript{188} O.C.G.A. § 29-3-35(f).
\textsuperscript{189} O.C.G.A. § 29-3-35(g).
\textsuperscript{190} O.C.G.A. § 29-3-35(h).
\textsuperscript{191} O.C.G.A. § 29-3-35(i).
\textsuperscript{192} O.C.G.A. § 29-3-35(a).
18.8 Sales of Listed Stocks and Bonds

Unless inconsistent with an existing court order, a conservator may sell stocks or bonds of the types described below without court order, subject to the following requirements:

1. The securities must be listed or admitted to unlisted trading privileges on a stock exchange or be quoted regularly in any newspaper having a general circulation in Georgia.

2. The sales price cannot be less than the stock exchange bid price or the published bid price at the time of sale.

3. Reasonable brokerage commissions, not in excess of those customarily charged by stock exchange members, may be paid.

A conservator must make a full return to the court within 30 days of every sale, specifying the property sold, the purchasers, and the amounts received, together with the terms of the sale.

18.9 Investments

A conservator is authorized to invest funds of the minor, without court order, in the following and will not otherwise be liable for such investment, except in the case of gross neglect:

1. Bonds issued by any county or municipality of this state which have been validated as required by law for the validation of county and municipal bonds;

2. Bonds issued by any county board of education under Subpart 1 of Part 3 of Article 9 of Chapter 2 of Title 20 for the purpose of building and equipping schoolhouses, which bonds have been validated and confirmed as required under Part 1 of Article 2 of Chapter 82 of Title 36;

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193 O.C.G.A. § 29-3-35(f).
194 O.C.G.A. §29-3-22(a)(11).
195 O.C.G.A. §29-3-35(b).
196 O.C.G.A. §29-3-35(f).
197 O.C.G.A. §29-3-22(a)(10).
3. Bonds and other securities issued by this state or by the Board of Regents of the University System of Georgia;

4. Bonds or other obligations issued by the United States government and bonds of any corporation created by an act of Congress, the bonds of which are guaranteed by the United States government;

5. Interest-bearing deposits in any financial institution located in this state, to the extent the deposits are insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or comparable insurance;

6. Bonds or other obligations issued by a housing authority pursuant to Article 1 of Chapter 3 of Title 8 or issued by any public housing authority or agency of the United States when such bonds or other obligations are secured by a pledge of annual contributions to be paid by the United States government or any agency thereof, as authorized by Code Section 8-3-81;

7. Bonds or other obligations issued by a housing authority in connection with a redevelopment program pursuant to Chapter 4 of Title 8, as authorized by Code Section 8-4-11;

8. Bonds issued by the Georgia Education Authority, pursuant to Part 3 of Article 11 of Chapter 2 of Title 20, as authorized by Code Section 20-2-570;

9. Bonds issued by the Georgia Building Authority (Hospital), pursuant to Article 2 of Chapter 7 of Title 31, as authorized by Code Section 31-7-27;

10. Bonds issued by the Georgia Highway Authority, pursuant to Code Section 32-10-30, as authorized by Code Section 32-10-45;

11. Bonds or other obligations issued by a municipality or county pursuant to Chapter 61 of Title 36 or by any urban redevelopment agency or housing authority vested with urban redevelopment project powers under Code Section 36-61-17, provided that such bonds or other obligations are secured by an agreement between the issuer and the federal government in accordance with Code Section 36-61-13, as authorized by Code Section 36-61-13;

12. Bonds issued by the Georgia Building Authority (Penal), pursuant to Chapter 3 of Title 42, as authorized by Code Section 42-3-21;
13. Farm loan bonds issued by federal land banks or joint-stock land banks under the Federal Farm Loan Act, 12 U.S.C. Sections 2001, et seq., and any notes, bonds, debentures, or other similar obligations, consolidated or otherwise, issued by farm credit institutions pursuant to the Farm Credit Act of 1971, 12 U.S.C. Sections 2001, et seq., as authorized by Code Section 53-12-286;

14. Real property loans, as authorized by Code Section 53-12-284:
   (A) Which are not in default;
   (B) Which are secured by mortgages or deeds to secure debt conveying a first security title to improve real property;
   (C) Which are insured pursuant to the National Housing Act, 12 U.S.C. Sections 1701, et seq.; and
   (D) With respect to which loans, on or after default, pursuant to such insurance, debentures in at least the full amount of unpaid principal are issuable, which debentures are fully and unconditionally guaranteed both as to principal and interest by the United States; and

15. Any other investments which are designated under the laws of this state as lawful or legal investments for guardians or conservators.¹⁹⁸

Whenever by law or by court order the conservator is authorized, permitted, required, or directed to invest funds in direct and general obligations of the United States government, obligations unconditionally guaranteed by the United States government, or obligations of the agencies of the United States government enumerated in Code Section 29-3-32, the conservator may invest in and hold such obligations either directly or in the form of securities or other interests in any open-end or closed-end management type investment company or investment trust registered under the Investment Company Act of 1940, 15 U.S.C. Sections 80a-1, et seq., so long as:

1. The portfolio of such investment company or investment trust is limited to such obligations and repurchase agreements fully collateralized by such obligations;

2. Such investment company or investment trust takes delivery of such collateral, either directly or through an authorized custodian; and

¹⁹⁸ O.C.G.A. §29-3-32.
3. Such investment company or investment trust is operated so as to provide a constant net asset value or price per share.

The authority granted in this Code section applies notwithstanding that a corporate fiduciary or an affiliate of the corporate fiduciary provides services to the investment company or investment trust as investment adviser, custodian, transfer agent, registrar, sponsor, distributor, manager, or otherwise and receives compensation for such services.

NOTE: The complicated language above refers to what are commonly called “mutual funds.” To be permissible investments, the mutual funds must be invested only in U. S. government backed issues.

After receiving court approval as required in subsection (b) or (c) of Code Section 29-3-22, in making investments and in acquiring and retaining those investments and managing property of the minor, the conservator must exercise the judgment and care, under the circumstances then prevailing, that a prudent person acting in a like capacity and familiar with such matters would use to attain the purposes of the account. In making such investment decisions, a conservator may consider the general economic conditions, the anticipated tax consequences of the investments, the anticipated duration of the account, and the needs of the minor or those entitled to support from the minor.

NOTE: This is what is commonly referred to as the “Prudent Investor Rule.”

Within the limitations of the standard set forth above and with prior approval by the court in accordance with Code Section 29-3-22, a conservator is authorized to acquire and retain every kind of property, including real, personal, or mixed, and every kind of investment, specifically including, but not by way of limitation, bonds, debentures and other corporate obligations, and stocks, preferred or common, including the securities of or other interests in any open-end or closed-end management investments company or investment trust registered under the Investment Company Act of 1940, 15 U.S.C. Sections 80a-1, et seq. 

NOTE: Again, this is a reference to “mutual funds”; however, these funds are not restricted as to the types of investments held in the funds. The propriety of an investment is to be determined by what the conservator knew or should have known at the time of the decision.

199 O.C.G.A. §29-3-33.
200 O.C.G.A. §29-3-34(a).
about the inherent nature and expected performance of a particular investment, including probable yield, the attributes of the portfolio, the general economy, and the needs of the minor or ward as they existed at the time of the decision. Any determination of liability for investment performance must consider not only the performance of a particular investment but also the performance of the minor’s portfolio as a whole. Within the limitations of such standard, a conservator may retain property properly acquired without limitation as to time and without regard to its suitability for original purchase.\textsuperscript{201}

A financial institution, trust company, national or state bank, savings bank, or savings and loan association described in Code Section 7-1-242 serving as a conservator is not precluded from acquiring and retaining securities of or other interests in an investment company or investment trust because the bank or trust company or an affiliate provides services to the investment company or investment trust as investment adviser, custodian, transfer agent, registrar, sponsor, distributor, manager, or otherwise and receives compensation for such services.\textsuperscript{202}

\section*{18.10 Compromise of Claims by Conservators [GPCSF 19]}

\textbf{NOTE:} See Sections 2.1 and 2.2 for compromise of claims by natural guardians.

Unless inconsistent with the terms of any court order relating to the conservatorship, a conservator, \textit{without court order}, may compromise any contested or doubtful claim for or against the minor if the proposed \textit{gross settlement} as defined in Code Section 29-3-3 is in the amount of $15,000.00 or less.\textsuperscript{203} At the time of the appointment of the conservator or at any time thereafter, and \textit{after appointment of a guardian-ad-litem} for the minor and such hearing and notice as the court deems appropriate, the judge of the probate court may grant the conservator, on a case by case basis, the power to compromise a contested or doubtful claim for or against the minor if the proposed gross settlement as defined in Code Section 29-3-3, is more than $15,000.00.\textsuperscript{204} The term \textit{“gross settlement”} means the present value of all amounts paid or to be paid in settlement of the claim, including cash, medical expenses, expenses of litigation, attorney’s fees, and any amounts paid to purchase an annuity or other

\begin{itemize}
\item \textsuperscript{201} O.C.G.A. §29-3-34(b).
\item \textsuperscript{202} O.C.G.A. §§29-3-34(c), 29-5-34(c).
\item \textsuperscript{203} O.C.G.A §§29-3-22(a)(12), 29-5-23(a)(13).
\item \textsuperscript{204} O.C.G.A §§29-3-22(c)(5), 29-5-23(c)(5).
\end{itemize}
similar financial arrangement.\textsuperscript{205}

Unless the power to compromise a claim without court order has been granted which applies to the compromise in question, the following rules apply with respect to minors:

1. If no legal action has been initiated and the proposed gross settlement of a minor’s claim is more than $15,000.00, \textit{the settlement must be submitted for approval to the judge of the probate court.}\textsuperscript{206}

2. If legal action has been initiated and the proposed gross settlement of a minor’s claim is more than $15,000.00, \textit{the settlement must be submitted for approval to the court in which the action is pending}. The conservator is not permitted to dismiss the action and present the settlement to the court for approval without the approval of the court in which the action is pending.\textsuperscript{207}

3. If an order of approval is obtained from the probate court or the trial court, as applicable, based upon the best interest of the minor, the natural guardian or conservator is authorized to compromise any contested or doubtful claim in favor of the minor without receiving consideration for such compromise as a lump sum. Without limiting the foregoing, the compromise may be in exchange for an arrangement that defers receipt of part or all of the consideration for the compromise until after the minor reaches the age of majority and may involve a \textit{structured settlement} or creation of a trust on terms which the court approves;\textsuperscript{208} and

4. Any settlement entered consistent with the provisions of the Code section is final and binding upon all parties, including the minor.\textsuperscript{209}

\textit{“Structured settlement” does not appear to be defined in the Code. However, it is generally accepted as referring to a settlement which involves the purchase of an annuity contract with all or part of the settlement proceeds. An annuity contract is one by which one party, in return for a stipulated payment or payments, promises to pay periodic installments for a stated certain period of time or for the life or lives of the person or persons specified in

\textsuperscript{205}\textit{O.C.G.A §29-3-3(a).}
\textsuperscript{206}\textit{O.C.G.A §29-3-3(d).}
\textsuperscript{207}\textit{O.C.G.A §29-3-3(e).}
\textsuperscript{208}\textit{O.C.G.A §29-3-3(h). The previous requirement that only the judge of the probate court could approve a non-lump sum payment has been removed from this Code provision.}
\textsuperscript{209}\textit{O.C.G.A §29-3-3(i).}
the contract.\textsuperscript{210} The annuity contract is usually issued by an insurance company and is usually purchased by the liability insurer involved in the minor’s personal injury or tort claim. For purposes of determining the “net settlement” referred to above, if no payments are to be received before the minor’s 18\textsuperscript{th} birthday, the cost of the annuity contract (the amount paid to purchase the annuity) is the “present value of amounts to be received by the minor after reaching the age of majority.”

When considering whether to approve a “structured settlement,” it is important for the judge of the probate court or the trial judge to ascertain that the annuity is being issued by an insurance company with an A.M. Best rating of not less than “A” (“A+” or better should be preferred).\textsuperscript{211}

Whenever a minor is injured by the negligent conduct of another, two legal causes of action arise:

1. A right of action in, or on behalf of, the minor for his/her personal injuries, pain and suffering, and any resulting physical handicap or disfigurement; and

2. A right of action in the parent for loss of services, damages to property, necessary medical expenses, and other incidental expenses.

It is only with the first of these that the conservator and the judge of the probate court are involved or concerned. Both claims are usually settled simultaneously. The petition for the approval of the settlement should show the amount being paid to the conservator and also show what amounts are being paid to any others, including the parents, as a result of the claims being settled.

In connection with the compromise of any personal injury or other tort claim of a minor, settlement may be proposed involving less than all of the supposed at-fault parties, with the minor retaining the right to pursue the cause of action against other parties. In such a case, the conservator will usually execute on behalf of the minor a covenant not to sue or a very carefully drawn limited release, rather than a general release. Hence, there may be more than one petition for leave to compromise related to a single injury, event, or claim.

The issue of the amount of attorney’s fees to be awarded (usually pursuant to a contingency fee contract) is a part and parcel of the total compromise being presented to the

\textsuperscript{210} O.C.G.A. §33-28-1.
\textsuperscript{211} To check the rating of an insurance company, go to \href{www.ambest.com}{www.ambest.com}.
court for approval. The judge of the probate court has jurisdiction and authority to review the attorneys’ fees, costs and other amounts being paid from the gross settlement, and the court may reduce or deny any fees and costs not previously approved by the court.\(^\text{212}\)

**18.11 Compromise of Debts**

Unless inconsistent with the order of appointment, the conservator is vested with the power, without court order, to release the debtor and compromise all debts in the amount of $15,000.00 or less when the collection of the debt is doubtful.\(^\text{213}\)

At the time of the appointment of the conservator, or at any time thereafter, and after appointment of a guardian-ad-litem for the minor and after such notice and hearing as the court deems appropriate, the power to release the debtor and compromise all debts for which the collection is doubtful when the amount of the debt is more than $15,000.00 may be specifically granted to the conservator on a case-by-case basis.\(^\text{214}\)

This involves debts owed to the minor, no debts owed by the minor.

**19. COMPENSATION AND EXPENSES**

**19.1 Guardians**

At the time of the appointment of a guardian or at any time thereafter, reasonable compensation from the estate of the minor for services rendered to the minor may be specifically granted by the judge of the probate court to the guardian. If applied for after the appointment, reasonable compensation may be granted after such notice, if any, as the judge determines, provided that no disposition of a minor’s or ward’s property may be made without the involvement of a conservator, if any. Before granting such compensation, the judge must appoint a guardian-ad-litem for the minor and must give notice to any natural guardian of a minor. The judge must consider the property rights of the minor and the views of the conservator, if available, or, if there is no conservator, of others who have custody of the minor’s property. The guardian must act in coordination and cooperation with the conservator or, if there is no conservator, with others who have custody of the minor’s or the


\(^{213}\) O.C.G.A. §29-3-22(a)(13).

\(^{214}\) O.C.G.A. §29-3-22(c)(6).
ward’s property.  

19.2 Conservators

A conservator, other than a temporary substitute conservator, is entitled to compensation for services as follows:

1. Two and one-half percent commission on all sums of money received by the conservator on account of the estate, except on money loaned by and repaid to the conservator, and two and one-half percent commission on all sums paid out by the conservator.

2. An additional commission equal to one-half of 1 percent computed on the market value of the estate as of the last day of the reporting period. This commission shall be proportionately reduced for any reporting period of less than 12 months.

3. Ten percent commission on the amount of interest made if, during the course of the conservatorship, the conservator receives interest on money loaned by the conservator in that capacity and includes the same on the return to the court so as to become chargeable with the interest as a part of the corpus of the estate.

4. Reasonable compensation, as determined in the discretion of the court and after such notice, if any, as the judge directs, for the delivery over of property in kind, not exceeding 3 percent of the appraised value and, in cases where there has been no appraisal, not over 3 percent of the fair value as found by the judge, irrespective of whether delivery over in kind is made pursuant to proceedings for that purpose and irrespective of whether the property, except money, is tangible or intangible or personal or real; and

5. In the discretion of the court, compensation for working land for the benefit of the minor or parties in interest, but not to exceed 10 percent of the annual income of the managed property.

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215 O.C.G.A. §29-2-22(b), (c), (d) and (e).
216 Note, however, that a commission may not be taken on a commission paid to the conservator by the conservator. O.C.G.A. §29-3-50(d).
217 O.C.G.A. §29-3-50(a).
### Example of Computation of Standard Commissions

A conservator began serving at the beginning of 2008. During the first year, the conservator took control of all accounts of the minor, totaling $100,000 from a personal injury settlement; received annuity payments as part of the settlement of $1,000 per month, for a total of $12,000; and received interest income for the year of $2,500. The conservator paid during the year: $3,150 for the bond; two authorized encroachments totaling $4,600; court costs of $41.50 for the filing and recording of the Inventory and Asset Management Plan; and $250.00 in attorney’s fees. The conservator is ready to compute and pay out the commissions on December 31, 2008 before the year ends. The computations would be:

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total non-interest receipts:</td>
<td>$112,000</td>
</tr>
<tr>
<td>2.5% of non-interest receipts (.025 X 112000)</td>
<td>2,800.00</td>
</tr>
<tr>
<td>10% of interest received (.10 X 2500)</td>
<td>250.00</td>
</tr>
<tr>
<td>Total commissions on receipts and interest</td>
<td>$3,050.00</td>
</tr>
<tr>
<td>Total expenditures BEFORE the commissions</td>
<td>$8,041.50</td>
</tr>
<tr>
<td>2.5% of expenditures (.025 X 8041.50)</td>
<td>$201.04</td>
</tr>
<tr>
<td>Commissions on receipts and expenditures</td>
<td>$3,050.00</td>
</tr>
<tr>
<td>Commissions on expenditures</td>
<td>+201.04</td>
</tr>
<tr>
<td>Total</td>
<td>$3,251.04</td>
</tr>
</tbody>
</table>

The conservator is also entitled to .5% of the total balance in the conservatorship on December 31, 2008. Receipts for the year were $112,000; expenditures were $8,041.50 plus the commissions of $3,251.04, for total expenditures of $11,292.54; the balance on 12/31 is $100,707.46 ($112,000 – 11292.54).

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commission on 12/31 balance (.005 X 100707.46)</td>
<td>503.54</td>
</tr>
<tr>
<td>Commissions on receipts and expenditures above</td>
<td>+3,251.04</td>
</tr>
<tr>
<td>Gross Commissions for 2008</td>
<td>$3,754.54</td>
</tr>
</tbody>
</table>

Therefore, the conservator may draw $3,754.54 from the account(s) as commissions.

**NOTE:** If the commissions are not paid until January, 2009, the commissions on receipts and expenditures would remain the same. However, in that case, the 12/31 balance would be $103,958.50 (balance before commissions), and the commission on that balance would be $519.79.

In either case, the total commissions must be excluded from all other expenditures when computing the commissions, since a commission may not be paid on a commission.

A conservator may petition the court for compensation that is greater than that allowed under Code Section 29-3-50. Service of notice of the petition for extra compensation must be made to the minor and to a guardian-ad-litem appointed for the minor. Service must be made in the manner described in Chapter 9 of Title 29 and must direct the parties served to file any written objections to the petition for extra compensation with the court within ten days. After hearing any objection filed by or on behalf of the minor, the
judge of the probate court may allow such extra compensation as deemed reasonable. The allowance of extra compensation is conclusive as to all parties in interest.\textsuperscript{218}

Any conservator who is a domiciliary of this state may receive compensation for services, as specified below, from a corporation or other business enterprise where the estate of the minor owns an interest in the corporation or other business enterprise, provided that:

1. The services furnished by the conservator to the corporation or other business enterprise are of a managerial, executive, or business advisory nature;
2. The compensation received for the services is reasonable; and
3. The services are performed and the conservator is paid pursuant to a contract executed by the conservator and the corporation or business enterprise, which contract is approved by a majority of those members of the board of directors or other similar governing authority of the corporation or business enterprise who are not officers or employees of the conservator and are not related to the conservator and provided the contract is approved by the court of the county which has jurisdiction over the conservatorship.\textsuperscript{219}

Any conservator receiving compensation from a corporation or other business enterprise for services to it as described above, may not receive extra compensation in respect to such services as provided in Code section 29-3-52; provided, however, that nothing in Code section 29-3-53(a) prohibits the receipt by the conservator of extra compensation for services rendered in respect to other assets or matters involving the estate,\textsuperscript{220} or prohibits the receipt by conservators of normal commissions and compensation for the usual services performed by conservators pursuant to law. The purpose of Code section 29-3-53(a) is to enable additional compensation to be paid to a conservator for business management and advisory services to corporations and business enterprises pursuant to a contract, without the necessity of petitioning for extra compensation pursuant to Code section 29-3-52.\textsuperscript{221}

Whenever any portion of the dividends, interest, or rents payable to a conservator is required by law of the United States or other governmental unit to be withheld by the person

\textsuperscript{218} O.C.G.A. §29-3-52.
\textsuperscript{219} O.C.G.A. §29-3-53(a).
\textsuperscript{220} O.C.G.A. §29-3-53(b).
\textsuperscript{221} O.C.G.A. §29-3-53(c) and (d).
paying the same for income tax purposes, the amount withheld is deemed to have been collected by the conservator.\footnote{O.C.G.A. §29-3-50(b).} In other words, the commission is based on the gross amount before taxes, even if he taxes were withheld from the payment.

Conservators are allowed \textit{reasonable expenses} incurred in the administration of the estate, including without limitation, expenses for travel, employing counsel and other agents, and the expenses and premiums incurred in securing a bond. Such reasonable expenses must be determined after such notice, if any, as the judge directs.\footnote{O.C.G.A. §29-3-50(b).} The conservator’s commissions are part of the expense of administering the estate and may be charged against the corpus of the estate as well as the income of the estate.\footnote{O.C.G.A. §29-3-51.}

\section*{19.3 Multiple, Successive, and Temporary Substitute Conservators}

If there is more than one conservator serving simultaneously, the division of the compensation allowed them shall be according to the services rendered by each conservator.

Where some or all of the estate passes through the hands of several conservators by reason of the death, removal, or resignation of the first or any prior qualified conservator or otherwise, the estate will not be subject to charges for commissions of each successive conservator holding and receiving in the same right; rather commissions for receiving the estate will be paid to the first conservator who receives the property for the benefit of the estate (or that person’s representative), and commissions for paying out will be paid to the conservator who actually distributes the fund. No commissions will be paid for handing over the fund to a successor conservator. In other words, unless forfeited for some cause, the first conservator is entitled to commissions on funds \textit{actually received and paid out} during that conservator’s term of service, except that no commission may be charged by the former conservator for \textit{transferring} or \textit{surrendering} the funds to the successor. Likewise, since a commission has already been charged for the original receipt of the funds by the first conservator, the successor conservator may not charge a commission for the \textit{receipt} of those funds from the first conservator.

A temporary substitute conservator may apply to the judge of the probate court for
reasonable compensation after notice to interested parties in compliance with Chapter 9 of Title 29. The judge must award reasonable compensation to a temporary substitute conservator and such compensation will be the only compensation or commission paid to the temporary substitute conservator for services performed in that capacity. For good cause, including but not limited to services performed and compensation awarded to a temporary substitute conservator, the judge may reduce the compensation otherwise due the conservator.\textsuperscript{225}

19.4 Forfeiture of Compensation

Conservators who fail to make annual returns as required by law forfeit all commissions for transactions during the year within which no return is made unless the judge of the probate court, upon cause shown, by special order entered on the record, relieves the forfeiture.\textsuperscript{226} The forfeiture for failure timely to file returns is automatic; however, the judge may allow the commissions if the circumstances warrant doing so. The approval of a return evidencing a late payment of commissions should be a sufficient, specific order approving same.

19.5 Renunciation of Compensation

A conservator may renounce the right to all or any part of the compensation to which the conservator is entitled to under Code Section 29-3-50.\textsuperscript{227}

20. RETURNS AND REPORTS OF GUARDIANS AND CONSERVATORS; SANCTIONS

20.1 Reports of Guardians

The guardian of a minor must file a personal status report within two months after appointment and within two months after each anniversary date of appointment. The report must include:

1. A description of the minor’s general condition, changes since the last report, and needs;

\textsuperscript{225} O.C.G.A. §29-3-54.
\textsuperscript{226} O.C.G.A. §29-3-50(e).
\textsuperscript{227} O.C.G.A. §29-3-50(f).
2. All addresses of the minor during the reporting period and the living arrangements of the minor for all addresses;

3. A description of the amount and expenditure of any funds that were received by the guardian; and

4. Recommendations for any alteration in the guardianship order.\textsuperscript{228}

\textbf{NOTE:} There is no standard form for the personal status report. See Appendix A10-5 for a sample personal status report form.

For permanent guardians, the filing of personal status reports is mandatory. However, the judge has discretion to waive the requirement of filing personal status reports by a temporary guardian.\textsuperscript{229}

The judge of the probate court may order a guardian to make any other reports to the court as may be determined to be in the best interest of the minor.\textsuperscript{230}

\section{20.2 Returns and Reports of Conservators}

\subsection{20.2.1 Inventory and Asset Management Plan}

\textbf{See Section 18.4 above.}

\subsection{20.2.2 Annual and Final Returns}

Within 60 days after the anniversary of his appointment in each year, unless the reporting date has been changed by order of the judge of the probate court, every conservator is required to file with the court a verified return consisting of:

1. A statement of the receipts and expenditures on behalf of the estate during the year preceding such anniversary date;

2. An updated inventory consisting of a statement of the assets and liabilities;

3. An updated plan for managing, expending, and distributing the property (Asset Management Plan), together with a note or memorandum of any other fact necessary to show the true condition of the estate; and

4. A statement of the current amount of bond.

The conservator must mail a copy of the return by first-class mail to the surety and the guardian, if any. If a minor has no guardian or if the guardian and the conservator are the

\textsuperscript{228} O.C.G.A. §29-2-21(b)(8).

\textsuperscript{229} O.C.G.A. §29-2-7(a).

\textsuperscript{230} O.C.G.A. §29-2-19(4).
same person, the conservator must mail a copy of the return by first-class mail to the minor.\textsuperscript{231}

Conservators are required to keep their accounts in a regular manner and to be ready always, when required, to support them with vouchers, including receipts for the support, education, and maintenance of the minor.\textsuperscript{232} An item not supported by a proper voucher or receipt may be disallowed in a return. A conservator's own receipt is not sufficient as a voucher; such a receipt is merely a statement by the conservator in his/her own behalf and has no value as evidence. If there is an objection to the return, the conservator has the burden of showing that the funds have been expended for the minor. However, in the absence of proper vouchers, a conservator may introduce oral evidence to prove such payments.\textsuperscript{233}

Each annual return should show the beginning and ending balance on hand both in cash and cash equivalents (deposits, accounts, certificates of deposit, money market accounts, etc.), as well as a detailed statement of all receipts and disbursements during the period covered by the accounting.

<table>
<thead>
<tr>
<th>NOTE: The first return of a conservator must begin with a balance of zero. (The conservator held nothing until the appointment and must account from that staring point forward.) All financial institutions in which funds of the minor are on deposit should be listed, with addresses, and the account numbers for each account should be included.</th>
</tr>
</thead>
<tbody>
<tr>
<td>There should be sufficient information in the return for the judge of the probate court and/or staff to determine with reasonable certainty the financial condition of the entire estate. The updated inventory and AMP will itemize all assets in addition to cash and cash equivalents and will show an approximate fair market value for same.</td>
</tr>
<tr>
<td>There is no standard form for the return of a conservator. See Appendix A10-6 for a sample return form. Some forms allow for “categorical” reporting, that is, the lumping of expenditures into categories such as utilities, taxes, medical, food, repairs, etc. The author of this Handbook highly recommends that categorical returns not be accepted because of the ease of hiding expenditures and of forcing returns to balance which otherwise would not. The best practice would be to require that each and every item of income and expenditure be</td>
</tr>
</tbody>
</table>

\textsuperscript{231} O.C.G.A. §29-3-60(a) and (b).

\textsuperscript{232} O.C.G.A. §10-6-30.

\textsuperscript{233} Pettigrew v. Williams, 65 Ga. App. 576 (1941)
separately itemized by date, source of deposits, check number, payee, and purpose of every expenditure, much like what should be found in a properly maintained check register.

When a conservator has concluded all duties, whether by termination of the conservatorship, the expenditure of all funds and distribution of all assets, or the appointment of a successor conservator, a final return must be filed. The final return should report from the ending date of the last filed return and, therefore, might not be for a full year. It should show no assets remaining in the estate, since all assets should have been surrendered to a successor conservator, a former minor then of age, or the personal representative of a minor then deceased.

20.3 Responsibilities of Judge Concerning Returns

It is the duty of the judge of the probate court to carefully examine or cause to be carefully examined each and every return filed with the court. This essentially is an audit of the return and should involve a review of the various items of the accounting and, if necessary, the vouchers supporting them. If this duty is delegated to one or more clerks in the office, the clerks should be instructed on the subject of the authority of conservators in the expenditure of funds and should refer any questionable items to the judge for a decision. Often, a conservator can explain unclear items and/or make necessary corrections which might make a return acceptable, and the clerks should attempt to clear up any discrepancies before referring a return for formal action by the judge. In this process, it is essential to examine a return with direct reference to the file for the minor. For example, automobile repairs paid for with a minor’s funds when the minor does not own an automobile are clearly questionable; similarly, alleged payments of taxes for a minor whose estate is of such size as to expect that no taxes would be due should cause inquiry. In a simple review of a return without reference to the specific case, such expenditures might “appear” to be reasonable.

If the return is in proper form, the specific items appear proper, and no objection is filed within 30 days, the court must record the return within 60 days of its filing. If the return is found not to be correct and remains uncorrected by the conservator, the judge should

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234 O.C.G.A. §29-3-60(c).
235 Id.
take such further action as is appropriate, including the issuance of a citation as discussed below.

The probate court is to maintain a docket of all conservators liable to make returns and upon failure of any conservator to do so within the time required by law, the judge of the probate court is required to cite the conservator to appear and show the reason for the delay.\textsuperscript{236} Citing defaulting conservators for failure to comply with the reporting requirements is not a matter within the discretion of the judge but is a mandatory duty. Whenever a citation is issued to require the filing of proper accountings, not only does the conservator forfeit the commissions for the reporting period, unless good cause is shown,\textsuperscript{237} but he/she becomes chargeable personally for all costs in connection with the citation and subsequent proceedings. The estate cannot be charged for costs which have resulted from the neglect or malfeasance of the conservator. Willful and continued failure to make an accounting is good cause for removal of a fiduciary.\textsuperscript{238}

No time is specified as to when a conservator who fails to file a return is to be cited to appear and show cause for the delay. However, at least ten days should intervene between the date of the service of the citation and the date set for the hearing.\textsuperscript{239} The citation should contain a clear statement of the failure to file the return and should indicate the date on which the return was due. Both the conservator and the registered agent for service of process for the surety should be personally served, unless the conservator is not domiciled in the state, in which case the conservator will be served by mail. It is suggested that such service be both by certified mail and by first-class mail and that the certificate of mailing so state. Every insurance company licensed to do business in the state of Georgia is required to designate a registered agent for service of process, upon whom the citation should be served.\textsuperscript{240}

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{236}] O.C.G.A. §29-3-60(d).
\item[\textsuperscript{237}] Id.
\item[\textsuperscript{238}] Id.
\item[\textsuperscript{239}] O.C.G.A. §15-9-86.
\item[\textsuperscript{240}] The identity and address of the registered agent for service of any insurance company may be obtained from the Web site of the Secretary of State [http://corp.sos.state.ga.us/corp/soskb/csearch.asp] or from the Web site of the Insurance and Safety Fire Commissioner [www.gainsurance.org/insurers/companysearch.aspx].
\end{itemize}
\end{footnotesize}
20.4 Sanctions for Breach of Duty; Citations; Release of Surety

20.4.1 Guardians

Upon the petition of any interested person or whenever it appears to the court that good cause may exist to revoke or suspend the Letters of Guardianship or Conservatorship, such as the failure of a guardian to properly care for the maintenance and education of the minor, or to impose sanctions, the judge of the probate court shall cite the guardian to answer the charge. The court shall investigate the allegations, may require an accounting of funds, may appoint a temporary substitute guardian, and/or may, in its discretion:

1. Revoke or suspend the Letters of Guardianship;
2. Require additional security;
3. Reduce or deny compensation to the guardian or impose such other sanction or sanctions as the judge deems appropriate under the circumstances of the case; and
4. Issue any other order as in the judge’s judgment is appropriate under the circumstances of the case.

The revocation or suspension of the Letters will not abate any action pending for or against the guardian. Any successor guardian is to be made a party to any such action as provided in Code Section 9-11-25.241

Furthermore, if a guardian commits a breach of fiduciary duty or threatens to commit a breach of fiduciary duty, the minor or an interested person acting on behalf of the minor will have a cause of action:

1. To recover damages;
2. To compel performance of the guardian’s duties;
3. To enjoin the commission of a breach of fiduciary duty; or
4. To compel the redress of a breach of fiduciary duty by payment of money or otherwise.

If a minor’s assets are misapplied and can be traced into the hands of persons having notice of the misapplication, a trust will attach to the assets. These remedies do not preclude

241 O.C.G.A. §29-2-42.
resort to any other remedies which may be available under law.\textsuperscript{242} The equitable remedies above may be pursued only in the superior courts or other courts of equity in this state.

\textbf{20.4.2 Conservators}

If the judge of the probate court knows or is informed that a conservator wastes or mismanages the estate, refuses to make returns or, for any cause is unfit for the trust, the judge is required to cite the conservator to answer to the charge. The court must investigate the allegations and may require such accountings it deems appropriate. The court may appoint a temporary substitute conservator during the investigation.\textsuperscript{243} Upon investigation the judge may, in his/her discretion, do any or all of the following:

\begin{enumerate}
\item Revoke or suspend the Letters of Conservatorship;
\item Require a settlement of accounts as discussed in Section 20.5 below;
\item Require additional security;
\item Reduce or deny compensation to the conservator or impose such other sanction or sanctions, as the court deems appropriate; and
\item Issue any other order as in the court’s judgment is appropriate under the circumstances of the case.\textsuperscript{244}
\end{enumerate}

A petition may be filed by any interested person alleging that cause exists to investigate, but the law also allows the court to take action on its own motion based upon information made known to the court. How such information is to be brought to the attention of the judge is not stated in the law. It seems that any communication with the court which raises concerns about the welfare and protection of the minor might be sufficient under the statute. In order to avoid improper \textit{ex parte} communications, a clerk or other employee of the court should be designated to receive and review complaints about the service of guardians and conservators. Such clerk or employee would make known to the judge such facts or allegations as may warrant judicial review.

Certainly, the judge is charged with knowledge of what an examination of the court’s records would disclose. From the docket, the court can determine which conservators are in

\begin{footnotesize}
\textsuperscript{242} O.C.G.A. §29-2-43.
\textsuperscript{243} O.C.G.A. §§29-2-42 and 29-3-82.
\textsuperscript{244} Id.
\end{footnotesize}
default in the filing of annual accountings. From the accountings, which the court is required to examine, information may reveal possible improper disbursements and waste.

20.4.3 Citation

The citation should be directed to the guardian and/or the conservator and the surety, setting a hearing at a specific date and time at least ten days after service and should contain a sufficient specification of any charges to put the guardian or conservator on notice of the allegations. The citation should be served on the conservator in accordance with the provisions of Chapter 9 of Title 29. The citation must also be served personally upon the registered agent for service of process for the surety. See Section 20.3 above concerning the registered agents for service of process of insurance companies.

See Appendix A10-7 for a sample citation.

If one or more unsuccessful attempts at service are made by the sheriff or a deputy upon the conservator or guardian at the last known address in the court records and it appears to the judge that further attempts are likely to be futile, then service is sufficient upon the conservator or guardian for these purposes if the citation is mailed by first-class mail to such address.

If the citation was issued on the court’s own motion, at the hearing, the judge should explain to the conservator or guardian the deficiencies charged. If the proceeding was instituted by an interested party, that party’s counsel or that party, if pro se, should present the facts of the case. The conservator or guardian should be allowed every opportunity to present evidence in his/her own behalf. The disposition of the matter will be dependent upon what occurs at the hearing, and the judge may then enter such order as may be appropriate according to the evidence.

20.4.4 Interest on Surcharges

When a conservator is found to have misappropriated funds, interest accrues at the rate of seven percent per year, simple interest, from the time of the loss to the minor’s estate until the judgment is issued. Postjudgment interest accrues at the rate of prime plus 3%

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246 O.C.G.A. §7-4-2.
from the date of the judgment until it is satisfied.\textsuperscript{247} The “prime rate” is defined in this Code Section as the “rate published by the Board of Governors of the Federal Reserve System, as published in statistical release H. 15 or any publication that may supersede it.\textsuperscript{248}\textsuperscript{5}\textsuperscript{5}

Calculation of simple interest can be accomplished by using the following formula:

1. Principal amount $\times$ interest rate = yearly interest.
2. Yearly interest $\div$ by 365 = daily interest.
3. Daily interest $\times$ number of days = amount of interest.

If losses occur at different times and in different amounts, such as the conversion or misappropriations at different times, the formula would have to be applied separately for each day or month and then be totaled. Postjudgment interest may not be charged on the portion of the judgment which consists of the prejudgment interest.\textsuperscript{249} Therefore, postjudgment interest can only accrue on the actual misappropriated amount. All payments made on the judgment are credited first against any interest due at the time the payment is made.\textsuperscript{250}

\textbf{20.4.5 Release and Discharge of Surety}

The surety on the bond of any conservator or, if the surety is dead, the surety’s personal representative, may at any time petition the court regarding any misconduct of the conservator in the discharge of the conservator’s trust or to show the court its desire for any reason to be relieved as surety. The death of a surety is a sufficient ground for the discharge of the surety from future liability.

Upon a petition by the surety or the surety’s personal representative, the judge of the probate court must cite the conservator to appear and show cause, if any, why the surety should not be discharged. After hearing the parties and the evidence, the court, in its discretion, may issue an order discharging the surety from all future liability and requiring the conservator to give new and sufficient security or be removed as conservator. If new security is given, the discharged surety shall be discharged only from liability for \textit{future misconduct} by the conservator from the time the new security is given. However, the new surety is liable for \textit{past as well as future misconduct} of the conservator. If new security is not

\textsuperscript{247} O.C.G.A. §7-4-12.
\textsuperscript{248} The “prime rate” may be found through the Federal Reserve’s Web site at [www.federalreserve.gov/releases/H15/data/Daily/H15_PRIME_NA.txt](http://www.federalreserve.gov/releases/H15/data/Daily/H15_PRIME_NA.txt).
\textsuperscript{249} O.C.G.A. §7-4-17.
\textsuperscript{250} Id.
given and the conservator is removed, the discharged surety is bound for a true accounting of the conservator with the successor conservator, the former minor, or the personal representative of the estate of the former minor. In all cases where Letters of Conservatorship are revoked, any surety on the bond shall be liable for all acts of the conservator up to the time of the settlement with the new conservator, the former minor, or the estate of the former minor.  

A surety is not relieved of the obligation under the bond except by court order.

20.5 Interim and Final Settlements of the Accounts of Conservators

20.5.1 Interim Settlements

At any time after the six-month period following qualification, but not more frequently than once every 24 months, a conservator may petition the court for an interim settlement of accounts. The judge of the probate court must appoint a guardian-ad-litem for the minor. The petition for interim settlement of accounts must be accompanied by a report which must set forth all of the information required by law in annual returns and, in addition thereto, must show:

1. The period which the report covers;
2. The name and address of the minor, the name and address of the minor’s guardian, if any, and the name of the surety on the conservator’s bond, with the amount of the bond; and
3. Such other facts as the court may require.

Upon the filing of a petition for interim settlement of accounts, the judge of the probate court issues a citation requiring any objections to be filed. The minor and the guardian-ad-litem must be served personally, and the minor’s guardian, if any, and the surety of the conservator’s bond must be served by first-class mail.

Any interested person may file an objection to the conservator’s interim settlement of accounts. Upon receipt of objections or on the court’s own motion, the judge must hold a hearing to consider all objections, hear evidence, and determine whether the conservator

251 O.C.G.A. §29-3-49.
252 O.C.G.A. §29-3-61(a) and (b).
253 O.C.G.A. §29-3-61(c).
should be discharged from liability for the period covered by the interim settlement of accounts.\textsuperscript{254} If the judge finds that the conservator is liable to the minor, the judge must enter a judgment against the conservator and any surety in the amount of such liability.\textsuperscript{255}

\textbf{20.5.2 Final Settlement and Discharge from Office and Liability [GPCSF 34]}

A minor who has reached the age of majority, the personal representative of a deceased minor, a successor conservator, or any interested person may petition the court for an order requiring a conservator or that conservator’s personal representative to appear and submit to a final settlement of the conservator’s accounts. Alternatively, the court on its own motion may issue such an order. The settlement period must be the period of time beginning with the commencement of the conservatorship, the date of the last approved return, or the end of the period covered by the last interim settlement of accounts. If the conservator fails or refuses to appear as cited, the judge of the probate court may proceed without the appearance of the conservator. If the conservator has been required to give bond, the surety on the bond will be bound by the settlement if the surety is given notice by first-class mail of the settlement proceeding.\textsuperscript{256}

A conservator, a former conservator, the conservator of a conservator, or the personal representative of a deceased conservator is allowed to cite the minor, a deceased minor’s personal representative, or a successor conservator to appear and be present at a final settlement of the conservator’s accounts and discharge from liability. The settlement period must be the period of time beginning with the commencement of the conservatorship, the date of the last approved return, or the end of the period covered by the last interim settlement of accounts. Notice by first-class mail of the settlement proceeding must be given to the surety on the conservator’s bond and to the minor’s guardian, if any. If a minor has not reached 18 years of age, or if the conservator is the personal representative of the estate of the deceased minor, the judge must appoint a guardian-ad-litem for the minor who must be served personally.\textsuperscript{257}

At the hearing, it is the duty of the judge:

\textsuperscript{254} O.C.G.A. §29-3-62.
\textsuperscript{255} O.C.G.A. §29-3-63.
\textsuperscript{256} O.C.G.A. §29-3-71(a).
\textsuperscript{257} O.C.G.A. §29-3-71(b).
1. Examine all the returns and accounts of the conservator during the settlement period; and
2. Hear any objection to the settlement and discharge.\textsuperscript{258}

The judge must order any property in the hands of the conservator to be delivered to the former minor, the deceased minor’s personal representative, or the successor conservator and must issue a judgment, writ of fieri facias, and execution thereon for any sums found to be due from the conservator. If the court finds that the conservator has faithfully and honestly discharged the office, an order must be entered releasing and discharging the conservator from all liability.\textsuperscript{259}

While the office of guardian or conservator of a minor expires by operation of law upon the minor attaining majority and no order severing the relationship is necessary,\textsuperscript{260} the relationship does not terminate for the purpose of settlement of accounts between the conservator and the minor.\textsuperscript{261} Termination by operation of law merely means that upon reaching majority the former minor is entitled to handle his/her own affairs even though the conservator has not been formally dismissed. The former minor does not continue to be subject to the control of the guardian or conservator after becoming of age but still has the right to a proper accounting and settlement of the affairs with the conservator.

Even though annual returns have been approved by a proper order, in an application for a final settlement, such approved annual returns are only prima facie evidence of their correctness, and the minor may attack them but will bear the burden of proof of incorrectness.\textsuperscript{262} When returns have been approved by the judge of the probate court, any objections made by the minor in a final settlement with the conservator must show which items of the returns are incorrect and the grounds therefor or show that items have been omitted and specifically set forth those items.\textsuperscript{263}

\begin{footnotesize}
\textsuperscript{258} O.C.G.A. §29-3-71(c).
\textsuperscript{259} O.C.G.A. §29-3-71(d).
\textsuperscript{260} Tingle v. Cate, 142 Ga. App. 467 (1977), decided before the 2005 Code.
\textsuperscript{262} Pettigrew v. Williams, 65 Ga. App. 576 (1941).
\textsuperscript{263} Tucker v. Lea, 83 Ga. App. 207 (1951); Tate v. Gairdner, 119 Ga. 133 (1903).
\end{footnotesize}
Objection by a successor conservator to the final return of a predecessor amounts to a citation for settlement,\textsuperscript{264} and on such objection the judge should require the prior conservator to appear for a settlement of accounts with the successor.

\textbf{20.5.3 Discharge from Office Only [GPCSF 34]}

Upon the termination of a guardianship or the resignation of a guardian, the guardian \textbf{may} petition the court for an order dismissing the guardian from office. The petition must include a final status report to the court which covers the period of time beginning with the latest annual status report filed by the guardian. The final status report must contain the information required for annual status reports and must otherwise comply with the provisions of Code Sections 29-2-21. Notice must be published one time and must state that any objection must be made in writing on or before the date set by which objections must be filed, which may not be less than 30 days from the date of publication. The judge of the probate court must examine any objections filed.\textsuperscript{265} If no objection is filed or if, upon hearing any objection, the judge finds that dismissing the guardian from office is appropriate, an order is entered dismissing the guardian from office only. However, such order does not bar an action against the guardian.\textsuperscript{266}

Upon the termination of a conservatorship or upon the resignation of a conservator, the conservator \textbf{may} petition the court for an order dismissing the conservator from office. The petition must include a final return to the court which covers the period beginning with the last annual return filed by the conservator. The final return must contain the information required for annual returns and must otherwise comply with the provisions of Code Sections 29-3-60. Notice must be published one time and must state that any objection must be made in writing on or before the date set by which objections must be filed, which may not be less than 30 days from the date of publication. The judge of the probate court must examine any objections filed.\textsuperscript{267} If no objection is filed or if, upon hearing any objection, the judge finds that dismissing the conservator from office is appropriate, an order is entered dismissing the

\textsuperscript{264} Henson v. Jones, 66 Ga. App. 22 (1941).
\textsuperscript{265} O.C.G.A. §29-2-31(a).
\textsuperscript{266} O.C.G.A. §29-2-31(b).
\textsuperscript{267} O.C.G.A. §29-3-70(a).
conservator from office only. However, such order does not bar an action against the conservator or the conservator’s surety.\textsuperscript{268}

21. TRANSFERS OF GUARDIANSHIPS AND CONSERVATORSHIPS

21.1 Intra-State Transfers (Transfers within Georgia)

If a minor has been moved to a different county in this state, the guardian and/or conservator may file a petition to have jurisdiction over the case transferred to the probate court in the county where the minor then resides. Upon the filing of the petition for transfer to another county in this state, the judge of the probate court must appoint a guardian-ad-litem for the minor.\textsuperscript{269} The court of the county in which the guardian or conservator was originally appointed must grant the petition for removal only if the judge determines that the removal is in the best interest of the minor.\textsuperscript{270} There is no standard form for an intra-state transfer. See Appendix A10-8 for a sample petition.

Before the removal of a guardianship to another county in this state, a guardian must file with the court of the county to which the guardianship is to be removed certified copies of all the records pertaining to the guardianship.\textsuperscript{271}

Before the removal of a conservatorship to another county in this state, a conservator must:

1. Give bond and good security to the court of such county as if the conservator had been first appointed by that court, and a certificate to this effect must be filed in the court in which the conservator was appointed;\textsuperscript{272} and

2. File with the court of the county to which the conservatorship is to be removed, certified copies of all the records pertaining to the conservatorship.\textsuperscript{273}

\textsuperscript{268} O.C.G.A. §29-3-70(b).
\textsuperscript{269} O.C.G.A. §§29-2-60(a)(b) and 29-3-100(a)(b).
\textsuperscript{270} O.C.G.A. §§29-2-60(b) and 29-3-100(b).
\textsuperscript{271} O.C.G.A. §29-2-60(c).
\textsuperscript{272} There would appear no reason why a rider to the existing bond, changing the obligee to the judge of the probate court to which the transfer is to be made. However, if there are any pending proceedings which might result in a judgment against the conservator for waste or mismanagement, the judge of the transferee court should be shown as an additional obligee.
\textsuperscript{273} O.C.G.A. §29-3-100(c)
Following removal of a guardianship or conservatorship to another county in this state, the judge of the probate court of that county will have the same jurisdiction over the guardian or the conservator as if the appointment had first been made in that county. Every proceeding growing out of or affecting the guardianship or conservatorship thereafter must be heard and tried only in the county to which it has been removed. The foregoing notwithstanding, the original court retains jurisdiction over any actions or proceedings which were pending or about which an order for a settlement of accounts, removal, or sanction of a guardian or conservator had been entered.

The sureties on a conservator’s first bond are liable only for misconduct of the conservator up until the giving of new bond and security. The sureties on the new bond are liable for both past and future misconduct of the conservator.

21.2 Interstate Transfers to Georgia from Another State [GPCSF 60]

Interstate transfers of adult guardianships or conservatorships will usually involve the filing of two petitions: one in the court from which the transfer will be made, seeking authority to make the transfer; and one in the court to which the transfer will be made, seeking acceptance of the transfer and assumption of jurisdiction.

For purposes of this Section, the term "guardianship" refers to a legal relationship in which a person is given responsibility by a foreign court of competent jurisdiction for the care of a minor, thereby becoming a guardian; the term “conservatorship” means a legal relationship in which a person is given responsibility by a (foreign) court of competent jurisdiction for the care of the property of a minor, thereby becoming a conservator.

A guardian or conservator who has been appointed by a foreign court of competent jurisdiction may petition to have the guardianship or conservatorship transferred to and accepted in this state by filing a petition for receipt and acceptance of the foreign guardianship or conservatorship in the court of the county in this state where the minor resides or may reside. The petition shall include the following:

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274 O.C.G.A. §§29-2-60(d) and 29-3-100(d).
275 O.C.G.A. §§29-2-60(f) and 29-3-100(f).
276 O.C.G.A. §29-3-100(e).
277 O.C.G.A. §§29-2-65(a) and 29-3-105(a).
278 O.C.G.A. §§29-2-65(b) and 29-3-105(b).
1. An authenticated copy of the foreign guardianship or conservatorship order including:
   (A) All attachments describing the duties and powers of the guardian or conservator; and
   (B) All amendments or modifications to the foreign guardianship or conservatorship order entered subsequent to the original order, including any order to transfer the guardianship or conservatorship;
2. The address of the foreign court which issued the guardianship or conservatorship order;
3. A listing of any other guardianship or conservatorship petitions that are pending in any jurisdiction and the names and addresses of the courts where the petitions have been filed;
4. The petitioner's name, address, and county of domicile;
5. The name, age, and current address of the minor and, for guardianship, the new or proposed address of the minor;
6. The names and addresses of the adult siblings of the minor, if any;
7. The name and address of the person responsible for the care and custody of the minor, if other than the petitioner, and of any other guardian or conservator currently serving;
8. The name and address of any currently acting legal representative, other than the petitioner, including any legal counsel or guardian-ad-litem appointed by the foreign court for the minor;
9. For guardianship, the name and address of the minor's conservator, if any;
10. For conservatorship, the name and address of the minor’s guardian, if any;
11. The reason the transfer is in the minor’s best interest; and
12. For conservatorship, the name and address of the surety on the conservator’s bond and, to the extent known to the petitioner, a statement of the location and estimated value of the minor’s property and the source and amount of any anticipated income and receipts.\(^\text{279}\)

The petition may be combined with other petitions related to the guardianship or

\(^{279}\) O.C.G.A. §§29-2-65(c) and 29-3-105(c).
conservatorship, including a petition to modify the terms of the guardianship or conservatorship.\(^{280}\)

Notice and a copy of the petition shall be *served personally on the minor*. The notice shall:

1. State that the minor has a right to a hearing on the petition;
2. Inform the minor of the procedure to exercise the minor's right to a hearing; and
3. State that the minor has the right to independent legal counsel and that the court shall *appoint legal counsel for the minor* unless the minor has retained counsel or legal counsel has been appointed by the foreign court to represent the minor in the transfer of the guardianship or conservatorship.\(^{281}\)

Notice and a copy of the petition shall be provided to the foreign court from which the guardianship or conservatorship is to be transferred. Notice to the foreign court shall include a request that the foreign court:

1. Certify whether:
   
   (A) The foreign court has any record that the guardian or conservator has engaged in malfeasance, misfeasance, or nonfeasance during the guardian's appointment;
   
   (B) Periodic reports have been filed in a satisfactory manner; and
   
   (C) All bond or other security requirements imposed under the guardianship or conservatorship have been performed; and

2. Forward copies of all documents filed with the foreign court relating to the guardianship or conservatorship including but not limited to:

   (A) The address of the foreign court which issued the guardianship or conservatorship order;
   
   (B) The initial petition for guardianship or conservatorship and other filings relevant to the appointment of the guardian or conservator;

\(^{280}\) O.C.G.A. §§29-2-65(d) and 29-3-105(d).

\(^{281}\) O.C.G.A. §§29-2-66(a) and 29-3-106(a).
(C) Reports and recommendations of guardians-ad-litem, court visitors, or other individuals appointed by the foreign court to evaluate the appropriateness of the guardianship or conservatorship;

(D) Reports of physical and mental health practitioners describing the capacity of the minor to care for himself or herself or to manage his or her affairs;

(E) Periodic status reports on the condition of the minor; and

(F) The order to transfer the guardianship or conservatorship, if any.\(^{282}\)

Notice and a copy of the petition shall be mailed by first-class mail to all other persons named in the petition. The notice shall inform these persons of the right to object to the petition for receipt and acceptance of the guardianship or conservatorship by this state.\(^{283}\)

The minor shall have 30 days from the date of service to request a hearing on the petition, and all other persons to whom notice is given shall have 30 days from the date of the mailing of the notice to request a hearing on the petition.\(^{284}\)

However, the judge may waive the notice requirements set forth above if (but only if):

1. The guardian or conservator has filed a petition in the foreign court for transfer and release of the guardianship or conservatorship to this state;

2. Notice was given to the minor and all interested persons in conjunction with the petition for transfer and release of the guardianship or conservatorship;

3. The petitioner provides the court with an authenticated copy of the petition filed with the foreign court and proof that service was made on the minor not more than 90 days from the date the petition for receipt and acceptance of the guardianship or conservatorship is filed in the Georgia court; and

4. The minor is represented by legal counsel with respect to the petition in the foreign court.\(^{285}\)

On the court's own motion or upon timely motion by the minor or by any interested person, the judge of the probate court shall hold a hearing to consider the petition for receipt

\(^{282}\) O.C.G.A. §§29-2-66(b) and 29-3-106(b).
\(^{283}\) O.C.G.A. §§29-2-66(c) and 29-3-106(c).
\(^{284}\) O.C.G.A. §§29-2-66(d) and 29-3-106(d).
\(^{285}\) O.C.G.A. §§29-2-66(e) and 29-3-106(e).
and acceptance of the foreign guardian or conservator. If any interested person challenges the validity of the foreign guardianship or conservatorship or the authority of the foreign court to appoint the guardian or conservator, the judge may stay its proceeding while the petitioner is afforded the opportunity to have the foreign court hear the challenge and determine its merits.\textsuperscript{286}

The court may grant a petition for receipt and acceptance of a foreign guardianship or conservatorship provided the court finds that:

1. The guardian or conservator is presently in good standing with the foreign court; and
2. The transfer of the guardianship or conservatorship from the foreign jurisdiction is in the best interest of the minor.\textsuperscript{287}

The judge may require the conservator to file an inventory of the minor’s property at the time of the transfer from the foreign jurisdiction.\textsuperscript{288}

At all times following the entry of the order accepting the guardianship or conservatorship, the laws of the State of Georgia shall apply to the guardianship or conservatorship; provided, however, that, in order to coordinate efforts with the foreign court to facilitate the orderly transfer of the guardianship, the judge is authorized to:

1. Delay the effective date of the receipt and acceptance for a reasonable period of time;
2. Make the receipt and acceptance contingent upon the release of the guardianship or conservatorship or the termination of the guardianship or conservatorship and the discharge of the guardian or conservator in the foreign jurisdiction;
3. Recognize concurrent jurisdiction over the guardianship or conservatorship for a reasonable period of time to permit the foreign court to release or terminate the guardianship or conservatorship and discharge the guardian or conservator in the foreign jurisdiction; or

\textsuperscript{286} O.C.G.A. §§29-2-67 and 29-3-107.
\textsuperscript{287} O.C.G.A. §§29-2-68(a) and 29-3-108(a).
\textsuperscript{288} O.C.G.A. §29-3-108(c).
4. Make other arrangements the court deems necessary to effectuate the receipt and acceptance of the guardianship or conservatorship.\textsuperscript{289}

The denial of a petition for receipt and acceptance of the foreign guardianship or conservatorship does not affect the right of a guardian or conservator appointed by a foreign court of competent jurisdiction to file the usual petition for guardianship or conservatorship under Georgia law.\textsuperscript{290}

\textbf{21.3 Interstate Transfers to Another State from Georgia}

A guardian or conservator may petition the Georgia court that has jurisdiction over the guardianship or conservatorship to transfer the guardianship or conservatorship to a foreign court of competent jurisdiction if the minor has moved permanently to the foreign jurisdiction. The minor may be presumed to have moved permanently to the foreign jurisdiction if:

1. The minor has resided in the foreign jurisdiction for more than 12 consecutive months;
2. The guardian or conservator notifies the court that the minor will move or has moved permanently to the foreign jurisdiction; or
3. A foreign court of competent jurisdiction notifies the court of the filing of a petition for guardianship or conservatorship for the minor in the foreign jurisdiction.

To facilitate the transfer, the judge of the probate court may order the guardian or conservator to file a petition for receipt and acceptance of the guardianship or conservatorship in the foreign jurisdiction. If the foreign jurisdiction does not have a procedure for receiving and accepting a foreign guardianship or conservatorship, the judge may order the guardian or conservator to file a petition for guardianship or conservatorship in the foreign jurisdiction.\textsuperscript{291}

The petition to be filed in the Georgia court to transfer a guardianship or conservatorship to a foreign jurisdiction shall include the following:

\textsuperscript{289} O.C.G.A. §§29-2-68(b),(c),(d) and 29-3-108(b),(d),(e).
\textsuperscript{290} O.C.G.A. §§29-2-68(e) and 29-3-108(f).
\textsuperscript{291} O.C.G.A. §§29-2-69 and 29-3-110.
1. The name and address of the foreign court to which the guardianship or conservatorship shall be transferred and an authenticated copy of the petition for receipt and acceptance of a foreign guardianship or conservatorship if previously filed in the foreign court;

2. A listing of any other guardianship or conservatorship petitions that are pending in any jurisdiction and the names and addresses of the courts where the petitions have been filed;

3. The petitioner's name, address, and county of domicile;

4. The name, age, and current address of the minor and the new or proposed address of the minor;

5. The names and addresses of the adult siblings of the minor, if any;

6. For guardianship, the name and address of the person responsible for the care and custody of the minor, if other than the petitioner, and of any other individual currently serving as guardian;

7. For conservatorship, the name and address of the person responsible for the care and custody of the minor, if other than the petitioner, and of any other conservator currently serving;

8. For guardianship, the name and address of the minor's conservator, if any;

9. For conservatorship, the name and address of the minor’s guardian, if any;

10. For conservatorship, the name and address of the surety on the conservator’s bond; and

11. The reason for moving the minor and the reason the transfer of the guardianship or conservatorship is in the minor's best interest.⁹²

Notice and a copy of the petition to transfer shall be served personally on the minor not less than ten days prior to the date set for the hearing. The notice shall:

1. State the date that the hearing shall be held; and

2. State that the minor has the right to independent legal counsel and that the judge shall appoint legal counsel for the minor unless the minor has retained counsel or legal counsel has been appointed by the foreign court to represent

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⁹² O.C.G.A. §§29-2-70 and 29-3-111.
the minor in the receipt and acceptance of the guardianship or conservatorship.

Notice and a copy of the petition to transfer shall be provided to the foreign court to which the guardianship or conservatorship is to be transferred and shall also be mailed to all other persons named in the petition. The notice shall inform these persons of the date of the hearing and of their right to file objections to the transfer of the guardianship or conservatorship from this state.\textsuperscript{293}

Upon the court's own motion or upon timely motion by the minor or by any interested person, the judge of the probate court shall hold a hearing to consider the petition to transfer.\textsuperscript{294} The judge may grant a petition to transfer if the court finds that:

1. The guardian or conservator is presently in good standing with the court; and
2. The transfer to the foreign jurisdiction is in the best interest of the minor.

In order to coordinate efforts with the foreign court to facilitate the orderly transfer, the judge is authorized to:

1. Notify the foreign court of any significant problems that may have occurred including whether periodic reports and accountings have been filed in a satisfactory manner and whether all bond or other security requirements imposed under the guardianship or conservatorship have been performed; and
2. Forward copies of all documents filed with the court relating to the guardianship or conservatorship, including but not limited to:
   (A) The initial petition for guardianship or conservatorship and other filings relevant to the appointment of the guardian or conservator;
   (B) Reports and recommendations of guardians-ad-litem, court visitors, or other individuals appointed by the court to evaluate the appropriateness of the guardianship or conservatorship;
   (C) Reports of physical or mental health practitioners describing the capacity of the minor to care for himself or herself; and
   (D) Periodic status reports on the condition of the minor.

\textsuperscript{293} O.C.G.A. §§29-2-71 and 29-3-112.
\textsuperscript{294} O.C.G.A. §§29-2-72 and 29-3-113.
3. Require the conservator to file an inventory of the minor’s property at the time of the transfer to the foreign court.

As necessary to coordinate the transfer of the guardianship, the judge is authorized to:

1. Delay the effective date of the transfer for a reasonable period of time;
2. Make the transfer contingent upon the acceptance of the guardianship or appointment of the guardian in the foreign jurisdiction;
3. Recognize concurrent jurisdiction over the guardianship for a reasonable period of time to permit the foreign court to accept the guardianship or appoint the guardian in the foreign jurisdiction; or
4. Make other arrangements that in the sound discretion of the court are necessary to transfer the guardianship.295

22. CONFIDENTIALITY OF GUARDIANSHIP/CONSERVATORSHIP RECORDS AND MISCELLANEOUS PROVISIONS UNDER TITLE 29

22.1 Confidentiality of Guardianship/Conservatorship Records

All of the records relating to any minor guardianship or conservatorship granted under Title 29 shall be kept sealed, except for a record of the names and addresses of the minor, the guardian and/or conservator and their attorneys of record, and the dates of filing, granting, and terminating the guardianship or conservatorship. The sealed records may be examined by the minor and the minor’s attorney, the minor’s parents, the guardian or conservator and their attorneys of record, and any surety for the conservator and the attorney for the surety at any time.

A request by other interested parties to examine the sealed records shall be by petition to the court and guardian or conservator shall have at least 30 days’ prior written notice of a hearing on the petition; provided, however, that for good cause shown to the court, the court may shorten such notice period or grant the petition without notice. The matter shall come before the court in chambers. The order allowing access shall be granted upon a finding that the public interest in granting access to the sealed records clearly outweighs the harm otherwise resulting to the privacy of the person in interest, and the court shall limit the portion of the file to which access is granted to that which is required to meet the legitimate

295 O.C.G.A. §§29-2-73 and 29-3-114.
needs of the petitioner.\textsuperscript{296}

Nothing in the Code indicates that the records become open to inspection after the death of the minor. The Court of Appeals, in fact, upheld a judge’s discretionary opening of a portion of a guardianship file after the death of the ward; while not holding specifically that the file remained sealed, the Court did not declare the file to no longer be sealed following the ward’s death, holding, instead that the judge of the probate court had discretion to determine whether and what parts of the record would be disclosed.\textsuperscript{297}

\textbf{22.2 Disclosure and Examination of Records}

Therefore, the files on any guardianship or conservatorship of a minor, including temporary guardianships and standby guardianships, are to be treated by the court as confidential and not subject to any open records request. However, the minor or the minor’s attorney, the minor parent(s), the guardian and/or conservator and their attorney(s), as well as the surety on the bond and the attorney for the surety, may examine the complete records at any time. Furthermore, the law permits certain information to be disclosed to anyone. The following information concerning any guardianship or conservatorship may be disclosed to anyone, and a record for such disclosure may be maintained:

1. The name and address of the minor;
2. The name(s) and address(es) of the guardian and/or conservator and of their attorney(s) of record; and
3. The date a petition was filed and granted and the date of a termination of the guardianship or conservatorship, if applicable.

Except as set forth in the preceding paragraph and the next paragraph, no other information may be disclosed. When a conservator has been appointed and the minor owns an interest in real estate, the certificate which is to be recorded on the deed records is such a record as may be disclosed. Otherwise, if no particular form is prepared by the court, the information may (should) be given upon request at any time. For the protection of the court, its staff, and the minor, and to assure no confusion or misunderstanding, it would seem best that the information be provided in writing, signed by a clerk.

\textsuperscript{296} O.C.G.A. §29-9-18.
Anyone else wishing to examine any records regarding or seeking to obtain any information about any guardianship or conservatorship of a minor must file a petition, as stated above. Disclosure should be only of such information as is necessary or appropriate to the interests of the petitioner, while protecting the privacy of the minor. For example, a title examiner will need to assure that authority has been granted to a conservator to sell the subject property. Therefore, a copy of the order granted a leave to sell should satisfy that requirement, and the title examiner should be given a certified copy of the order. This type request can be granted without a hearing or notice, if the court finds it appropriate.

The judge of the probate court is granted discretion in determining when disclosure of parts of the file may be granted, and the death of the minor does not terminate the confidentiality or sealed nature of the guardianship/conservatorship file.\textsuperscript{298}

### 22.3 Recording

Apparently, there is some confusion about the recording of confidential or “sealed records.” All proceedings of the probate court are to be entered on the dockets and minutes.\textsuperscript{299} Therefore, all pleadings, motions, orders and other matters docketed to the case must be recorded. “Sealed records” does not appear to be defined in the Code. Traditionally, sealed files were actually enclosed in an envelope, marked “sealed” and securely closed, such as in the case of a deposition which has been filed with the court. However, that does not appear to be dictated by any statute in the Code. The obvious idea is that “sealed records” are not to be maintained in any fashion which would permit unauthorized access. In order to maintain the confidentiality prescribed by the statute, the minutes (the actual recording of all docketed matters) for guardianship/conservatorship cases must be maintained in separate books from those which are open to the public. In addition, the actual file, whether maintained physically or electronically, must be kept from public inspection. Therefore, the physical files must be kept in locked file cabinets or in a part of the offices where the public does not have access or be actually sealed to prevent accidental access; electronic files must be maintained in folders which are not accessible to anyone other than court staff, so that no access occurs without court approval.

\textsuperscript{299} O.C.G.A. §15-9-37(a)(7); U.P.C.R. 207. \textit{See also Chapter 16.}
23.0 APPEALS

Unlike in Chapters 4 and 5 of Title 29, no provision is made specifically for appeals from proceedings concerning guardians and conservators of minors. However, the general rules of appeals would apply. See Chapter 11, Section 17 and Chapter 2, Section 8.

PART II. PROBATE JUDGES AS CUSTODIAN OF CERTAIN FUNDS

24. PROBATE JUDGES AS CUSTODIANS OF CERTAIN FUNDS [GPCSF 22]

The judges of the probate courts are, in their discretion, made the legal custodians and distributors of all moneys up to $15,000.00 due and owing to any minor in need of a conservator but who has no legal and qualified conservator; and the judges are authorized to receive and collect all such moneys arising from insurance policies, benefit societies, legacies, inheritances, or any other source. Without any appointment or qualifying order, the judge is authorized to take charge of the moneys or funds of the minor by virtue of the judge's position as judge of the probate court in the county of residence of the minor; provided, however, that notice shall be given to the living parents of a minor, if any. The certificate of the judge that no legally qualified conservator has been appointed shall be conclusive and shall be sufficient authority to justify any debtor in making payment on claims made by the judge.300

The judge is authorized, in the judge's discretion, to employ counsel to bring an action to recover any amount due to a minor described above, in the minor's name or in the name of the judge as custodian, in any court having jurisdiction thereof. The judge shall have authority to pay to counsel a reasonable fee out of the funds collected for legal services in the proceeding which were necessary to enforce the right of the minor.301

It shall be the duty of the judge to keep a properly indexed and complete record of all money received by the judge for minors as custodian. The record shall show from what source the funds were derived and to whom and for what the money was paid. The record shall be open for inspection by the public.302

300 O.C.G.A. §29-6-1.
301 O.C.G.A. §29-6-2.
302 O.C.G.A. §29-6-3.
The judge who receives funds due and owing a minor is authorized and directed to pay from the funds so received whatever amount the judge may think necessary for the support, care, education, health, and welfare of the minor, as well as the funeral and burial expenses of the minor, in case of the individual's death, as in the judge's opinion may be proper and right. The expenditures made by the judge shall be final and no liability shall attach to the judge or the judge's bond by reason of the expenditures when made in good faith.\footnote{303}

In appropriate cases, the judge who holds property or funds as custodian may order that a conservatorship be established in accordance with the provisions of Chapter 3 of Title 29 and shall distribute any or all of such property or funds to the conservator.\footnote{304}

When any funds due and owing a minor come into the hands of the judge and the funds are not needed for the support, care, education, health, and welfare of the minor or adult, it shall be the duty of the judge to place the funds in an account insured by the Federal Deposit Insurance Corporation, in the name of the judge as custodian for the minor. There shall be no further liability against the judge or the judge's bond when the deposit is made in good faith.\footnote{305}

The judges of the probate courts shall receive as compensation for their services as custodians the fee specified in subsection (j) of Code Section 15-9-60.\footnote{306} Presently that amount is a flat, one-time fee of 8% of the total fund when received.\footnote{307}

Judges of the probate courts shall be held accountable on their official bonds for the faithful discharge of their duties as custodians and for the proper distribution of funds coming into their hands as such custodians. It is the judge's responsibility to increase his/her official bond if necessary to cover the gross total of all custodial accounts held.\footnote{308}

The judge shall turn over all custodial property held pursuant to Chapter 6 to:

1. A conservator if the custodial funds exceed $15,000.00;
2. A minor upon reaching the age of majority;
3. The personal representative of a deceased minor; or

\footnotesize
\begin{itemize}
\footnotesize
\item \footnote{303}{O.C.G.A. §29-6-4.}
\item \footnote{304}{O.C.G.A. §29-6-5.}
\item \footnote{305}{O.C.G.A. §29-6-6.}
\item \footnote{306}{O.C.G.A. §29-6-7.}
\item \footnote{307}{O.C.G.A. §15-9-60(j).}
\item \footnote{308}{O.C.G.A. §29-6-8.}
\end{itemize}
4. The Department of Revenue four years after the death of a minor if no proceedings are commenced on that individual's estate for four years after the date a minor who cannot be located would have reached the age of majority.\textsuperscript{309}

**PART III. VA GUARDIANS**

25. **VA GUARDIANS**

Occasionally, a minor will become the beneficiary of benefits payable by the Department of Veterans Affairs. In such a case, the DVA may determine the need for the appointment of a guardian (conservator) to receive and manage those funds, and a petition will be filed in the probate court. A VA guardianship for a minor is handled in the same manner as VA guardianships for incapacitated adults.

See Chapter 11, Part III, Section 20.

**PART IV. TRANSFERS TO MINORS ACT**

26. **GEORGIA TRANSFERS TO MINORS ACT**

The “Georgia Transfers to Minors Act”\textsuperscript{310} gives jurisdiction to the probate courts with regard to certain matters which might arise in connection with custodial accounts created under the Act. The Act defines "court" as "the probate court in the county where the minor resides, or, if the minor is not a resident of this state, the probate court in the county where the custodian resides or has a principal place of business or where the custodial property is located."\textsuperscript{311} Most of the provisions of the Act deal with the mechanics of creating a custodianship that complies with the Act and the duties of the custodian and do not directly impact the probate court. However, the judge of the probate court may be asked to rule on issues involving the adequacy of payments made for the minor's benefit, removal of the custodian and designation of a successor custodian, accounting by the custodian, and approval of certain transfers.

\textsuperscript{309} O.C.G.A. §29-6-9.
\textsuperscript{310} O.C.G.A. §§44-5-110.
\textsuperscript{311} O.C.G.A. §44-5-111(4).
It might be well to note that custodians are not confined to the legal investments for conservators but are governed by the broader "prudent man rule."\footnote{O.C.G.A. §44-5-122.}

While bond and accountings are not generally required under the Act, the court may order the custodian to post bond\footnote{O.C.G.A. §44-5-128(f).} or file accountings\footnote{O.C.G.A. §44-5-129.} as explained below.

An interested person or the minor, if the minor is 14 years of age or older, may petition the judge of the probate court for an order directing the custodian to use the custodial property for the minor's benefit. The judge seemingly has broad discretion in such a proceeding since the statute authorizes the judge to order the expenditure of "so much of the custodial property as the court considers advisable for the use and benefit of the minor."\footnote{O.C.G.A. §44-5-124(b).}

If a custodian is ineligible, dies, or becomes incapacitated, and the other alternatives for designating a successor are not met, any interested person may petition the judge of the probate court to designate a successor custodian.\footnote{O.C.G.A. §44-5-128(d).}

The transferor, the legal representative of the transferor, an adult member of the minor's family, a guardian or conservator\footnote{The Act still makes reference to “guardian of the person” and “guardian of the property.” Apparently, this Code Section was not changed when new Title 29 was enacted.} of the minor, or the minor if he is 14 years of age or older, may petition the judge of the probate court to remove a custodian for cause and to appoint a successor custodian.\footnote{O.C.G.A. §44-5-128(f).} If a custodian is removed pursuant to this Code section, the judge of the probate court must require an accounting and order delivery of the custodial property and records to the successor custodian, as well as the execution of all instruments required for transfer of the custodial property.\footnote{O.C.G.A. §44-5-129(d).}

A minor who is 14 years of age or older, the minor’s guardian legal representative, an adult member of the minor's family, a transferor, or a transferor's legal representative, may petition the judge of the probate court for an accounting by the custodian or for a determination of responsibility for claims against the custodial property.\footnote{O.C.G.A. §44-5-129(a).} A successor
The custodian also may petition for an accounting by the predecessor custodian. The judge may either require or permit the custodian to provide an accounting.

The judge of the probate court may also be asked to approve transfers to the custodian of a minor by personal representatives of estates of decedents, trustees, guardians, or conservators. In particular, a conservator may seek authority to convert the conservatorship to a custodianship. Any such transfer may be made only if:

1. The personal representative, trustee, guardian, or conservator considers such transfer to be in the best interest of the minor;
2. The transfer is not prohibited by or inconsistent with provisions of any applicable will, trust agreement, or other governing instrument; and
3. The transfer is authorized by the judge of the probate court as in the best interest of the minor whenever the transfer, when combined with all prior transfers to the minor under the Act, in the aggregate exceeds $10,000.00 in value.

If the custodian is or will be the same person as the guardian, conservator, or other fiduciary holding the property to be transferred, or is a close relative thereof, the judge may want to appoint a guardian-ad-litem to represent the minor’s best interest. The court may impose conditions upon its approval of the transfer to a custodian, such as requiring annual reports to the court or to a guardian-ad-litem, requiring bond, or limiting the custodian to the legal investments which conservators are allowed to make.

Transfers by other persons, including a person who owes a liquidated debt to the minor, may be made to custodians as follows:

1. If a person having the right to designate the recipient of property transferable upon the occurrence of a future event has nominated a custodian to receive the property upon the occurrence of the event pursuant to Code Section 44-5-113, the transfer must be made to the custodian so designated.
2. If no custodian has been so nominated or all persons so nominated are unable to serve, the transfer may be made to an adult family member or to a trust

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321 O.C.G.A. §44-5-129(b).
322 O.C.G.A. §44-5-129(c).
323 See FN 8 above,
324 O.C.G.A. §44-5-116(c).
company as custodian if a guardian appointed for the minor considers the transfer to be in the best interest of the minor and, on petition brought by the guardian, the transfer is authorized by the probate court as in the best interest of the minor.\textsuperscript{325}

The age at which the minor is entitled to receive all remaining custodial property is 21, rather than 18, except that, when property was transferred to a custodian under one of the two court procedures described immediately above, the remaining property must be paid over or delivered to the minor at age 18.\textsuperscript{326}

PART V. EMANCIPATION OF MINORS

27. EMANCIPATION OF MINORS

27.1 In General

The probate court is not involved in the process by which a minor may become or be declared to be emancipated. However, determining whether a minor is or has been emancipated may arise in connection with matters and proceedings in the probate courts. For example, guardianship and conservatorship of minors will terminate upon a minor’s emancipation,\textsuperscript{327} and an emancipated minor may demand, sue for, receive, recover, and possess property, including property inherited from an estate;\textsuperscript{328} however, an emancipated minor may not marry at ages 16 or 17 without parental consent and is not entitled to property held by a custodian under the Transfers to Minors Act discussed above. Hence, the subject of emancipation is briefly covered in this Part.

Note that, for purposes of emancipation, the term “minor” means a person who is at least 16 years of age.\textsuperscript{329} In other words, a minor less than 16 years of age cannot become emancipated under Georgia law.

\textsuperscript{325} O.C.G.A. §44-5-117.
\textsuperscript{326} O.C.G.A. §44-5-130.
\textsuperscript{327} See Section 11. above.
\textsuperscript{328} See the remainder of this Part.
\textsuperscript{329} Id.
27.2 Methods of Emancipation

Emancipation, that is, the termination of the rights of the parents to the custody, control, services, and earnings of a minor,\(^{330}\) may occur either (1) by operation of law or (2) by an order of a juvenile court granting a petition by the minor for the declaration of the minor’s emancipation.\(^{331}\)

Emancipation occurs by operation of law:

1. When a minor is validly married;
2. When a minor reaches the age of 18 years; or
3. During the period when the minor is on active duty with the armed forces of the United States.\(^{332}\)

Otherwise, emancipation may only occur by virtue of a juvenile court order.

27.3 Petition Seeking Emancipation

A minor seeking emancipation may file a petition in the juvenile court in the county where the minor resides.\(^{333}\) The Code sets forth the requirements for the petition, and service of a summons and copy of the petition on the minor’s parent(s) or guardian(s) and others is required.\(^{334}\) The court must appoint a court employee or guardian-ad-litem to investigate the allegations of the petition and to report to the court the results of the investigation and a recommendation whether the minor should be emancipated. An attorney must be appointed for the minor, as well as for the parents or guardians if they are indigent and oppose the petition.\(^{335}\) If the court finds that emancipation is in the best interest of the minor, an order granting the petition is entered; if not, an order denying the petition is entered. The minor or the parents or guardians may appeal the ruling.\(^{336}\)

There is a provision for the minor to file a petition to have the order of emancipation rescinded by the juvenile court which issued the original order.\(^{337}\)

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\(^{330}\) O.C.G.A. §15-11-200(1).
\(^{331}\) O.C.G.A. §§15-11-201(a) and 15-11-201(c).
\(^{332}\) O.C.G.A. §15-11-201(b).
\(^{334}\) O.C.G.A. §15-11-203.
\(^{335}\) O.C.G.A. §15-11-204.
\(^{336}\) O.C.G.A. §15-11-205.
\(^{337}\) O.C.G.A. §15-11-206.
27.4 Rights of an Emancipated Minor

The Code provides that an emancipated minor “shall be considered to have all the rights and responsibilities of an adult, except for those specific constitutional and statutory age requirements regarding voting, use of alcoholic beverages, and other health and safety regulations relevant to the minor because of his or her age.”\textsuperscript{338} In addition, the Code makes two specific provisions limiting the effect of the emancipation which are of importance to probate judges.

The Code provides that an order of emancipation has no effect on the rights of the minor to receive property or funds held under the Georgia Transfers to Minors Act.\textsuperscript{339} In other words an emancipated minor may not demand a transfer of custodial property until age 18 or 21, as applicable to the type of custodial account.\textsuperscript{340}

The Code provides also that an order of emancipation does not grant the right of marriage to a minor 16 or 17 years of age; parental consent, as set forth in Code Section 19-3-37, is still required.\textsuperscript{341}

\textsuperscript{338} O.C.G.A. §15-11-207.
\textsuperscript{339} O.C.G.A. §15-11-207(a).
\textsuperscript{340} See Part IV. above.
\textsuperscript{341} See Chapter 13.
APPENDIX TO CHAPTER 10

GUARDIANS AND CONSERVATORS OF MINORS;
PROBATE JUDGES AS CUSTODIANS OF CERTAIN
FUNDS; VA GUARDIANS; TRANSFERS TO MINORS;
AND EMANCIPATION OF MINORS

1. Sample Petition to Terminate Temporary Guardianship………………A10-1
2. Statutory form Designating Standby Guardian…………………………A10-2
3. Sample Notice of Standby Guardianship………………………………A10-3
4. Sample Inventory and AMP for a Minor………………………………A10-4
5. Sample Personal Status Report for a Minor……………………………A10-5
6. Sample Return of Conservator………………………………………..A10-6
7. Sample Citation………………………………………………………..A10-7
8. Sample Petition for Intra-State Transfer………………………………..A10-8

Important Notice

Several sample orders and forms have been included in this Appendix. These sample orders and forms have not been officially sanctioned by the Georgia Council of Probate Court Judges. They have, unless otherwise noted, been prepared by the author. They are provided solely as samples. They should be modified or adapted to the specific court for the specific purpose, with any unnecessary material being deleted and any additional material being added.

William J. Self, II
IN THE PROBATE COURT OF __________ County
STATE OF GEORGIA

IN RE: ) ESTATE NO.
) PETITION TO TERMINATE
) TEMPORARY GUARDIANSHIP OF
Minor ) MINOR BY NATURAL GUARDIAN(S)

TO THE HONORABLE JUDGE OF THE PROBATE COURT:

The petition of ___________________________ shows:

1. Petitioner(s) is/are the natural guardian of the above named minor as

   ___ a parent of the minor presently married to the other parent,
   ___ the sole surviving parent,
   ___ the parents of the minor who remain married or, if divorced, have joint legal custody,
   ___ a divorced parent having sole custody of the minor, or
   ___ a divorced parent having joint legal custody of the minor.

2. On ____________________________, 20_____, this Court appointed as temporary guardian(s) of the above named minor after petitioner:

   ___ temporarily relinquished parental rights; or
   ___ did not object to the appointment of the temporary guardian.

3. Pursuant to O.C.G.A. § 29-2-8, petitioner(s) now desire(s) to terminate the temporary guardianship and revoke(s) any temporary relinquishment previously signed by petitioner(s).

   WHEREFORE, petitioner(s) pray(s) that the Court enter an Order dissolving the temporary guardianship:

   ___ immediately because the temporary guardian(s) has/have consented in writing; or
at the expiration of thirteen (13) days after notice is given to the temporary guardian(s) and no objection is filed.

____________________________________  __________________________________
Signature of first petitioner                Signature of second petitioner, if any

____________________________________
Printed Name

____________________________________
Address

____________________________________
Telephone Number

Signature of Attorney: __________________________________________

Typed/printed name of Attorney: _________________________________

Address: _____________________________________________________

Telephone: ____________________________State Bar # ______________

VERIFICATION

GEORGIA, ___________________________ COUNTY

Personally appeared before me the undersigned petitioner(s) who on oath state(s) that the facts set forth in the foregoing petition are true.

Sworn to and subscribed before me
this ___ day of __________, 20___.

First Petitioner

NOTARY/CLERK OF PROBATE COURT

Sworn to and subscribed before me
this ___ day of __________, 20___.

First Petitioner

NOTARY/CLERK OF PROBATE COURT
ACKNOWLEDGMENT AND CONSENT

The undersigned temporary guardian(s) of the above-named minor does/do hereby acknowledge service of the foregoing Petition and further consent(s) to the termination, instanter, of the temporary guardianship.

Date: ____________
Witness: __________________________

Temporary Guardian

______________________________
NOTARY/CLERK OF PROBATE COURT

Printed Name

Date: ____________________________
Witness: __________________________

Temporary Guardian

______________________________
NOTARY/CLERK OF PROBATE COURT

Printed Name

ORDER FOR SERVICE

The foregoing Petition to Terminate Temporary Guardianship of Minor(s) having been considered, and one or more temporary guardians having failed to consent in writing,

IT IS ORDERED that Citation issue and be served upon each temporary guardian who has not consented by personal service if resident in the State of Georgia, by first-class mail if resident at a known address outside the State of Georgia, or by publication if the address of the temporary guardian is unknown.

SO ORDERED on ____________, 20_____.

________________________________
Judge, Probate Court of _____ County
CITATION TO TEMPORARY GUARDIAN(S)

TO:

______________________________
Temporary Guardian

______________________________
Temporary Guardian

______________________________
Address

______________________________
Address

______________________________
City, ST ZIP

______________________________
City, ST ZIP

All objections to the Petition of ________________________ to Terminate Temporary Guardianship of _________________________, Minor, must be in writing and must be filed with this court no later than ten days after personal service or after the date of the mailing of this Citation to you if served by mail, or no later than ten days after publication if you are served by publication. If an objection is timely filed, this Court will either (1) set a hearing at a time certain before the Probate Judge for a determination whether a continuation or dissolution of the temporary guardianship is in the best interest of the minor, or (2) transfer the records relating to the temporary guardianship to the Juvenile Court of this County, which shall determine, after notice and hearing, whether a continuation or dissolution of the temporary guardianship is in the best interest of the minor.

If no objection is timely filed, the Court will remove you as temporary guardian(s) and dissolve the temporary guardianship without a further hearing.

This _____ day of _________________, 20____.

WITNESS the Honorable ________________________

By: ________________________________

(Deputy) Clerk

RETURN OF SHERIFF

I have this day served ________________________________ personally with a copy of the within petition, order and notice.

This ____ day of _________________, 20____.

_____________________________________
Deputy Sheriff ____________ County, Georgia

CERTIFICATE OF MAILING

I hereby certify that I have this date mailed, by first class mail, a copy of the above Citation to the temporary guardian(s) to whom the Citation is directed and at the address set forth therein, in a properly addressed and stamped envelope.

This ____ day of __________, 20____.

_____________________________________
Deputy Clerk
IN THE PROBATE COURT OF __________ COUNTY

STATE OF GEORGIA

IN RE:

) ESTATE NO.

) PETITION TO TERMINATE

) TEMPORARY GUARDIANSHIP OF

) MINOR

) BY NATURAL GUARDIAN(S)

MINOR

ORDER

The foregoing Petition having been filed, read and considered, and it appearing to the court:

that the temporary guardian(s) have consented in writing to the dissolution;

that Citation was served upon the temporary guardian(s) of the minor and no objection to the dissolution of the temporary guardianship has been timely filed; or

that Citation was served upon the temporary guardian(s) of the minor and an objection to the dissolution of the temporary guardianship has been timely filed;

WHEREUPON, IT IS ORDERED that

the temporary guardianship be, and the same is, dissolved by the Court, the Temporary Letters of Guardianship heretofore issued are rescinded, and the temporary guardian(s) is/are hereby removed as such.

the records relating to the temporary guardianship shall be transferred by the Deputy Clerk of this Court to the Juvenile Court of this County, which shall determine, after notice and hearing, whether a continuation or dissolution of the temporary guardianship is in the best interest of the minor; the Clerk shall prepare an exemplified copy of the records of this Court relating to the temporary guardianship, including the petition to terminate, the objection thereto, and this Order, and shall transmit same to the Juvenile Court; copies of this Order shall be sent by the Clerk to the Temporary Guardian and to the natural guardian(s) seeking termination; and all other notices shall hereafter be sent by the Juvenile Court.

the petitioner(s) and temporary guardian(s) are hereby ordered and directed to be and appear before this Court at ______.M. on _____________, 20____ in Courtroom ____. __________ County Courthouse, __________, GA, then and there to show cause whether a continuation or dissolution of the temporary guardianship is in the best interest of the minor and why the prayers of the petition should not be granted.
SO ORDERED on __________________, 20____.

_____________________________________
Judge, Probate Court of _________ County

FILED: ________________________
       Date

____________________________
Deputy Clerk
APPENDIX A10-2

DESIGNATION OF STANDBY GUARDIAN

(1) IDENTIFICATION OF DESIGNATING INDIVIDUAL:

I, ____________________________ (insert name of person designating the standby guardian), whose address is _______________________________ (insert address) and whose county and state of domicile are ____________________________ (insert name of county and state), am:

(Check and complete the ones which apply)

(A) ______ The parent with physical custody of the minor child or children listed below and my parental rights are not terminated; and the other parent, whose name is _______________________________ (insert name of other parent) and whose address is ___________________________________ (insert address of other parent), of the minor child or children listed below:

______ (A-1) Is deceased;
______ (A-2) Has his or her parental rights to the minor or minors terminated;
______ (A-3) Cannot be found after a diligent search has been made; or
______ (A-4) Has consented to the designation of and service by the standby guardian as set forth below; or

(B) ______ The guardian of the minor child or children listed below, who is duly appointed and serving pursuant to court order.

(2) IDENTIFICATION OF MINOR(S): The minor or minors for whom I am designating a standby guardian are:

<table>
<thead>
<tr>
<th>NAME</th>
<th>ADDRESS (include county of domicile)</th>
<th>DATE OF BIRTH</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(3) DESIGNATION AND IDENTIFICATION OF STANDBY GUARDIAN: Pursuant to Part 4 of Article 1 of Chapter 2 of Title 29 of the Official Code of Georgia Annotated, I hereby designate _______________________________ (insert name of standby guardian), whose
address is _________________________________ (insert address) and whose county and state of domicile are _____________________ (insert name of county and state), to serve as the standby guardian of the minor(s) whom I have identified above.

(4) **POWERS OF STANDBY GUARDIAN:** The standby guardian whom I have designated above shall have all the rights, duties, and responsibilities under Georgia law of a guardian of a minor who has been appointed by a court.

(5) **DURATION OF STANDBY GUARDIANSHIP:**

I understand that upon a health care professional determining in writing that, due to my physical or mental health condition, I am not able to care for the minor(s) identified above, this standby guardianship shall become effective and the person whom I have designated above shall become the standby guardian of the person of the minor(s).

I understand that I can revoke this standby guardianship by destroying this document, obliterating it, or by revoking it in writing with proper witnesses. I understand that if I wish to revoke the standby guardianship after the health determination has been made I must file a notice of the revocation of the standby guardianship with the probate court and mail a copy of the notice of revocation to the standby guardian. Finally, I understand that this standby guardianship will automatically end 120 days after the health care professional makes the determination that I am unable to care for the minor(s), unless the standby guardian has filed a petition for guardianship of the minor. If the standby guardian files such a petition, the standby guardianship will remain in effect, unless otherwise revoked, until the judge rules on the petition. In considering such a petition for guardianship, I understand that the judge will give preference for the appointment to the individual whom I name as the standby guardian in this document.

(6) **SIGNATURE:** I certify that the statements contained herein are true and correct, this ____ day of ____________, 20___.

____________________________________
(Designating individual signs here)

___________________________________
(Print name of designating individual)
We, the undersigned witnesses, are at least 18 years of age, are not designated as the standby guardian, and state that the designating individual signed this designation in our presence.

(Signature of first witness)  (Print first witness's address)

(Signature of second witness)  (Print second witness's address)

(7) CONSENT OF PARENT (To be completed only if line A-4 in paragraph (1) above has been checked):

I, ________________________ (insert name of parent other than the one designating the standby guardian), whose address is __________________________ (insert address), am the parent of the above named minor(s). I understand that by this form, an individual is being designated to serve as a standby guardian of my child (or children). I understand that this standby guardian will have all the rights, duties, and responsibilities under Georgia law of a guardian of the person of a minor who has been appointed by a court.

I further understand that I may object to this designation. Knowing this, I consent to the designation of _____________________________ (insert name of standby guardian).

This _____ day of ____________, ______.

(Other parent signs here)

(Print name of other parent)

We, the undersigned witnesses, are at least 18 years of age, are not designated as the standby guardian in this document, and state that the above-named parent signed this consent in our presence.

(Signature of first witness)  (Print first witness's address)

(Signature of second witness)  (Print second witness's address)

(8) ACCEPTANCE OF DESIGNATION BY STANDBY GUARDIAN:

I, __________________________ (insert name of designated standby guardian), am the individual designated as the standby guardian in this document. I hereby accept this designation with full knowledge that upon a health care professional making a written
determination that the parent of the minor(s) is not able to care for the minor(s) due to his or her physical or mental health or condition, I automatically take on this guardianship.

Further, I understand that I must file a notice of my becoming a standby guardian, a copy of this designation, and a copy of the health determination with the probate court as soon as the health determination has been made. I understand that within 120 days of the health determination being made I must petition the probate court to name me as guardian of the minor(s).

This ______ day of ______________, ______.

____________________________________
(Standby guardian signs here)

____________________________________
(Print name of standby guardian)

We, the undersigned witnesses, are at least 18 years of age, are not designated as the standby guardian in this document, and state that the standby guardian signed this document in our presence.

____________________________________  ______________________________
(Signature of first witness) (Print first witness's address)

____________________________________  ______________________________
(Signature of second witness) (Print second witness's address)
NOTICE OF HEALTH DETERMINATION
AND ACTIVATION OF STANDBY GUARDIANSHIP

TO: Probate Court of ____________________ County

Designating Individual: ______________________________________
Standby Guardian: __________________________________________
Effective Date: _____________________________
Minor(s): ______________________________________
____________________________________
____________________________________

I, the undersigned, do hereby state that I am the Standby Guardian designated as such by ________________________ in a Designation of Standby Guardian, dated_______, a true and complete copy of which is attached hereto.

A “health determination” was made by ____________________ (physician)(licensed nurse practitioner) on __________________, and a copy of same is attached hereto.

Therefore, pursuant to O.C.G.A. §29-2-10(2)(c), notice is hereby filed with the probate court of the domicile of the minor(s).

I understand that, pursuant to O.C.G.A. §29-2-13, the Standby Guardianship shall automatically terminate 120 days from the date of the health determination (effective date) unless I shall have filed prior to such automatic termination a petition for the appointment of a temporary guardian for the minor(s).

____________________________________
Signature of Standby Guardian

____________________________________
Printed Name of Standby Guardian

Witness:

____________________________________
Judge/Clerk of Probate Court

Filing Date: _______________________
APPENDIX A10-4

PROBATE COURT OF ___________ COUNTY
STATE OF GEORGIA

MINOR: __________________________ ESTATE NO. ______________

______________________________

CONSERVATOR(S):

MINOR CONSERVATORSHIP INVENTORY
AND ASSET MANAGEMENT PLAN SHORT FORM

A. INVENTORY

<table>
<thead>
<tr>
<th>Approx. Current Value</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
</tr>
</tbody>
</table>

1. Checking/Savings/Money Market/Certificates of Deposit/Liquid Accounts:

<table>
<thead>
<tr>
<th>Bank/Financial Institution/Broker</th>
<th>Acct. No.</th>
<th>$</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

2. Stocks/Bonds/Investments (including retirement and profit-sharing accounts):

<table>
<thead>
<tr>
<th>Brokerage Firm or Institution</th>
<th>Acct. No.</th>
<th>$</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

3. Real Estate:

<table>
<thead>
<tr>
<th>Brief Description</th>
<th>Minor’s Interest</th>
<th>Co-Owner(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

4. Personal Property (Vehicles, furniture, etc.):

<table>
<thead>
<tr>
<th>Brief Description</th>
<th>$</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**TOTAL ASSET VALUE:** $
B. **ESTIMATED MONTHLY INCOME FROM ALL SOURCES:**

Interest, dividend, or investment income $______________
Social Security $______________
Other (describe) $______________

**TOTAL AVERAGE MONTHLY INCOME:** $______________

The minor:

____ I. is not a beneficiary of a Trust

____ II. is a beneficiary of a Trust, and the following is the name of the Trust, the Trustee, his/her address, and telephone number; state when and how payments are required to made under the Trust and the criteria for payment (attach outline if necessary):

___________________________________________________________

C. **BUDGET**

I/We plan during the following reporting year (initial one)

_____ a. not to expend any of the minor’s funds but to allow it to accumulate; **OR**

_____ b. to expend the **interest earned** on the minor’s estate for the following purposes: _______________________________________________________; **OR**

_____ b. **regardless** of interest earned, to expend from the minor’s estate the sum of $______________ per month for the following purposes: _______________________________________________________; **and**

If b. or c. above is selected, the following are the monthly estimated expenses for the care, support, health and education of the minor:

- Room and board allowance: $______________
- Child care: $______________
- School Tuition/Supplies/Expenses/Lunches: $______________
- Clothing/Diapers/Grooming/Hygiene: $______________
- Medical/Dental/Prescription: $______________
- Health/Life/Disability Insurance: $______________
- Entertainment/Activities: $______________
- Personal Caretakers/home health care: $______________
- Transportation: $______________
- Miscellaneous: $______________

**Average Monthly Expenses:** $______________
SUMMARY

1. Average Monthly Income $___________________
2. Monthly support provided by parent(s) $___________________

Subtotal $___________________

3. Less Average Monthly Expenses - ____________________

Requested spending amount $___________________

D. ASSET MANAGEMENT PLAN

I/We plan to: (initial one)

_____a. maintain the investment plan for the minor’s assets as indicated in the above Inventory, OR

_____b. expend the amount requested above and maintain and invest the remaining funds as authorized by law or in accordance with an investment plan approved by the court.

E. AFFIDAVIT

I/We, ___________________________, Conservator(s) of the above minor, do swear that the foregoing Inventory and Asset Management Plan contains a just, true, and complete inventory and budget of all property belonging to said minor within my/our possession, control, or knowledge, in addition to the financial information of the parent(s), if provided. This Inventory and Asset Management Plan has been provided to the Guardian of the ward, if any, by first class mail.

Sworn to and subscribed before me
this ___ day of _______, 20____.

Conservator

______________________________

NOTARY/CLERK OF PROBATE COURT
My Commission Expires: _____________________

______________________________

Printed Name

Sworn to and subscribed before me
this ___ day of _______, 20____.

Conservator

______________________________

NOTARY/CLERK OF PROBATE COURT
My Commission Expires: _____________________

______________________________

Printed Name
IN THE PROBATE COURT OF _______________ COUNTY

STATE OF GEORGIA

IN RE: ) ESTATE NO. _______________

) INVENTORY AND

MINOR ) ASSET MANAGEMENT PLAN

) FOR A MINOR

CONSERVATOR(S) )

ORDER

The Conservator(s) having filed an Inventory/Asset Management Plan for the above estate on ________________, 20 ____,

IT IS HEREBY ORDERED that said Inventory/Asset Management Plan is hereby APPROVED.

(initial if applicable)

__ IT IS FURTHER ORDERED that Conservator(s) is/are authorized to disburse from the minor’s estate:

__ a. the sum of $______ per month for the support of the minor.

__ b. the income for the support of the minor.

__ c. a one time lump sum distribution of $_______ for the following purpose(s):__________________________________________________

__________________________________________

IT IS FURTHER ORDERED that said Conservator(s) shall show in the annual return how such funds actually were spent.

SO ORDERED this __ day of __________, 20__.

___________________________________________
Judge, Probate Court of ____________ County

FILED: _____________________

DATE

(DEP.) CLERK
IN THE PROBATE COURT OF ___________ COUNTY
STATE OF GEORGIA

IN RE: ______________________________

: DOCKET NO. ________________

: PERSONAL STATUS REPORT

: Minor

: Annual Report on Condition of

Guardian : Minor

NOTE: THIS FORM MUST BE TYPED OR LEGIBLY PRINTED IN BLACK INK.

1. I/We, ________________________________, am/are the guardian(s) of the above-named minor, and my/our annual report on the condition of the minor is as follows:

2. Present age of minor: _________ Date of Birth: ____________.

3. Living Arrangements:
   a. Current physical address of the minor is: ________________________________
   b. The ward/minor has been in the present residence since _________________. If moved within the past year, state change(s) and reason(s) for change:

   c. The minor ☐ does ☐ does not live full time with the guardian(s). If not, the minor has lived with the following person(s) during the past year for the period(s) of time indicated: ________________________________
   d. I/We recommend a more suitable living arrangement for the minor as follows:

4. Physical Health
   a. The minor’s general, physical condition is ☐ excellent ☐ good ☐ fair ☐ poor.
   b. During the past year, the minor’s physical condition has
      ☐ remained about the same.
      ☐ improved; explain: ________________________________
      ☐ worsened; explain: ________________________________

5. Education
   a. The minor is ☐ not yet of school age ☐ is enrolled in school at:

   b. The minor's performance in school is ☐ excellent ☐ good ☐ fair ☐ poor. If only fair or poor, the following is the guardian's plan for improving the school performance of the minor:

   ________________________________________________________________

   ________________________________

Revised Handbook Ch. 10, pg. 10-114 January, 2010
6. Social Activities/Services
   a. The minor’s current social condition is ☐ excellent ☐ good ☐ fair ☐ poor.
   b. During the past year, the minor’s social condition has
      ☐ remained about the same.
      ☐ improved; explain: _____________________________________________
      ☐ worsened; explain: _____________________________________________
   c. During the past year, the minor has participated in the following activities
      (explain):
      ☐ recreational: ___________________________________________________
      ☐ social: _______________________________________________________

7. We believe that the minor has the following unmet needs (if any):
   _________________________________________________________________

8. The guardianship ☐ should ☐ should not be continued because:
   _________________________________________________________________

9. ☐ I/We also serve as conservator(s) for the minor. If so, my/our accounting for the
    current year ☐ is filed simultaneously with this report ☐ was filed earlier on
    ☐ is not yet due but will be filed on ___________ ☐ has not been filed because
    ___________________________________; OR
    ☐ I/We do not serve as conservator(s) for the ward/minor. I/We ☐ have ☐ have not
    received funds for the support, care, education, health and welfare of the ward/minor. If
    so, following is a description of the amount(s) and expenditures of all such funds
    received by me/us during the reporting period: ____________________________
    ________________________________________________________________

10. My/Our current contact information is:

    Printed Name of Guardian  Printed Name of Co-Guardian
    ___________________________  ___________________________
    Street Address                Street Address
    ___________________________  ___________________________
    City, State, ZIP             City, State, ZIP
    ___________________________  ___________________________
    Mailing Address, if different Mailing Address, if different
    ___________________________  ___________________________
    Home Telephone              Work Telephone
    ___________________________  ___________________________
    Home Telephone              Work Telephone
    ___________________________  ___________________________
    Electronic Mail (Email) Address
    ___________________________  ___________________________
    Electronic Mail (Email) Address
    ___________________________  ___________________________
Verification

The answers to the foregoing questions and the information provided with regard to the ward/minor are true and correct to the best of my/our personal knowledge and belief and are hereby made under oath.

_______________________________
Guardian’s Signature

_______________________________
Co-Guardian’s Signature

________________________________
Printed Name of Guardian

________________________________
Printed Name of Co-Guardian

Sworn to and subscribed before me
on __________________________

Sworn to and subscribed before me
on __________________________

_______________________________
Notary Public or Clerk of Probate Court

_______________________________
Notary Public or Clerk of Probate Court

ORDER ADMITTING TO RECORD

The within and foregoing Personal Status Report is hereby accepted, approved and ordered admitted to record on __________________________.

Filed: __________________________

_______________________________
Judge/Clerk of Probate Court

Recorded in the Imaged Records of Probate Court of _____________ County on _________________, 20____.

Deputy Clerk __________________________.
APPENDIX A10-6

PROBATE COURT OF __________ COUNTY
Instructions for Completing
Annual/Final Return of Conservator

1. Returns of conservators must be full, complete and accurate. Estimates and rounding are not permitted.
2. The return is a report of every receipt and every expenditure of cash and is similar to a simple check register on a personal bank account.
3. If all funds are deposited into the conservatorship account(s) and all payments are made by check or drafts from those account(s), completing the return should be no more difficult than transferring the information from the bank records to these forms.
4. It is the responsibility of the conservator to fully and properly complete the returns required. It is not the responsibility of court staff to prepare or correct returns. Incorrect, incomplete or unbalanced returns will simply be returned to the conservator for completion or correction.
5. Please NOTE: all returns must be typed or legibly printed in black ink. Illegible returns will NOT be accepted for filing.

Page 1 of Return

1. Enter the name(s) of the Conservator(s) on the line in the box at the top of Page 1.
2. Enter the Docket No. (the case number) on the line indicated.
3. Enter the Name of the Ward or Minor on the line indicated.
5. Circle "Final" or "Annual" to indicate the type of return.
6. Enter the dates covered by the return. If this is the first return, the beginning date will be the date of your appointment. If this is not the first return, the beginning date will be the ending date from the last return.
7. Complete the Combined Summary Accounting.
   A. Enter the total beginning balance from the last accounting. If this is the first return, the beginning balance is zero; everything received will be reported under Receipts.
   B. Enter the Total Receipts in all accounts for the period covered by the return. Include all money and accounts initially transferred to and/or deposited into the conservatorship account(s) and all additional money received. Include all income received from all sources and all interest paid on any accounts or deposits. *If you received it, you must report it.*
   C. Add the beginning balance and the Receipts, and enter the Subtotal.
   D. Enter the Total Expenditures from all accounts for the period covered by the return. Include all money spent or paid out, including any amounts automatically deducted from accounts and any bank charges, check printing charges, service charges or other fees. Include also any money paid out in cash (a practice discouraged by the court). *If you spent it, you must report it.*
   E. Subtract the Expenditures from the Subtotal, and enter the ending balance on the next line.
8. You are REQUIRED to file with each Return and updated Inventory and Asset Management Plan. Check the box to indicate that you have attached it to your Return.
9. Complete and sign the Verification. Your signature must be notarized or be witnessed by a Probate Court Clerk. Include the full information on how you may be contacted if there are any questions about your return.
10. Remainder of Page 1 is to be completed by Court staff.
1. **Transaction Register(s)**
   
   A. Complete a TRANSACTION REGISTER [Page 2] for EACH conservatorship account for the full period covered by your Return. If all transactions for the period covered will not fit on one page, make copies of Page 2. The period covered for each account must be the same.

   B. If you prefer, instead of the Transactions Register, you may attach a printed and complete computer software transaction report for each conservatorship account, provided it includes all of the required information.

   C. You **MUST** report and show all receipts and all expenditures. Any money you received, from any source, is a “Receipt,” and any money you spent or paid out is an “Expenditure.” Be sure to include any money automatically deposited into an account and any interest earned on an account. Also be sure to include any automatic payments from an account and all service charges, check printing charges and other bank fees.

   D. If you have more than one account, use the following Worksheet to combine the amounts from all accounts into totals for the Combined Summary on Page 1.

   **WORKSHEET TO RECAP ALL ACCOUNTS**

   If you have more than one account, before entering the amounts in the Combined Summary on Page 1, complete the following **RECAP**:

   **BEGINNING BALANCES**:

   - Account No. ________________
   - Account No. ________________
   - Account No. ________________
   - Account No. ________________
   
   TOTAL BEGINNING BALANCES (Enter on Page 1)

   **RECEIPTS**:

   - Account No. ________________
   - Account No. ________________
   - Account No. ________________
   - Account No. ________________
   
   TOTAL RECEIPTS (Enter on Page 1)

   **EXPENDITURES**:

   - Account No. ________________
   - Account No. ________________
   - Account No. ________________
   - Account No. ________________
   
   TOTAL EXPENDITURES (Enter on Page 1)

   **ENDING BALANCES**:

   - Account No. ________________
   - Account No. ________________
   - Account No. ________________
   - Account No. ________________
   
   TOTAL ENDING BALANCES (Enter on Page 1)
Page 3 of Return

1. **Bank Account Verifications:** The balances in all accounts must be verified. A certificate signed by a bank employee for each account is required unless you provide the court an *original* bank statement for the account showing the account balance on the ending date of the return. The bank statement will be returned to you after being copied by the staff.

2. **Verification of Investments:** All investments held by a broker or financial institution must be verified. A certificate signed by an employee of each brokerage firm or institution is required unless you provide the court an *original* statement of holdings showing the investments held on the ending date of the return. The statement will be returned to you after being copied by the staff.

*Serving as Conservator for another is an important job. It should be taken seriously. As a Conservator, you have taken an oath of office by which you have agreed to perform your duties as a Conservator in compliance with Georgia law. It is YOUR DUTY to file a Return each and every year as long as you serve as Conservator. It is the responsibility of the Court and its staff to assure that EVERY Conservator complies with this requirement.*
IN THE PROBATE COURT OF ______________ COUNTY, GEORGIA

Conservator(s)

IN THE MATTER OF THE ESTATE OF ) Final - Annual RETURN OF CONSERVATOR
) ) From To
Ward/Minor

COMBINED SUMMARY ACCOUNTING OF CASH TRANSACTIONS IN ALL ACCOUNTS

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. CASH BALANCES FROM ALL ACCOUNTS FROM LAST ACCOUNTING</td>
<td>$</td>
</tr>
<tr>
<td>B. ADD TOTAL DEPOSITS/RECEIPTS FOR ALL ACCOUNTS</td>
<td>$</td>
</tr>
<tr>
<td>C. SUBTOTAL</td>
<td>$</td>
</tr>
<tr>
<td>D. SUBTRACT TOTAL WITHDRAWALS FROM ALL ACCOUNTS</td>
<td>$</td>
</tr>
<tr>
<td>E. CASH BALANCES IN ALL ACCOUNTS AT END OF REPORTING PERIOD</td>
<td>$</td>
</tr>
</tbody>
</table>

____ (Check here) I/We have attached hereto an updated Inventory and Asset Management Plan (Required)

VERIFICATION AND CERTIFICATION BY CONSERVATOR(S)

STATE OF GEORGIA
COUNTY OF ______________

I/We, ____________________________, being duly sworn, depose and say that I am/we are the Conservator(s) for the Minor/Ward named above, that I/we now reside at ____________________________ and that this is a full and true account of the estate for the period stated, to the best of my/our knowledge and belief. I/We do further certify to the Court: that all bond premiums due have been paid to date; that all income tax returns required have been filed to date; and that all taxes, including ad valorem taxes, have been paid to this date.

For purposes of contacting me/us with regard to this return, my/our daytime telephone number(s) is/are ____________________________, my/our evening telephone number(s) is/are ____________________________, my/our cell telephone number(s) is/are ____________________________ and my/our email address(es) is/are ____________________________.

____ I/We also serve as guardian(s) of the ward/minor, and the Personal Status Report ( ) is filed simultaneously herewith ( ) was previously filed on _____________.

____ I/We certify that copies of this Return have been mailed by me/us to the Guardian of the Minor/Ward, if one and if different than the Conservator(s) and to the Surety on the bond of the Conservator(s).

Sworn to and subscribed before me on _____________.

Signatures of Conservator(s)

(Notary or Clerk, Probate Court)

Recorded in Imaged Records

PROBATE COURT OF ______________ COUNTY

Docket No. ____________________________

Date Imaged: ____________________________

RETURN FILED

Filed

(Clerk)
<table>
<thead>
<tr>
<th>DATE</th>
<th>CHECK NO.</th>
<th>Transaction Description</th>
<th>Deposit, Credit (Additions)</th>
<th>Payment, Fee, Withdrawal (Subtractions)</th>
<th>BALANCE</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Show source of all receipts/deposits. Show check number, payee and purpose of all expenditures/deductions</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Beginning Balance** [See Note on Page 2]

[NOTE: Please copy this page if additional space is needed. Enter the TOTALS on the last page.]
ACCOUNT VERIFICATIONS

NOTE: Use the certificates on this page to verify balances in each account held OR attach an ORIGINAL bank statement for each account showing balances on ending date. The bank statement will be returned to you.

[NOTE: Please copy this page if additional certificates are needed.]

CERTIFICATE OF BALANCES ON DEPOSIT

(Name and Address of Bank or Financial Institution)

I do certify that on ____________________, 20___, there was on deposit in this institution to the credit of the estate managed by this Conservator the following:

Checking Account Balance: $_________________________ Account Nos. ____________________________

Savings Account Balance: $_________________________ Account Nos. ____________________________

Certificate(s) of Deposit at Face Value: $_________________________ Certificate Nos. ____________________________

Interest paid and credited to the above accounts during period of this Statement of Account totaled $__________________________.

[Do NOT include accrued but unpaid interest.]

I further certify that each account is properly titled in the Conservator’s fiduciary capacity for the benefit of the ward/minor.

(Signature of Certifying Official)

Printed Name and Title of Certifying Official

CERTIFICATE OF INVESTMENTS HELD

(Name and Address of Institution)

I do certify that on ____________________, 20___, there were held by this institution to the credit of the estate managed by this Conservator the Investments shown on the Inventory and Asset Management Plan attached to this Return and that the cost or value at acquisition are correct. I further certify that all investments are properly titled in the Conservator's fiduciary capacity for the benefit of the ward/minor.

(Signature of Certifying Official)

Printed Name and Title of Certifying Official
Calculation of Bond Sufficiency

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Value of Personal and Intangible Property from Updated Inventory and Asset Management Plan attached to Return</td>
<td>$</td>
</tr>
<tr>
<td>PLUS: Any Cash Assets Not Shown on Updated Inventory</td>
<td></td>
</tr>
<tr>
<td>TOTAL VALUE TO BE BONDED</td>
<td>$</td>
</tr>
<tr>
<td>CURRENT SURETY BOND AMOUNT</td>
<td></td>
</tr>
<tr>
<td>AMOUNT OF BOND EXCESS/(DEFICIENCY)</td>
<td>$</td>
</tr>
</tbody>
</table>

RETURN AUDITED
Audited and approved on

By: ___________________________
Fiduciary Compliance Officer/Deputy CLERK

ORDER ADMITTING RETURN TO RECORD

The foregoing Return and its affidavit having been carefully examined and found correct, and having remained on file in office for __________ days and no objections having been filed thereto, the same is allowed; and it is ordered that said return together with its affidavit be recorded as the law requires.

Filed __________________________
Judge, Probate Court _____________ County

(Deputy) Clerk

ORDER DIRECTING RECORDING OF RETURN
WITHOUT APPROVAL OR DISAPPROVAL

The within and foregoing return having been filed and examined and having remained on file for more than thirty days and no objection to same having been filed, but it appearing to the Court that the return may evidence waste or mismanagement, it is ordered that the return be recorded without approval or disapproval by the Court and that a copy of same be served upon the surety on the conservator’s bond.

Filed __________________________
Judge, Probate Court _____________ County

(Deputy) Clerk
IN THE PROBATE COURT OF __________ COUNTY
STATE OF GEORGIA

IN RE: ________________________________ : DOCKET NO. __________________

(Decedent/Minor/Incapacitated Adult) : ________________________________ :

(Personal Representative/Conservator) : ________________________________ :

Surety : ________________________________ :

CITATION TO FIDUCIARY AND SURETY TO SHOW CAUSE WHY LETTERS
SHOULD NOT BE REVOKED AND WHY ANY SHORTAGE OF FUNDS OR LOSSES
SHOULD NOT BE ASSESSED AGAINST SAID FIDUCIARY AND SURETY

Upon information or belief, it appearing to the Court that the above-named fiduciary has either (1) failed to file annual returns, inventory, personal status reports and/or other reports as required by law or Court order, (2) made unauthorized expenditures or otherwise encroached upon corpus without leave of the Court, (3) failed to properly carry out the duties of the fiduciary, and/or (4) otherwise failed to comply with the rules and instructions of this Court, as required by law.

The above named fiduciary is hereby ordered to be and appear before this Court, in Room ____, __________ County Courthouse, __________, Georgia, at __ M. on ____________, then and there to answer these charges, and to render a full and complete accounting of all money and property coming into your hands and/or all actions taken by you in your fiduciary capacity, and to show cause why you should not be removed from your fiduciary capacity in the above estate.

Notice is further given that if any property or funds are unaccounted for or have been expended improperly, you and your surety may be held jointly and severally liable for same, together with all costs of these proceedings. Notice is further given that Letters heretofore issued to you by the Court may be revoked at such hearing. If you fail to appear after proper notice then the Court will have to assume that you have violated your duties and will proceed with such evidence as may be before the Court.

You are hereby further directed to bring with you and deliver to the Clerk of this Court at or before the time of such hearing all records of your dealings and actions as estate fiduciary since the date of your last filed and accepted return or report, including, but not necessarily limited to: all bank statements; canceled checks; deposit slips; receipts; invoices; statements; and other document(s) in support of your dealings and actions as fiduciary.
SO ORDERED, on ____________.

__________________________________________

JUDGE

PROBATE COURT, ____________ COUNTY

ENTRY OF SERVICE

GEORGIA, ____________ COUNTY

This is to certify that I have this day served ____________________________ personally with a copy of the within Citation .

_________________________  
Deputy Sheriff, ____________ County

Date

ENTRY OF SERVICE

GEORGIA, ____________ COUNTY

This is to certify that I have this day served ____________________________, the registered agent for service in Georgia of ____________________________, personally with a copy of the within Citation .

_________________________  
Deputy Sheriff, ____________ County

Date

CERTIFICATE OF MAILING

I certify that I have this date, mailed by United States first-class mail, in envelope properly addressed with adequate postage affixed, a copy of the foregoing Citation to:

_________________________  
(Date.) CLERK, Probate Court

Date

S E A L

Revised Handbook  Ch. 10, pg. 10-125  January, 2010
APPENDIX A10-8

IN THE PROBATE COURT OF __________ COUNTY
STATE OF GEORGIA

IN RE: : DOCKET NO. ________________

________________________________
Ward/Minor :

PETITION TO ACCEPT INTRA-STATE TRANSFER OF
GUARDIANSHIP AND/OR CONSERVATORSHIP

The petition of _____________________________, Guardian and/or Conservator of
the above named (ward)(minor), respectfully shows to the Court the following:

1.

Petitioner is the duly qualified and acting Guardian and/or Conservator of the above
named ward/minor, having been duly appointed by the Probate Court of ______ County on

2.

Petitioner, whose current residence is in this county at ________________ and
whose mailing address is ________________, desires to have the proceedings removed to this
county.

3.

The ward's/ minor's current domicile is ______ County, Georgia, and the ward/minor is
presently residing at ____________________________

4.

Petitioner herewith tenders to this court a surety bond in the amount of $__________,
which is the amount of the bond presently posted in the Probate Court of ____________ County.

5.

Upon certification by this court of the posting and acceptance of the herewith tendered
bond, petitioner will seek an order from the Probate Court of ____________ County transferring
jurisdiction over the proceedings to this court and will file with this court certified copies of all
records concerning the guardianship/conservatorship from said transferring court.
Wherefore, petitioner prays that this court enter an order certifying to the filing with and acceptance by this court of the said bond and acknowledging this court's willingness to accept a transfer of jurisdiction over the proceedings on the above-named ward/minor; and that this Court grant such other and further relief that it deems just and proper.

_______________________________
Signature of first petitioner
_______________________________
Printed Name
_______________________________
Address
_______________________________
Telephone Number
_______________________________
Signature of second petitioner, if any
_______________________________
Printed Name
_______________________________
Address
_______________________________
Telephone Number

Signature of Attorney: _____________________________

Typed/printed name of Attorney: _____________________________

Address: _____________________________

Telephone: ____________ State Bar # _____________

VERIFICATION

GEORGIA, ____________ COUNTY

Personally appeared before me the undersigned petitioner(s) who on oath state(s) that the facts set forth in the foregoing petition are true.

Sworn to and subscribed before me this ___ day of ________, 20___.

First Petitioner

NOTARY/CLERK OF PROBATE COURT

Sworn to and subscribed before me this ___ day of ________, 20___.

First Petitioner

NOTARY/CLERK OF PROBATE COURT
ORDER CERTIFYING THE POSTING OF BOND AND ACCEPTING PROPOSED TRANSFER OF GUARDIANSHIP AND/OR CONSERVATORSHIP

A petition to accept transfer of guardianship/conservatorship having been filed in this court concerning the above-named ward/minor, and the same having been read and considered, and

It appearing to the court that the conservator has filed with this court a surety bond in the amount of $____________, which bond and security are acceptable to this court, and

This court being willing to accept a transfer of jurisdiction over the proceedings from the Probate Court of _______ County,

IT IS ORDERED that the said bond be filed, that the same is hereby approved by this court; that a transfer of jurisdiction over the proceedings concerning the above-named ward/minor to this court from the Probate Court of ___________ County is acceptable to this court; and that a copy of this order shall serve to so certify the same to the Probate Court of County.

IT IS FURTHER ORDERED that, upon receipt by this court of an order transferring jurisdiction over the said proceedings to this court entered by the Probate Court of County, together with certified copies of all records concerning the guardianship/conservatorship from the said transferring court, this court will assume all jurisdiction over and supervision of the proceedings concerning the above-named ward/minor.

IT IS FURTHER ORDERED that, upon such a transfer of jurisdiction over the said proceedings concerning the above-named ward/minor, the sureties on the bond in this court shall be liable for both past and future misconduct, if any, of the conservator.

SO ORDERED, on______________.

____________________________________
Judge, Probate Court of
County
IN THE PROBATE COURT OF ___________ COUNTY
STATE OF GEORGIA

IN RE: _____________________________ : DOCKET NO. ____________
______________________________________________________________
Ward/Minor

PETITION TO AUTHORIZE INTRA-STATE TRANSFER OF
GUARDIANSHIP AND/OR CONSERVATORSHIP

The petition of _________________, Guardian and/or Conservator of the above-named (ward)(minor), respectfully shows to the Court the following:

1. Petitioner is the duly qualified and acting Guardian and/or Conservator of the above named ward/minor, having been duly appointed by this court on ____________.

2. Petitioner, whose current residence is in _________________ County at ___________________________ and whose mailing address is ____________________________, desires to have the proceedings removed to the Probate Court of said county.

3. The ward's/minor’s current domicile is _________________ County, Georgia, and the ward/minor is presently residing at _____________________________.

4. Attached hereto as Exhibit “A” is a copy of an Order from the Probate Court of _________________ County, certifying the fact that Petitioner has filed with said court a surety bond in the amount of $ _____________, which bond has been approved by said court. The said Order further acknowledges the willingness of said court to accept a transfer of jurisdiction over the proceedings concerning the above-named ward/minor upon the entry of an order in this court authorizing same.

5. There are no matters pending in this court which would prevent the proposed transfer, and the proposed transfer will not work any undue detriment to the ward/minor or the estate.

Wherefore, petitioner prays that this court enter an order transferring jurisdiction over the proceedings concerning the above-named ward/minor to the Probate Court of ____________.
County, directing the Clerk of this court to prepare for filing in said court certified copies of all records concerning the proceedings in this court, and relieving the sureties on the bond in this court from liability for any future misconduct, if any, of the conservator, and granting such other and further relief that it deems just and proper.

Signature of first petitioner

Printed Name

Address

Telephone Number

Signature of second petitioner, if any

Printed Name

Address

Telephone Number

Signature of Attorney:

Typed/printed name of Attorney:

Address:

Telephone: State Bar #

VERIFICATION

GEORGIA, COUNTY

Personally appeared before me the undersigned petitioner(s) who on oath state(s) that the facts set forth in the foregoing petition are true.

Sworn to and subscribed before me this ___ day of _______, 20__.

NOTARY/CLERK OF PROBATE COURT

Printed Name

Sworn to and subscribed before me this ___ day of _______, 20__.

NOTARY/CLERK OF PROBATE COURT

Printed Name
ORDER APPOINTING GUARDIAN AD LITEM

The within and forgoing petition having been filed, read and considered,

IT IS ORDERED that ________________________ is hereby appointed as guardian-ad-litem for the ward/minor named in the proceedings.

IT IS ORDERED FURTHER that a copies of the petition, together with all Exhibits, and this Order be served upon the guardian-ad-litem, who shall make answer whether, in the opinion of the guardian ad litem, the proposed transfer of jurisdiction is in the best interest of the ward/minor.

SO ORDERED on _____________.

______________________________
–
Judge, Probate Court of ______
County

ANSWER OF GUARDIAN AD LITEM

I hereby accept the foregoing appointment, acknowledge service and notice of the proceedings as provided by law, and for answer say:

______________________________
DATE

______________________________
Signature of Guardian ad Litem

______________________________
Printed Name of Guardian ad Litem

______________________________
Address

______________________________
Telephone
IN THE PROBATE COURT OF ___________ COUNTY  
STATE OF GEORGIA  

IN RE:  

DOCKET NO. ________________  

___________________________  

Ward/Minor  

ORDER DIRECTING TRANSFER OF  
GUARDIANSHIP AND/OR CONSERVATORSHIP  

A petition to transfer guardianship/conservatorship having been filed in this court concerning the above-named ward/minor, and the same having been read and considered, and  

It appearing to the court that the Petitioner has filed with this court a copy of an order from the Probate Court of ___________ County certifying the fact that the Petitioner has filed with said court a surety bond in the amount of $___________, which bond has been approved by said court, which Order further acknowledges the willingness of said court to accept a transfer of jurisdiction over the proceedings concerning the above-named ward/minor upon the entry of an order in this court authorizing same, and  

It appearing to the court that there are no matters currently pending in this court which would prevent the proposed transfer, and it further appearing that the proposed transfer is in the best interest of the ward/minor,  

IT IS ORDERED that jurisdiction over the proceedings concerning the above-named ward/minor be, and the same are hereby, transferred to the Probate Court of County.  

IT IS FURTHER ORDERED that the Clerk of this court shall send a copy of this order, together with authenticated certified copies of all records concerning the proceedings in this court, to the Probate Court of ___________ County, which court has agreed to assume all jurisdiction over and supervision of the said proceedings.  

IT IS FURTHER ORDERED that the sureties on the bond posted in this court be, and are hereby, relieved of all liability for future misconduct, if any, of the conservator. Said sureties are not hereby relieved of liability for any past misconduct, if any, of the conservator.  

SO ORDERED, on ________________.

______________________________  
Judge, Probate Court of _______ County  

FILED: ________________________  
DATE  
______________________________  
CLERK
Chapter 11

GUARDIANS AND CONSERVATORS OF ADULT WARDS, PROBATE JUDGES AS CUSTODIANS OF CERTAIN FUNDS, GUARDIANS OF VETERANS, PROTECTION OF DISABLED ADULTS AND ELDER PERSONS, AND TEMPORARY HEALTH CARE PLACEMENT OF ADULTS

The Revised
HANDBOOK FOR PROBATE JUDGES OF GEORGIA
2010
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PART I. GUARDIANS AND CONSERVATORS OF ADULT WARDS

1. GUARDIANSHIPS AND CONSERVATORSHIPS

1.1 In General

The Guardianship Code of Georgia (Title 29) was revised extensively, effective July 1, 2005.\(^1\) Under this revision, the term “guardian” replaces the term “guardian of the person,” which was used in the former Code, and the term “conservator” replaces the term “guardian of the property.” Generally, conservators are appointed to handle an individual’s financial affairs while guardians are appointed to handle the personal affairs of an individual. An individual may have both a guardian and a conservator and the guardian and conservator may or may not be the same person. In Georgia, the probate court\(^2\) has exclusive, original jurisdiction in matters relating to the appointment, supervision, and discharge of guardians and conservators, except as otherwise provided by law.\(^3\)

1.2 Demand for Property not in Excess of $2,500

Upon receiving an affidavit:

1. That the total personal property of an incapacitated adult does not exceed $2,500.00 in value;

2. That no conservator has been appointed for the incapacitated adult’s estate; and

3. That the affiant is the spouse or that there is no spouse and the affiant is a relative having the responsibility of the support of the incapacitated adult,

any person or corporation indebted to or holding personal property of the incapacitated adult shall be authorized to pay the amount of the indebtedness or deliver the personal property to the affiant. In the same manner and upon like proof, any person or corporation having the responsibility for the issuance or transfer of stocks, bonds, or other personal property shall be authorized to issue or transfer the stocks, bonds, or personal property to or in the name of the affiant. Upon payment, delivery, transfer, or issuance pursuant to the affidavit, the person or corporation shall be released to the same extent as if

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\(^1\) All references in this Handbook to Title 29 are to the 2005 version unless otherwise noted.

\(^2\) In all of Title 29, “court” means the probate court, and the term is so used in this Chapter, except in Sections 2.2 and 2.3 below wherein there are references to trial courts.

\(^3\) O.C.G.A. §15-9-30.
the payment, delivery, transfer, or issuance had been made to the legally qualified conservator of the incapacitated adult and shall not be required to see to the application or disposition of the personal property.

The person making the affidavit and receiving the personal property shall be authorized to expend or otherwise dispose of the personal property for the benefit of the incapacitated adult in the person's judgment as may be just and proper.4

2. JURISDICTION TO APPOINT GUARDIANS AND/OR CONSERVATORS

The court may appoint a guardian and/or a conservator for an adult only if the court finds the adult lacks sufficient capacity to make or communicate significant responsible decisions concerning his/her health or safety and/or concerning the management of his/her property.

No guardian, other than a guardian-ad-litem, shall be appointed for an adult except pursuant to the procedures of Chapter 4 of Title 29, and no conservator, other than a conservator for an individual who is missing or who is believed to be dead, shall be appointed for an adult except pursuant to the procedures of Chapter 5 of Title 29.

No guardian or conservator shall be appointed for an adult unless the appointment is in the best interest of the adult.

No guardian or conservator shall be appointed for an adult within two years after the denial or dismissal on the merits of a petition for the appointment of a guardian or conservator for that adult unless the petitioner shows a significant change in the condition or circumstances of the adult.

No adult shall be presumed to be in need of a guardian or conservator unless adjudicated to be in need of a guardian or conservator pursuant to Chapters 4 and/or 5 of Title 29.

An adult shall not be presumed to be in need of a guardian or conservator solely because of a finding of criminal insanity or incompetence to stand trial or a finding of a need for treatment or services pursuant to:

1. Code Section 37-1-1;
2. Code Sections 37-3-1 through 37-3-6;
3. Articles 2 through 6 of Chapter 3 of Title 37;
4. Code Sections 37-4-1 through 37-4-3 and 37-4-5 through 37-4-8;
5. Articles 2 through 5 of Chapter 4 of Title 37;
6. Code Section 37-5-3;
7. Code Sections 37-7-1, 37-7-2, and 37-7-4 through 37-7-7; and
8. Articles 2 through 6 of Chapter 7 of Title 37.

4 O.C.G.A. §29-5-4.
All guardianships and conservatorships ordered shall be designed to encourage the development of maximum self-reliance and independence in the adult and shall be ordered only to the extent necessitated by the adult's actual and adaptive limitations after a determination that less restrictive alternatives to the guardianship or conservatorship are not available or appropriate.5

3. QUALIFICATIONS AND PRIORITY OF APPOINTMENT

3.1 Guardians

Only an individual may serve as guardian of an adult, except in the event a public guardian or the Department of Human Services is appointed pursuant to subsection (b.1) of Code Section 29-4-3. No individual may be appointed as guardian of an adult who:

1. Is a minor,6 a ward,7 or a protected person8;
2. Has a conflict of interest9 with the adult unless the court determines that the conflict of interest is insubstantial or that the appointment would be in the adult's best interest; or
3. Is an owner, operator, or employee of a long-term care or other caregiving institution or facility at which the adult is receiving care, unless related to the adult by blood, marriage, or adoption.

No entity (public guardian or Department of Human Services) may be appointed as guardian of an adult which:

1. Has a conflict of interest with the adult unless the court determines that the conflict of interest is insubstantial or that the appointment would be in the adult's best interest; or
2. Is a long-term care or other caregiving institution or facility at which the adult is receiving care.10

3.1.1 Public Guardians

The office of “public guardian” was created by an Act which became effective on July 1, 2005.11 The term “public guardian” means an individual or private entity, including a non-profit entity, who/which meets the qualifications set forth in Chapter 10 of Title 29 and has registered with and approved by the probate court to serve as a public guardian.12 This subject is not fully covered in this Handbook, since, as of the date of publication, there are very few “public guardians” who have

5 O.C.G.A. §§29-4-1 and 29-5-1.
6 A “minor” is an individual who is under age 18 and is not emancipated. O.C.G.A. §29-1-1(11).
7 A “ward” is an adult for whom a guardian or conservator has been appointed. O.C.G.A. §29-1-1(27).
8 “Protected person” is not a defined term in Title 29. It has been used in Title 29 because the term is used in some other states to refer to an adult who is not sui juris.
9 “Conflict of interest” is not defined in Chapter 4 nor are examples of conflicts of interest set forth. Chapter 5 does partially define “conflict of interest” by way of examples. See Section 14.3 below.
10 O.C.G.A. §29-4-2.
12 O.C.G.A. §29-10-1.
qualified and become registered with any probate courts in the state. It was originally hoped by those who sponsored the legislation that an effort to recruit persons and/or entities to serve as “the guardian of last resort” instead of the Department of Human Services, Division of Aging, Adult Protective Services. There are specific training requirements for qualifications, and public guardians must be bonded and maintain additional records concerning cases in which they serve. Additionally, each judge of the probate court is given the sole authority to determine whether any particular public guardian will be registered and approved for service as such is his/her county. It was also originally hoped that funding might be provided by the State and/or through grants for training and partial compensation. Unfortunately, State funding has not been given, there has been little public interest in serving as public guardians, and the efforts and program are essentially on hold. However, this does not preclude a person or entity becoming a public guardian by meeting the qualifications and been approved and registered by any judge of the probate court who might find persons interested in serving as such and funding.

3.2 Conservators

No person may be appointed or continue to serve as conservator of the estate of an adult who:

1. Is a minor, a ward, or a protected person;

2. Has a conflict of interest with the adult unless the court determines that the conflict of interest is insubstantial or that the appointment would be in the adult's best interest; or

3. Is an owner, operator, or employee of a long-term care or other caregiving institution or facility at which the adult is receiving care, unless related to the adult by blood, marriage, or adoption.

---

13 O.C.G.A. §29-10-3.
14 O.C.G.A. §29-10-5.
15 O.C.G.A. §29-10-7.
17 “Person” is not defined in Title 29. However, it is clear that service as a conservator is not restricted to individuals, as is service as a guardian. O.C.G.A. §1-2-1 defines two classes of persons, natural and artificial, and provides that corporations are artificial persons. It is the author’s opinion that the use of the word “person” in Title 29 is probably intended to have the same meaning as in Title 53, wherein “person” is defined to mean “an individual, corporation, partnership, joint-stock company, business trust, unincorporated association, limited liability company, and two or more persons having a joint and common interest, including an individual or a business entity acting as a personal representative or in any other fiduciary capacity.” [Emphasis added.] O.C.G.A. §53-1-2(11).

18 In requiring a disclosure of conflicts of interest, O.C.G.A. §29-5-24(c) states that a “transaction affected by a substantial conflict between the personal and fiduciary interests includes any sale, encumbrance or other transaction involving the conservatorship estate entered into by the conservator or the spouse, descendent, agent, or lawyer of the conservator or a corporation or other enterprise in which the conservator has a significant beneficial interest.

3.3 Priority of Appointment

The judge of the probate court shall appoint as guardian that individual who will best serve the interest of the adult and/or as conservator that person who will best serve the interest of the adult, considering the order of preferences set forth in this Code section. The judge may disregard an individual or person who has preference\textsuperscript{20} and appoint an individual or person who has a lower preference or no preference; provided, however, that the court may disregard the preferences listed in paragraph (1) below only upon good cause shown.

Individuals (as guardians) or persons (as conservators) who are eligible have preference in the following order:

1. The individual or person last nominated by the adult in accordance with the provisions discussed in the next paragraph below;
2. The spouse of the adult or an individual or person nominated by the adult's spouse in accordance with the provisions discussed in the second paragraph below;
3. An adult child of the adult or an individual or person nominated by an adult child of the adult in accordance with the provisions discussed in the second paragraph below;
4. A parent of the adult or an individual nominated by a parent of the adult in accordance with the provisions discussed in the second paragraph below;
5. A guardian or conservator appointed during the minority of the adult;
6. A guardian or conservator previously appointed in Georgia or another state;
7. A friend, relative, or any other individual or person;
8. Any other person, including a volunteer to the court, found suitable and appropriate who is willing to accept the appointment; and
9. The county guardian.
10. As to the appointment of a guardian, if no other person is available to serve as guardian of the ward, the judge may appoint a public guardian in accordance with Chapter 10 of Title 29 (Public Guardian).\textsuperscript{21} In the event the court determines that there is no public guardian registered in accordance with that Chapter available to serve as guardian for a ward, the court may appoint the Department of Human Services as guardian. If so appointed, the Department shall designate a representative of the department to provide guardian services who shall take the oath of guardianship. If, after having been so appointed, the Department presents to the court a public guardian registered in accordance with Chapter 10 or some other person suitable and appropriate to serve as

\textsuperscript{21} See Section 3.1.1 above.
guardian of a ward and willing to so serve, the court shall allow the Department to resign and shall appoint such public guardian or other person. If the Department is appointed, it shall be bound by all the requirements of this Chapter 4 of Title 29, except that it shall not be required to post bond or pay any cost or fee of court associated with the guardianship proceeding. If the department is appointed and enters into a contract with an independent contractor for the provision of guardianship services, the expense of providing such services may be paid for from state funds appropriated for public guardians under Chapter 10 or, upon approval of the court, from the estate of the ward.

At any time prior to the appointment of a guardian or conservator, an adult may nominate in writing an individual to serve as that adult's guardian or a person to serve as that adult's conservator in the event the adult is judicially determined to be in need of a guardian and/or conservator, and that nomination shall be given the preference described above, provided that it is signed as described below or in accordance with the provisions of Code Section 31-32-5, dealing with advanced directives.

At any time prior to the appointment of a guardian or conservator, a spouse, adult child, or parent of an adult may nominate in writing an individual to serve as that adult's guardian or a person to serve as that adult's conservator in the event the adult is judicially determined to be in need of a guardian and/or conservator, and that nomination shall be given the preference described above, provided that it is signed as described below or, if in a will, is executed in accordance with the provisions of Code Section 53-4-20.

In order to qualify for the preferences above, a writing nominating a guardian or conservator of an adult:

1. Must contain an express nomination of the individual who shall serve as guardian and/or the person who shall serve as conservator and must be signed or acknowledged by the individual making the nomination in the presence of two witnesses who sign in the individual's presence; and

2. May be revoked by the individual by obliteration, cancellation, or by a subsequent inconsistent writing, whether or not witnessed.
4. **PROCEDURE FOR APPOINTMENT OF A GUARDIAN AND/OR A CONSERVATOR OF AN ADULT**

**Adult Guardianships and Conservatorships**

Proceedings for adult guardianship and/or conservatorship are serious proceedings involving the potential taking away of the rights of a person otherwise entitled to all rights afforded under the Constitutions and laws of the United States and the State of Georgia. In this process, the judge of the probate court has three opportunities to determine whether a guardianship and/or conservatorship is necessary and is obliged to dismiss the proceedings if the burden of proving the need for a guardian and/or conservator, as defined in Code Sections 29-4-1 and 29-5-1, is not met:

1. When the petition is initially filed;
2. When the evaluation report has been received, and
3. Upon the final hearing of the case.

The entire process of adult guardianship and conservatorship proceedings is graphically shown on the flowchart in Appendix A11-1.

### 4.1 Procedure in General and the Petition  [GPCSF 12]

The procedures explained in this Section govern the appointment of a permanent guardian and/or a conservator of an adult, which is commenced by the filing of a petition. The petition is filed in the probate court of the county in which the proposed ward is domiciled or is found, provided that the probate court of the county where the proposed ward is found shall not have jurisdiction to hear any guardianship or conservatorship petition if it appears that the proposed ward was removed to that county solely for the purposes of filing a petition for the appointment of a guardian or conservator.\(^\text{22}\)

The petition may be filed by any interested person or persons, including the proposed ward, and the petition for appointment of a guardian and/or conservator shall set forth:

1. A statement of the facts upon which the court's jurisdiction is based;
2. The name, address, and county of domicile of the proposed ward, if known;
3. The name, address, and county of domicile of the petitioner or petitioners and the petitioner's relationship to the proposed ward, if any, and, if different from the petitioner, the name, address, and county of domicile of the person nominated by the petitioner to serve as guardian and that person's relationship to the proposed ward, if any;

\(^{22}\) O.C.G.A. §§29-4-10(a) and 29-5-10(a).
4. A statement of the reasons the guardianship and/or conservatorship is sought, including the facts which support the claim of the need for a guardian and/or conservator;

5. Any foreseeable limitations on the guardianship and/or conservatorship;

6. As to guardianship, whether, to the petitioner's knowledge, there exists any living will, durable power of attorney for health care, advance directive for health care, order relating to cardiopulmonary resuscitation, or other instrument that deals with the management of the person of the proposed ward in the event of incapacity and the name and address of any fiduciary or agent named in the instrument;

7. As to conservatorship, whether to the petitioner’s knowledge there exists any power of attorney, trust or other instrument that deals with the management of the property of the proposed ward in the event of incapacity and the name and address of any fiduciary or agent named in the instrument;

8. As to conservatorship, a description of all known assets, income, other sources of funds, liabilities and expenses of the proposed ward;

9. The names and addresses of the following whose whereabouts are known:
   a. The spouse of the proposed ward; and
   b. All children of the proposed ward; or
   c. If there are no adult children, then at least two adults in the following order of priority:
      i. Lineal descendants of the proposed ward;
      ii. Parents and siblings of the proposed ward; and
      iii. Friends of the proposed ward;

10. If known, the name and address of any individual nominated to serve as guardian by the proposed ward, as described in paragraph (1) of subsection (b) of Code Section 29-4-3 and/or any person nominated to serve as conservator by the proposed ward, as described in paragraph (1) of subsection (b) of Code Section 29-5-3;

11. If known, the name and address of any individual nominated to serve as guardian by the proposed ward's spouse, adult child, or parent, as described in paragraph (2), (3), or (4) of subsection (b) of Code Section 29-4-3 and/or any person nominated to serve as conservator by the proposed ward's spouse, adult child, or parent, as described in paragraph (2) through (4) of subsection (b) of Code Section 29-5-3;

12. The name and address of any person nominated to serve as conservator by the petitioner and whether any nominated guardian or conservator has consented or will consent to serve as guardian and/or conservator;
13. If known, whether any nominated guardian or conservator is an owner, operator, or employee of a long-term care or other caregiving institution or facility at which the proposed ward is receiving care, and, if so, whether the nominated guardian or conservator is related to the proposed ward by blood, marriage, or adoption;

14. Whether an emergency guardian and/or conservator has been appointed for the proposed ward or a petition for the appointment of an emergency guardian and/or conservator has been filed or is being filed;

15. If known, a disclosure of any ownership or other financial interest that would cause any nominated guardian or conservator to have a conflict of interest with the proposed ward;

16. As to guardianship, a specific listing of any of the additional powers, as described in subsection (b) of Code Section 29-4-23, that are requested by the guardian and a statement of the circumstances that would justify the granting of additional powers;

17. As to conservatorship, a specific listing of any of the additional powers, as described in subsection (b) and (c) of Code Section 29-5-23, that are requested by the conservator and a statement of the circumstances that would justify the granting of additional powers;

18. Whether a guardian or conservator has been appointed in another state or whether a petition for the appointment of a guardian or conservator is pending in another state;

19. That to petitioner's knowledge, there has been no petition for guardianship or conservatorship denied or dismissed within two years by any court of this state or, if so, that there has been a significant change in the condition or circumstances of the proposed ward, as shown by affidavits or an evaluation attached to the petition; and

20. The reason for any omission in the petition for appointment of a guardian or conservator in the event full particulars are lacking.23

The sworn petition must be filed by two or more petitioners or, if there is only one petitioner, shall be supported by an affidavit of a physician licensed to practice medicine under Chapter 34 of Title 43, a psychologist licensed to practice under Chapter 39 of Title 43, or a licensed clinical social worker, or, if the proposed ward is a patient in any federal medical facility in which such a physician, psychologist, or licensed clinical social worker is not available, a physician, psychologist, or licensed clinical social worker who is authorized to practice in that facility.

If an affidavit is used to support a petition, such affidavit shall be based on personal knowledge and shall state that the affiant has examined the proposed ward within 15 days prior to the filing of the

23 O.C.G.A. §§29-4-10(b) and 29-5-10(b).
petition and that, based on the examination, the proposed ward was determined to lack sufficient capacity to make or communicate significant, responsible decisions concerning the proposed ward's health or safety, as to guardianship, and/or to make or communicate significant, responsible decisions concerning the management of the proposed ward’s property, as to conservatorship. In addition to stating the facts that support the claim of the need for a guardian or conservator, the affidavit shall state the foreseeable duration of the guardianship and/or conservatorship and may set forth the affiant's opinion as to any other limitations on the guardianship and/or conservatorship.24

4.2 Initial Review of Petition after Filing

Upon the filing of a petition for guardianship or conservatorship of a proposed ward, the judge of the probate court shall review the petition and the affidavit, if any, and determine whether there is probable cause25 to believe that the proposed ward is in need of a guardian and/or conservator within the meaning of Code Sections 29-4-1 and 29-5-1.26

If the judge determines that there is no probable cause to believe that the proposed ward is in need of a guardian or conservator, that is, if the facts alleged do not present sufficient evidence to believe that the proposed ward might be incapacitated, the judge shall dismiss the petition and provide the proposed ward with a copy of the petition, the affidavit, if any, and the order dismissing the petition.27

If, on the other hand, the judge determines that there is probable cause28 to believe that the proposed ward is in need of a guardian and/or conservator:

1. The court shall immediately notify the proposed ward of the proceedings by service of all pleadings on the proposed ward, which notice shall:
   a. Be served personally on the proposed ward by an officer of the court and shall not be served by mail;
   b. Inform the proposed ward that a petition has been filed to have a guardian and/or conservator appointed for the proposed ward, that the proposed ward has the right to attend any hearing that is held, and that, if a guardian and/or

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24 O.C.G.A. §§29-4-10(c) and 29-5-10(c).
25 “Probable cause” is not defined in Title 29, nor is it defined in Title 53. Probable cause means reasonable cause or a reasonable ground for belief that in the existence of facts warranting the particular proceedings; having more evidence for than against. Black’s Law Dictionary, Fifth Edition, West Publishing Co., St. Paul, MN, ©1979.
26 O.C.G.A. §§29-4-11(a) and 29-5-11(a).
27 O.C.G.A. §§29-4-11(b) and 29-5-11(b).
28 The Court of Appeals has held that a review of this decision is not reviewable after the trial has occurred. Presumably, this means that a certificate of immediate review (interim appeal) must be sought before trial to challenge the judge’s determination of probable cause. Yeatman v. Walsh, 282 Ga. App. 499 (2006).
conservator is appointed, the proposed ward may lose important rights to control
the management of the proposed ward's person and/or property;
c. Inform the proposed ward of the place and time at which the proposed ward
shall submit to the evaluation provided for by subsection (d) of Code Sections 29-4-10 and 29-5-10, more fully described below; and
d. Inform the proposed ward of the proposed ward's right to independent legal
counsel and that the judge shall appoint counsel within two days of service
unless the proposed ward indicates that he/she has retained counsel in that time
frame;
2. Upon notice that the proposed ward has retained legal counsel or upon the appointment
of legal counsel by the judge, the court shall furnish legal counsel with a copy of the
petition, the affidavit, if any, and the order for the evaluation, more fully described
below;
3. The court shall give notice of the petition by first-class mail to all adult individuals and
other persons who are named in the petition pursuant to the requirements of paragraphs
(7), (8), and (9) of subsection (b) of Code Sections 29-4-10 and 29-5-10; and
4. On the motion of any interested person or on the court's own motion, the judge may
appoint a guardian-ad-litem.29

4.3 Appointment of an Evaluator and the Evaluation

If the petition is not dismissed, the judge of the probate court shall appoint an evaluator, who
shall be a physician licensed to practice medicine under Chapter 34 of Title 43, a psychologist licensed
to practice under Chapter 39 of Title 43, or licensed clinical social worker. If the proposed ward is a
patient in any federal medical facility in which such a physician, psychologist, or licensed clinical
social worker is not available, the judge may appoint a physician, psychologist, or licensed clinical
social worker authorized to practice in that federal facility. In either case, the evaluator must not be
the physician, psychologist, or licensed clinical social worker who completed the affidavit attached to
the petition.

When evaluating the proposed ward, the physician, psychologist, or licensed clinical social
worker shall explain the purpose of the evaluation to the proposed ward. The proposed ward may
remain silent if he/she so desires or on advice of counsel. Any statements made by the proposed ward
during the evaluation shall be privileged and shall be inadmissible as evidence in any proceeding other

29 O.C.G.A. §§29-4-11(c) and 29-5-11(c).
than a proceeding for guardianship or conservatorship. The proposed ward's attorney shall have the right to be present but shall not participate in the evaluation.

The evaluation shall be conducted with as little interference with the proposed ward's activities as possible. The evaluation shall take place at the place and time set in the notice to the proposed ward and the proposed ward’s attorney, and the time set shall not be sooner than the fifth day after the service of notice on the proposed ward. The court, however, shall have the exclusive power to change the place and time of the examination at any time upon reasonable notice being given to the proposed ward and to his/her attorney. If the proposed ward fails to appear, the judge may order that the proposed ward be taken directly to and from a medical facility or the office of the physician, psychologist, or licensed clinical social worker for purposes of evaluation only. The evaluation shall be conducted during the normal business hours of the facility or office and the proposed ward shall not be detained in the facility or office overnight.

The evaluation may include, but not be limited to:

1. A self-report from the proposed ward, if possible;
2. Questions and observations of the proposed ward to assess the functional abilities of the proposed ward;
3. A review of the records for the proposed ward including, but not limited to, medical records, medication charts, and other available records;
4. An assessment of cultural factors and language barriers that may impact the proposed ward's abilities and living environment; and
5. All other factors the evaluator determines to be appropriate to the evaluation.

A written report of the evaluation shall be filed with the court by the evaluator no later than seven days after the evaluation, and the court shall serve a copy of the report by first-class mail upon the proposed ward and the proposed ward's attorney and the guardian-ad-litem, if any. The evaluation report shall be signed under oath by the physician, psychologist, or licensed clinical social worker and shall:

1. State the circumstances and duration of the evaluation, including a summary of questions or tests utilized, and the elements of the evaluation;
2. List all persons and other sources of information consulted in evaluating the proposed ward;
3. Describe the proposed ward's mental and physical state and condition, including all observed facts considered by the physician or psychologist or licensed clinical social worker;
4. Describe the overall social condition of the proposed ward, including support, care, education, and well-being; and

5. Describe the needs of the proposed ward and their foreseeable duration.

The proposed ward's attorney may file a written response to the evaluation, provided the response is filed no later than the date of the commencement of the hearing. The response may include, but is not limited to, independent evaluations, affidavits of individuals with personal knowledge of the proposed ward, and a statement of applicable law.  

4.4 Judicial Review and Subsequent Proceedings

After the filing of the evaluation report, the judge of the probate court shall review the pleadings and the evaluation report. If, after the review, the judge finds that there is no probable cause to support a finding that the proposed ward is in need of a guardian and/or conservator within the meaning of Code Sections 29-4-1 and 29-5-1, the judge shall dismiss the petition. At this point, the judge considers the evaluation report and the findings and statements of the evaluator together with the allegations in the petition to determine the existence of probable cause.

If, after the review, the judge finds that there is probable cause to support a finding that the proposed ward is in need of a guardian, the court shall schedule a hearing on the petition.

4.4.1 Notice of the Hearing; Date of Hearing

Notice of the hearing shall be served by first-class mail upon the proposed ward, the proposed ward's attorney, and the guardian-ad-litem, if any. Notice must also be served by first-class mail upon the petitioner(s) or the attorney for the petitioner(s) legal counsel, if any, and all adult individuals and other persons who are named in the petition pursuant to the requirements of paragraphs (7), (8), and (9) of subsection (b) of Code Sections 29-4-10 and 29-5-10.

The date of the hearing shall not be less than ten days after the notice is mailed.

4.4.2 The Hearing

The hearing shall be held in a courtroom or, for good cause shown, at such other place as the judge of the probate court may choose. At the request of the proposed ward or the proposed ward's attorney and for good cause shown, the judge may exercise the discretion to exclude the public from the hearing, and the record shall reflect the court's action. The proposed ward or the proposed ward's attorney may waive the appearance of the proposed ward at the hearing.

30 O.C.G.A. §§29-4-11(d) and 29-5-11(d).
31 O.C.G.A. §§29-4-12(a),(b),(c) and 29-5-12(a),(b),(c).
The hearing shall be recorded either by a certified court reporter or by use of a sound-recording device, and the recording shall be retained for not less than 45 days from the date of the entry of the final order.

The rules of evidence applicable in civil cases shall apply in the hearing. The judge must utilize the criteria in Code Sections 29-4-1 and 29-5-1 to determine whether there is clear and convincing evidence of the need for a guardianship and/or conservatorship in light of the evidence taken at the hearing. The judge may consider the evaluation report and any response filed by the proposed ward. The burden of proof shall be upon the petitioner.

Upon determination of the need for a guardianship and/or a conservatorship, the judge shall determine the powers, if any, which are to be retained by the proposed ward, in accordance with the provisions of Code Sections 29-4-21 and 29-5-21 and whether any additional powers are to be granted to the guardian or conservator, pursuant to the provisions of subsection (b) of Code Section 29-4-23 or subsections (b) and (c) of Code Section 29-5-23.

If the judge determines that a guardianship or conservatorship is necessary and the proposed ward is present, the proposed ward may suggest any individual as guardian and/or any person as conservator. The judge shall select as guardian the individual who will serve the best interest of the ward and/or as conservator the person who shall serve the best interest of the ward.

4.4.3 Hearing by Associate Judge; Appointment of Hearing Officer

An associate judge of the probate court, duly appointed pursuant to the provisions of Chapter 9 of Title 15, whether full- or part-time, may conduct and preside over the hearing, decide the matter, and enter a final order. 32

In any procedure under Chapters 4 and 5 of Title 29 in which the judge of the probate court is unable to hear a case within the time required for such hearing and there is no associate judge able to hear the matter, the judge shall appoint an attorney to hear the case and exercise all the jurisdiction of the court in the case. Any attorney so appointed shall also be qualified to serve as the probate judge in that county and be, in the opinion of the appointing judge, qualified for the duties by training and experience. The appointment may be made on a case-by-case basis or by making a standing appointment of one or more individuals. Any attorney who receives a standing appointment shall serve at the pleasure of the judge who makes the appointment (or the judge's successor in office). The compensation of an individual appointed shall be as agreed upon by the judge who makes the appointment and the attorney, with the approval of the governing authority of the county for which the

individual is appointed, to be paid from county funds. All fees collected for the service of the appointed individual shall be paid into the general funds of the county.33

4.5 The Final Order; Service of Final Order; Recording of Certificate

The court shall issue an order that sets forth the findings of fact and conclusions of law34 that support the grant or denial of the petition. An order granting guardianship shall specify:

1. The name(s) of the guardian and/or conservator and the basis for the selection;
2. Any powers retained by the ward pursuant to Code Sections 29-4-21 and 29-5-21;
3. The limitations on the guardianship and/or conservatorship;
4. A specific listing of any of the additional powers, as described in subsection (b) of Code Section 29-4-23, that are granted to the guardian, and a specific list of any additional powers which are granted to the conservator as set forth in subsections (b) and (c) of Code Section 29-5-23;
5. If only a guardian is appointed or if the guardian and the conservator appointed are not the same person, the reasonable sums of property to be provided the guardian to provide adequately for the ward's support, care, education, health, and welfare, subject to modification by subsequent order of the court;
6. The type and frequency of any physical, mental, and social evaluations of the ward's condition which the court may require to supplement the reports submitted pursuant to paragraph (9) of subsection (a) of Code Section 29-4-22 by the guardian;
7. If a conservator is appointed and the ward has an interest in real property, the name of each county in Georgia in which real property is located; and
8. Such other and further provisions of the guardianship as the court shall determine to be in the best interest of the ward, stating the reasons therefor.35

Service of the court's order shall be made by first-class mail upon the ward, the ward's attorney, the guardian-ad-item, if any, the guardian and/or conservator, the petitioner(s), and other persons designated for service of the petition for guardianship or conservatorship.36 Although the Code does not require service of the order upon the attorney for the petitioner(s), the attorney should be so served. After service of an order granting guardianship and/or conservatorship, the ward's attorney shall make reasonable efforts to explain to the ward the order and the ward's rights under the order.37

33 O.C.G.A. §§29-4-12(d)(7) and 29-5-12(d)(7).
34 See Chapter 2, Section 5.2.
35 O.C.G.A. §§29-4-13(a) and 29-5-13(a).
36 O.C.G.A. §§29-4-13(b) and 29-5-13(b). Personal service of a copy of the Final Order at the time of the hearing upon any of the named persons present would certainly be sufficient, if not preferred.
37 O.C.G.A. §§29-4-13(c) and 29-5-13(c).
In any case involving the appointment of a conservator, if the ward has an interest in real property, within 30 days of granting the petition for conservatorship, the court shall file a certificate with the clerk of the superior court of each county in this state in which the ward owns real property, to be recorded in the deed records of the county and indexed under the name of the ward in the grantor index. The certificate shall set forth the name of the ward, the expiration date of the conservatorship, if any, the date of the order granting the conservatorship, and the name of the conservator. The certificate shall be accompanied by the same fee required for filing deeds with the clerk of the superior court, and the filing fee and any fee for the certificate shall be taxed as costs to the estate.  

4.6 Payment of Expenses of Hearings  
The amounts actually necessary or requisite to defray the expenses of any hearing held under Article 2 of Chapters 4 and 5 of Title 29, including proceedings for the appointment of an emergency guardian and/or conservator as set forth in Section 4. below, shall be paid:

1. From the estate of the ward if a guardianship or conservatorship is ordered;
2. By the petitioner if no guardianship or conservatorship is ordered; or
3. By the county in which the proposed ward is domiciled or by the county in which the hearing is held if the proposed ward is not a domiciliary of the state. The amounts shall be paid by the appropriate county upon the warrant (order assessing costs) of the court of the county where the hearing was held. Payment by the county shall be required, however, only if the person who actually presides over the hearing executes an affidavit or includes a statement in the order that the party against whom costs are cast pursuant to paragraph 1. or 2. above appears to lack sufficient assets to defray the expenses.

5. PROCEDURE FOR APPOINTMENT OF AN EMERGENCY GUARDIAN AND/OR AN EMERGENCY CONSERVATOR OF AN ADULT

5.1 Procedure and the Petition [GPCSF 11]  
Any interested person, including the proposed ward, may file a petition for the appointment of an emergency guardian and/or conservator. The petition shall be filed in the court of the county in which the proposed ward is domiciled or is found. The petition for appointment of an emergency guardian and/or conservator shall set forth:

1. A statement of the facts upon which the court's jurisdiction is based;
2. The name, address, and county of domicile of the proposed ward, if known;

38 O.C.G.A. §29-5-13(d).
39 O.C.G.A. §§29-4-17 and 29-5-17.
3. The name, address, and county of domicile of the petitioner and the petitioner's relationship to the proposed ward;

4. A statement of the reasons the emergency guardianship or conservatorship is sought, including the facts that support the need for a guardian and/or conservator and the facts that establish (for guardianship) an immediate and substantial risk of death or serious physical injury, illness, or disease and/or (for conservatorship) an immediate and substantial risk of irreparable waste or dissipation of the proposed ward’s property unless an emergency guardian and/or conservator is appointed;

5. The reasons why compliance with the procedures of Code Sections 29-4-10 through 29-4-13 and 29-5-10 through 29-5-13 is not appropriate in the circumstances (that is, why cannot the circumstances and issues be appropriately and sufficiently addressed in regular guardianship proceedings;

6. The fact that no other person appears to have authority and willingness to act in the circumstances, whether under a power of attorney, trust, or otherwise; and

7. The reason for any omission in the petition for appointment of emergency guardian and/or emergency conservator in the event full particulars are lacking.

The petition shall state whether a regular petition for the (permanent) appointment of a guardian or conservator has been filed or is being filed in conjunction with the emergency petition.

The sworn petition must be filed by two or more petitioners or, alternatively, if there is only one petitioner, shall be supported by an affidavit of a physician, psychologist, or licensed clinical social worker.\(^{40}\) Any affidavit shall be based on personal knowledge and shall state that the affiant has examined the proposed ward within 15 days prior to the filing of the petition and that, based on the examination, the proposed ward was determined to lack sufficient capacity to make or communicate significant, responsible decisions concerning (for guardianship) the proposed ward's health or safety and/or (for conservatorship) management of the proposed ward’s property and that there is an immediate and substantial risk of death or serious physical injury, illness, or disease and/or irreparable waste or dissipation of property unless an emergency guardian and/or conservator is appointed. In addition to stating the facts that support the claim of the need for an emergency guardianship or conservatorship, the affidavit shall state the foreseeable duration of the emergency guardianship or conservatorship and may set forth the affiant's opinion as to any other limitations on the emergency guardianship or conservatorship.\(^{41}\)

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\(^{40}\) Licensed as set forth in Section 4.3 above, or a physician, psychologist or licensed clinical social worker at a federal medical facility.

\(^{41}\) O.C.G.A. §§29-4-14 and 29-5-14.
Upon the filing of an emergency petition, the judge of the probate court shall review the petition and the affidavit, if any, to determine whether there is probable cause to believe that the proposed ward is in need of an emergency guardian and/or an emergency conservator within the meaning of paragraph (4) of subsection (b) of Code Section 29-4-14 and/or Code Section 29-5-14.\textsuperscript{42}

If the court determines that there is no probable cause to believe that the proposed ward is in need of an emergency guardian and/or an emergency conservator, the court shall dismiss the petition and provide the proposed ward with a copy of the petition, the affidavit, if any, and the order dismissing the petition.\textsuperscript{43}

If the court determines that there is probable cause to believe that the proposed ward is in need of an emergency guardian and/or an emergency conservator, the court shall:

1. Immediately appoint an attorney to represent the proposed ward at the emergency hearing, which attorney may be the same attorney who is appointed to represent the proposed ward in the hearing on the petition for guardianship or conservatorship, if any such petition has been filed, and shall inform the attorney of the appointment;

2. Order an emergency hearing to be conducted not sooner than three days nor later than five days after the filing of the petition;

3. Order an evaluation of the proposed ward by a physician, psychologist, or licensed clinical social worker\textsuperscript{44}, other than the physician, psychologist, or licensed clinical social worker who completed an affidavit attached to the petition. The evaluation shall be conducted within 72 hours of the time the order was issued and a written report shall be furnished to the court and made available to the parties within this time frame, which evaluation and report shall be governed by the provisions of subsection (d) of Code Sections 29-4-11 and 29-5-11;\textsuperscript{45}

4. Immediately notify the proposed ward of the proceedings by service of all pleadings on the proposed ward, which notice shall:
   a. Be served personally on the proposed ward by an officer of the court and shall not be served by mail;
   b. Inform the proposed ward that a petition has been filed to have an emergency guardian and/or an emergency conservator appointed for the proposed ward, that the proposed ward has the right to attend any hearing that is held, and that, if an emergency guardian and/or emergency conservator is appointed, the proposed ward

\textsuperscript{42}O.C.G.A. §§29-4-15(a) and 29-5-15(a).
\textsuperscript{43}O.C.G.A. §§29-4-15(b) and 29-5-15(b).
\textsuperscript{44}Licensed as set forth in Section 4.3 above.
\textsuperscript{45}There is an erroneous reference to subsection (d) of Code Section 29-5-14 in the text of the Code.
ward may lose important rights to control the management of the proposed ward's person;
c. Inform the proposed ward of the place and time at which the proposed ward shall submit to the evaluation provided for by paragraph (3) of this subsection;
d. Inform the proposed ward of the appointment of legal counsel; and
e. Inform the proposed ward of the date and time of the hearing on the emergency guardianship; and

5. Appoint an emergency guardian and/or an emergency conservator to serve until the emergency hearing, with or without prior notice to the proposed ward, if the threatened risk is so immediate and the potential harm so irreparable that any delay is unreasonable and the existence of the threatened risk and potential for irreparable harm is certified by the affidavit of a physician, psychologist, or licensed clinical social worker. If the petition seeks the appointment of an emergency conservator, the judge shall also order that no withdrawals be made from any account on the authority of the proposed ward signature without the court’s prior approval and that the emergency conservator not expend any funds of the proposed ward without prior court approval. Appointment of an emergency guardian or an emergency conservator under this Section is not a final determination of the proposed ward's need for a nonemergency guardian or conservator. Any emergency guardian shall have only those powers and duties specifically enumerated in the Letters of Emergency Guardianship and the powers and duties shall not exceed those absolutely necessary to respond to the immediate threatened risk to the ward.\(^{46}\)

The judge of the probate court shall conduct the emergency hearing at the time and date set forth in the order to determine whether there is clear and convincing evidence of the need for an emergency guardianship and/or an emergency conservatorship in light of the evidence taken at the hearing. In addition to the evidence at the hearing, the court may consider the evaluation report and any response filed by the proposed ward. The burden of proof shall be upon the petitioner. Upon the consent of the petitioner and the proposed ward, the court may grant a continuance of the case for a period not to exceed 30 days.

If the judge finds at the emergency hearing that an emergency guardianship and/or an emergency conservatorship is necessary, the judge shall order the emergency guardianship and/or emergency conservatorship; provided, however, that:

\(^{46}\) O.C.G.A. §§29-4-15(c) and 29-5-15(c).
1. Any emergency guardian and/or emergency conservator shall have only those powers and duties specifically enumerated in the Letters of Emergency Guardianship and/or Conservatorship and the powers and duties shall not exceed those absolutely necessary to respond to the immediate threatened risk to the ward;

2. The court may order the emergency guardian or emergency conservator to make any report the court requires; and

6. The emergency guardianship and/or emergency conservatorship shall terminate on the earliest of:
   a. The court’s removal of the emergency guardian or emergency conservator, with or without cause;
   b. The effective date of the appointment of a guardian or a conservator;
   c. Unless otherwise specified in the order of dismissal, the dismissal of a petition for appointment of a guardian and/or conservator;
   d. The date specified for the termination in the order appointing the emergency guardian and/or emergency conservator; or
   e. Sixty days from the date of appointment of the emergency guardian and/or emergency conservator.

In emergency proceedings, the process is “crammed” into a much shorter time, potentially adversely affecting the proposed ward’s rights to due process. The proceedings are intended solely for truly emergency situations. The proposed ward’s rights should not be so adversely affected because someone has waited until the last minute to address a matter of placement or transfer. The duration of an emergency guardianship/conservatorship cannot exceed sixty (60) days.

6. QUALIFICATION AND BOND OF GUARDIAN OR CONSERVATOR

6.1 Oath of Guardian or Conservator [GPCSF 35]

Every guardian or conservator appointed by the judge of the probate court, before entering upon the duties of the appointment, must take an oath to well and truly perform the duties required as guardian or conservator and to faithfully account for the estate of the ward. The oath or affirmation of an appointed guardian or conservator may be subscribed before the judge or clerk of any probate court of this state, without the necessity of a commission. The judge who appoints the guardian or conservator may grant a commission to a judge or clerk of any court of record of any other state to
administer the oath or affirmation. While the Code Section does not specify the language of the oath, the standard form [GPCSF 35] provides the following oath:

“I/We do solemnly swear (or affirm) that I/we will well and truly perform all the duties required of me/us as guardian/conservator of the ward named above (for conservators) and faithfully account to my ward for my ward’s estate.”

6.2 Bond [GPCSF 21]

6.2.1 Requirement of Bond Generally

Every guardian or conservator appointed by the judge of the probate court, before entering upon the duties of the appointment, must give bond with good security payable to and approved by the judge, whenever required by law or court order. Bond is not required by law for a guardian, but the law provides that bond may be required by the judge in such amount as the judge may determine. The bond must be secured by an individual who is a domiciliary of this state or by a licensed commercial surety; the bond shall be payable to the judge of the probate court for the benefit of the ward, conditioned upon the faithful discharge of the conservator’s duty, and be attested by the judge or clerk. Substantial compliance with these requirements shall be deemed sufficient, and no bond shall be declared invalid by reason of any variance in these requirements, as long as there was a manifest intention to give bond for the conservator.

Bond is required for a conservator, unless the ward’s estate consists solely of real property in the estate of the ward. If the bond is signed by a corporate surety, the amount must be equal to the value of all personal property and should include the anticipated annual income. If a personal surety signs the bond, the amounts are doubled. A financial or other similar institution with combined capital, surplus, and undivided profits of $3 million serving as conservator is not required to give bond.

The judge of the probate court may order a conservator who is required to give bond to post such bond for a period in excess of one year, if appropriate in the circumstances. This will likely be used more often in conservatorships for minors. Sureties will generally discount the premiums for prepayment for a term in excess of one year, and the ward is protected for the whole period. It should

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47 O.C.G.A. §§29-4-25 and 29-5-25.
48 O.C.G.A.§29-4-30. If a guardian is to receive any funds for the benefit of the ward, such as Social Security benefits or some allowance from a conservator, the requirement of a bond for the estimated annual amount to be received might be appropriate, if not preferred.
49 O.C.G.A. §29-5-41(a).
50 O.C.G.A. §29-5-41(d).
51 O.C.G.A. §29-5-41(c).
52 Id.
53 O.C.G.A. §29-5-40(b).
be noted, however, that a surety is not relieved of liability solely because of the expiration of the term of the bond but is subject to the provisions of law for the discharge of a surety.\textsuperscript{54}

The responsibility of assuring that the bond is adequate to protect the interests of the ward falls upon the judge of the probate court. Personally endorsed bonds should be discouraged. However, if a personal bond is proposed, the personal surety must be a domiciliary of this state and should:

1. Show that he/she is the sole owner in his/her own right of real estate which is returned for tax purposes or appraised at more than the amount of the bond required; and

2. Show that the property is not subject to a mortgage, lien, or security deed, or that the equity over any such debt exceeds the amount of the bond.

A lien or deed to secure debt should be given by the surety and be recorded on the deed records of the county where the property is located as a manner of protecting the bond and the ward.

While bond is mandatory for the conservator, if the judge of the probate court does not require a bond, anyone dealing in good faith with the conservator in reliance upon the order of the probate court and the Letters of Conservatorship will be protected, based upon the theory that its orders are presumed to have been entered only after compliance with all prerequisites.\textsuperscript{55}

\textbf{6.2.2 Recording of Bonds}

Bonds must be recorded in a book “kept for that purpose” and the original is kept on file in the probate court.\textsuperscript{56} While bonds may have been separately recorded in separate books, there would appear no reason why bonds cannot be recorded together with the entire proceeding in the general Minutes.\textsuperscript{57}

\textbf{6.2.3 Increase or Reduction of Bond}

The judge of the probate court may increase or reduce the amount of the bond when there has been an increase or reduction in the value of the ward's estate; a reduction does not affect the liability of the surety for any waste or misconduct occurring prior to the approval of the reduction.\textsuperscript{58}

Whenever it comes to the attention of the probate court by the annual returns or otherwise that the bond of any conservator is not sufficient, it becomes the duty of the judge to give notice to such conservator to appear and give additional security or an additional bond. Notice must be given by

\textsuperscript{54} O.C.G.A. §29-5-41(b).
\textsuperscript{56} O.C.G.A. §§29-4-30(b) and 29-5-40(c).
\textsuperscript{57} Some probate courts now record all proceedings and all parts of proceedings, excepting those proceedings which are confidential and not available for public inspection, in general Minutes, a book of all proceedings in the court.
\textsuperscript{58} O.C.G.A. §29-5-42.
first-class mail to the conservator and the surety. Upon the conservator’s failure to give additional bond and security, the judge may revoke the Letters of Conservatorship.⁵⁹

If a surety dies, becomes insolvent, or removes from this state, or if, for any other reason, the security becomes insufficient the judge may (should) require the conservator to give other and sufficient security. Upon a failure to do so, the judge may revoke the Letters of Conservatorship.⁶⁰

6.2.4 Responsibility of Court Regarding Bond

The bonding requirement places a serious responsibility upon the judge of the probate court and the probate court staff. In effect, it requires that whenever a conservator’s inventory and asset management plan or annual return is filed, the judge or staff must compare the amount of the ward's estate as shown to the amount of the bond in the court records and should require such adjustment in the amount of the bond as is proper.

6.2.5 Bond Premiums

The premiums for any bond backed by a commercial surety for a conservator or guardian are payable from the estate assets.⁶¹

6.2.6 Liability of Conservator and Surety

If the appointment of a conservator for any cause is declared void, the surety of that conservator shall nevertheless be responsible on the bond for any property received by the conservator.⁶²

The conservator and any surety shall be held and deemed joint and several obligors and may be subjected jointly and severally to liability in the same action. When a conservator moves beyond the limits of this state, dies and leaves an unrepresented estate, or is in a position that an attachment may be issued as against a debtor, any party in interest or any person having demands against that conservator in the conservator's representative capacity may institute an action against any one or more of the sureties on the bond of the conservator, without first obtaining a judgment against the conservator in that person's representative capacity.⁶³

When a judgment has been obtained against the conservator or the surety on the bond of a conservator, or both, a levy may be made upon any property of any defendant in fi. fa. The judge shall

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⁵⁹ O.C.G.A. §29-5-43(a).
⁶⁰ O.C.G.A. §29-5-43(b).
⁶¹ O.C.G.A. §§29-4-30(c) and 29-5-44.
⁶² O.C.G.A. §29-5-45.
⁶³ O.C.G.A. §29-5-46.
be authorized to enter a judgment and to issue a writ of execution against the conservator and surety on
the bond and shall be authorized to grant judgment and execution in favor of the surety against the
conservator upon payment of the judgment by the surety. In all cases of judgments recovered against
a conservator or any surety of a conservator, the execution shall first be levied on the property of the
surety and no levy shall be made on the property of the conservator until there is a return of nulla bona as to the surety.

The surety on the bond of any conservator or, if the surety is dead, the surety's personal
representative, may at any time petition the court regarding any misconduct of the conservator in the
discharge of the conservator's trust or to show the court the surety’s desire for any reason to be relieved
as surety. The death of a surety shall be a sufficient ground for the discharge of the surety from future
liability. Upon a petition by the surety or the surety's personal representative, the court shall cite the
conservator to appear and show cause, if any, why the surety should not be discharged. After hearing
the parties and the evidence, the judge, in his/her discretion, may issue an order discharging the surety
from all future liability and require the conservator to give new and sufficient security or be removed.
If new security is given, the discharged surety shall be discharged only from liability for future
misconduct of the conservator from the time the new security is given. The new surety shall be liable
for past as well as future misconduct of the conservator. If new security is not given and the
conservator is removed, the discharged surety shall be bound for a true accounting of the conservator
with the successor conservator or with the ward if no other conservator is appointed. In all cases
where Letters of Conservatorship are revoked, any surety on the bond shall be liable for all acts of the
conservator in relation to the trust up until the time of the settlement with the new conservator or the
ward.

7. TERMINATION OF GUARDIANSHIP OR CONSERVATORSHIP; RESTORATION
OF RIGHTS

7.1 Automatic Termination

Both guardianships and conservatorships terminate when the ward dies, except for purposes of
the final settlement of the conservator in a petition for discharge.

No action is required to terminate the guardianship or conservatorship. However, in order for
the conservator and the surety on the bond to be discharged from further liability, a petition for final

64 O.C.G.A. §29-5-47.
65 “Nulla bona” loosely means “not good.” A return of nulla bona means that the sheriff was unable to find property of the
defendant to levy upon.
67 O.C.G.A. §29-5-49.
68 O.C.G.A. §§29-4-42(e) and 29-5-72(e).
settlement of accounts and for discharge must be filed. While the filing of the petition seems to be discretionary under the Code, it would appear to be the best practice to require a final settlement and discharge of a conservator of a ward. A guardian or conservator may also file a petition seeking dismissal from office only.

7.2 Formal Dismissal and Discharge

7.2.1 Guardians

There would appear no reason, in the ordinary case, for a guardian to seek formal dismissal and discharge. However, the Code permits a guardian to file a petition for an order dismissing the guardian. The petition must include a final personal status report. Notice of the petition must be published one time and must state a date, not less than 30 days after the date of publication, on or before which objections must be filed. If no objection is filed, the judge of the probate court enters an order dismissing the guardian, but the order does not bar an action against the guardian. If an objection is filed, the judge is to hear the objection and determine whether the guardian is entitled to dismissal.

7.2.2 Conservators

On the other hand, although the filing seems optional under the Code, a conservator probably should, and may be required by the court to, file a petition for final settlement of accounts and discharge. The formal discharge will be necessary to relieve the surety from liability and to end the premiums for the bond. Citation is served upon the ward, the ward’s personal representative, or a successor conservator, and notice must also be given by first-class mail to the surety on the conservator’s bond.

A conservator may seek discharge from office only, in which case, the notice requirements, filing of objections and determinations are the same as in the case of a guardian above.

7.3 Petition for Termination and Restoration of Rights [GPCSF 65]

The proceeding for the termination of a guardianship or conservatorship tracts the original proceeding for the appointment. A petition is filed, an attorney is appointed, an evaluation is performed, and a hearing is held. However, proof of the ward’s regaining full capacity need only be
by a preponderance of the evidence, instead of by clear and convincing evidence, as required in the initial proceeding.

Upon the petition of any interested person, including the ward, or upon the court's own motion, and upon a proper showing that the need for a guardianship or conservatorship is ended, the judge may terminate the guardianship or conservatorship and restore all personal and property rights to the ward. Except for good cause shown, the judge shall order that notice of the petition be given, in whatever form the judge deems appropriate, to the ward, the guardian or conservator, and the ward's attorney, if any. The judge shall appoint an attorney for the ward and may, in his/her discretion, appoint a guardian-ad-litem.75

The petition must be supported either by the affidavits of two persons who have knowledge of the ward, one of whom may be the petitioner, or of a physician, psychologist, or licensed clinical social worker, setting forth the supporting facts and determinations. Note here, that there is no requirement that there be two petitioners. A sole petitioner may file the petition, and the petitioner may be the ward. If the petitioner cannot obtain affidavits from two persons having knowledge of the ward, the petition may be supported by the affidavit of the healthcare professional.

If, after reviewing the petition and the affidavits, the judge determines that there is no probable cause to believe that the guardianship or conservatorship should be terminated, the judge shall dismiss the petition. If the petition is not dismissed, the judge shall order that an evaluation be conducted, in accordance with the provisions of subsection (d) of Code Sections 29-4-11 and 29-5-11. This means that the timing of the evaluation and for returning the evaluation report are the same as in the original proceeding.

If, after reviewing the evaluation report, the judge finds that there is no probable cause to believe that the guardianship or conservatorship should be terminated, the judge shall dismiss the petition. If the petition is not dismissed, the judge shall schedule a hearing, with such notice as the judge deems appropriate.76 The burden is on the petitioner to show by a preponderance of the evidence that there is no longer a need for the guardianship or conservatorship, that is, that the ward has regained sufficient capacity to make and communicate significant responsible decisions concerning his/her health and safety and/or concerning the management of his/her property.77

No petition for termination of a guardianship shall be allowed by the court within two years after the denial or dismissal on the merits of a petition for termination of the guardianship or

75 O.C.G.A. §§29-4-42(a) and 29-5-72(a).
76 O.C.G.A. §§29-4-42(b) and 29-5-72(b).
77 O.C.G.A. §§29-4-42(c) and 29-5-72(c).
conservatorship unless the petitioner shows a significant change in the condition or circumstances of
the ward.\textsuperscript{78}

Except as provided in Section 7.4 below, upon termination of the guardianship or
conservatorship, the guardian or conservator shall deliver any money or property to: the conservator, if
a conservator has been appointed and will continue to serve; the ward; or, if the ward is deceased, the
ward's personal representative.\textsuperscript{79}

7.4 County Guardian Serving as Conservator of Deceased Intestate Ward

When a ward dies \textit{intestate} and the county administrator or county guardian has been
previously appointed as conservator, the conservator shall proceed to distribute the ward's estate in the
same manner as if the conservator had been appointed administrator of the estate. The sureties on the
conservator's bond shall remain liable for the conservator's faithful administration and distribution of
the estate.\textsuperscript{80}

This provision replaces the provision in the Pre-1998 Probate Code which permitted any
guardian of the property to serve as \textit{ex-officio} administrator of the estate of a ward who dies intestate.
This is permitted under the new Probate Code \textit{only} when the county guardian is serving as the
conservator for a ward who dies intestate.

The conservator (county guardian) completes the administration of the estate without any
further action being necessary. On the final return, the conservator (county guardian) will account all
the way through the final distribution of the estate to the heirs after payment of the expenses of
administration and debts of the estate. There will be no commission for delivery over from the
conservator to the “administrator,” since the conservator (county guardian) continues to hold and
administer the property in the same right or position. The conservator (county guardian) continues to
file annual returns until the estate is fully administered and distributed.

8. RESIGNATION AND REMOVAL OF GUARDIANS OR CONSERVATORS;
APPOINTMENT OF SUCCESSORS

8.1 Petition to Resign

A guardian or conservator or the duly authorized guardian, conservator, or attorney in fact of a
guardian or conservator, acting on behalf of the guardian or conservator, may resign upon petition to
the court, showing to the satisfaction of the court that:

\textsuperscript{78} O.C.G.A. §§29-4-42(d) and 29-5-72(d).
\textsuperscript{79} O.C.G.A. §§29-4-42(f) and 29-5-72(f).
\textsuperscript{80} O.C.G.A. §29-5-72(g).
1. The guardian or conservator is unable to continue to serve due to age, illness, infirmity, or other good cause;

2. Greater burdens have devolved upon the office of the guardian or conservator than those that were originally contemplated or should have been contemplated when the guardian or conservator was qualified and the additional burdens work a hardship upon the guardian or conservator;

3. Disagreement exists between the ward and the guardian or between the guardian and the conservator in respect to the guardian’s care of the ward, which disagreement and conflict appear to be detrimental to the ward;

4. Disagreement exists between the ward and the conservator or between the guardian and the conservator in respect to the conservator’s management of the ward’s property, which disagreement and conflict appear to be detrimental to the ward;

5. The resignation of the guardian or conservator will result in or permit substantial financial benefit to the ward; or

6. The resignation would not be disadvantageous to the ward.81

In all instances where a guardian or conservator has petitioned the court for an order allowing resignation, the petition must include the name of a suitable person who is willing to accept the guardianship or conservatorship.82

In connection with a petition for resignation, personal service of the petition must be made on the ward and an attorney appointed by the judge of the probate court. Service must be made by first-class to any guardian or conservator of the ward who is not the petitioner for resignation and, in the following order of preference, to the following relatives of the ward whose whereabouts are known and who must be persons other than the resigning guardian or conservator or the proposed successor guardian or conservator:

1. The spouse of the ward; and

2. The adult children of the ward; or

3. If there is no child, then at least two adults in the following order of priority:
   a. Lineal descendents of the ward;
   b. Parents and siblings of the ward; and
   c. Friends of the ward.83

If, after such hearing as the court deems appropriate, the judge finds that the petition for resignation of the guardian and/or conservator and the appointment of the proposed successor guardian

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81 O.C.G.A. §§29-4-50(a) and 29-5-90(a).
82 O.C.G.A. §§29-4-50(b) and 29-5-90(b).
83 O.C.G.A. §§29-4-50(c) and 29-5-90(c).
and/or conservator should be granted, the judge enters an order accepting the resignation and appointing the successor guardian and/or conservator in accordance with the provisions of Code Sections 29-4-61 and 29-5-101.84

8.2 Removal of Guardian or Conservator

Upon the petition of any interested person or whenever it appears to the court that good cause may exist to revoke or suspend the Letters of a guardian or conservator to impose sanctions, the court shall cite the guardian or conservator to answer the charge. The judge of the probate court shall investigate the allegations and may require such accounting as the judge deems appropriate. The judge may appoint a temporary substitute guardian for the ward during the investigation.

Upon investigation, the judge may, in his/her discretion:

1. Revoke or suspend the guardian's letters;
2. Require additional security;
3. Require the conservator to appear and submit to a settlement of accounts, whether or not the conservator has first resigned or been removed and whether or not a successor conservator has been appointed;
4. Reduce or deny compensation to the guardian or impose any other sanction(s) as the judge deems appropriate; and
5. Issue any other order as in the court's judgment is appropriate under the circumstances of the case.

The revocation or suspension of Letters of Guardianship or Conservatorship shall not abate any action pending for or against the guardian or conservator. The successor guardian or conservator shall be made a party to the action against the guardian or conservator in the manner provided in Code Section 9-11-25.85

See also Section 16.4 below.

8.3 Death of Guardian or Conservator

The judge of the probate court may appoint a successor guardian or conservator on the court’s own motion, on the petition of an interested person, or if the guardian or conservator dies.

In such a case, personal service of the petition must be made on the ward and an attorney appointed by the judge. Service must be made by first-class to any guardian or conservator of the ward who is not the petitioner for resignation, the personal representative of the deceased guardian or

84 O.C.G.A. §§29-4-50(d) and 29-5-90(d).
85 O.C.G.A. §§29-4-52 and 29-5-92.
conservator, and, in the following order of preference, to the following relatives of the ward whose whereabouts are known and who must be persons other than the resigning guardian or conservator or the proposed successor conservator or the proposed successor guardian or conservator:

1. The spouse of the ward; and
2. The adult children of the ward; or
3. If there is no child, then at least two adults in the following order of priority:
   a. Lineal descendents of the ward;
   b. Parents and siblings of the ward; and
   c. Friends of the ward.

After such hearing as the court deems appropriate, the judge enters an order appointing a successor guardian and/or conservator in accordance with the provisions of Code Sections 29-4-61 and 29-5-101.\textsuperscript{86}

### 8.4 Delivery of Property to Successor Guardian or Conservator

Upon the appointment of a successor guardian, the predecessor guardian or the personal representative of a deceased predecessor guardian shall deliver to the successor guardian all property of the ward held by the guardian and shall submit a final status report covering the period since the guardian's last status report.\textsuperscript{87}

Upon the appointment of a successor conservator, the predecessor conservator or the personal representative of a deceased predecessor conservator shall deliver to the successor conservator all property of the ward held by the conservator and shall submit a final return covering the period since the conservator's last annual return. The surety of the predecessor conservator shall be liable for all acts of the conservator in relation to the ward's property up to the time of the receipt of all of the ward's property by the successor conservator.\textsuperscript{88} Discharge will be necessary to release the surety from future liability and terminate the premiums. See Section 16.5 below.

### 9. TEMPORARY SUBSTITUTE GUARDIAN OR CONSERVATOR

A temporary substitute guardian or conservator may be needed if there is some reason to temporarily suspend the Letters of Guardianship or Conservatorship without rescinding or revoking the Letters; this can be done in circumstances where the guardian or conservator may be able to resume service. Upon its own motion or on the petition of any interested party, including the ward, the judge

\textsuperscript{86} O.C.G.A. §§29-4-51 and 29-5-91.
\textsuperscript{87} O.C.G.A. §29-4-62.
\textsuperscript{88} O.C.G.A. §29-5-102.
of the probate court may appoint a temporary substitute guardian or conservator if it appears to the court that some immediate action is required to protect the ward’s interests.\(^89\)

The judge, in his/her discretion, will select the person who will serve as the temporary substitute guardian or conservator.\(^90\) Notice of the appointment of a temporary substitute guardian or conservator will be served personally on the ward and on the guardian or conservator whose powers are being suspended and by mail surety and to the other fiduciary (guardian or conservator) of the ward, if any. During the term of service, the temporary substitute guardian or conservator will have the powers “set forth in the order of appointment,” and the powers of the previously appointed guardian or conservator will be suspended. Hence, the judge should make clear in the order exactly what powers the temporary substitute guardian has.

The position of substitute guardian or conservator is, by its nature, “temporary”. The substitute will serve until the earlier of (1) the lapse of 120 days from the date of appointment, (2) such earlier date as may be set in the order of appointment, or (3) removal by the court. The temporary substitute guardian or conservator must give any report the court requires as well as comply with all other provisions relating to guardians or conservators.\(^91\)

A temporary substitute conservator will receive only such reasonable compensation that is determined by the judge, upon application by the temporary substitute conservator. Notice of the application is to be served upon the “interested parties”\(^92\) pursuant to Chapter 9 of Title 29. For good cause shown, the judge may reduce the compensation of the regular conservator.\(^93\)

10. COUNTY GUARDIANS\(^94\)

The county administrator is ex-officio county guardian and must serve as guardian or conservator when so appointed by the judge of the probate court.\(^95\) Separate Letters of Guardianship or Conservatorship are issued on all appointments, and the county guardian occupies the same position as any regularly appointed guardian or conservator.\(^96\) There are, however, special rules which apply only when the county guardian serves as conservator of a ward who dies intestate. In that case, the conservator proceeds to distribute the ward’s estate in the same manner as if the conservator had been appointed administrator of the estate. The sureties on the conservator’s bond remain bound for the

\(^89\) O.C.G.A. §§29-4-60 and 29-5-100.
\(^90\) In the case of a conservatorship, the judge may appoint the county guardian. O.C.G.A. §29-5-100(c).
\(^91\) O.C.G.A. §§29-4-60 and 29-5-100.
\(^92\) The Code Section does not indicate who the interested parties are. It would seem that notice should be given to the regular conservator and the guardian, and it would appear that a guardian-ad-litem should be appointed for the ward, who could acknowledge service for the ward pursuant to Code Section 29-9-2(b).
\(^93\) O.C.G.A. §29-5-54.
\(^94\) See Chapter 4, Section 9 concerning the appointment of county guardians.
\(^95\) O.C.G.A. §29-8-1.
\(^96\) O.C.G.A. §29-8-3.
conservator’s faithful administration and distribution of the estate.\textsuperscript{97} The county guardian’s (conservator’s) final return will cover the post-death period and the distribution of the intestate estate of the ward. Prior law permitted any guardian of the property (now conservator) to serve as \textit{ex officio} administrator of the estate of an intestate ward or ward. Under present law, only the county guardian serving as a conservator may proceed to administer and distribute the estate of an intestate ward or ward.

The county administrator is required to post an additional bond of $5,000.00 as county guardian. Such bond must be attested by the judge or clerk of the probate court, and the condition of the bond is the faithful performance of all duties of county guardian as required by law.\textsuperscript{98} Any person damaged by the misconduct of the county guardian may bring suit on the bond in the same manner that suits are brought on bonds of other guardians. The judge has the duty to require additional security or an additional bond whenever considered to be in the best interest of any conservatorship.\textsuperscript{99}

The blanket bond of the county administrator should always be of sufficient amount to cover all funds under the control of the county administrator. It is good practice to require a separate bond for the value of the personal property in each estate of any significant size, just as though the county guardian were an ordinary conservator. For good cause, the judge of the probate court may revoke the Letters of Guardianship or Conservatorship of the county guardian, require additional security on the county guardian’s bond, or issue any other order as may be expedient and necessary for the good of any particular guardianship or conservatorship in the hands of the county guardian.\textsuperscript{100}

11. GUARDIANS APPOINTED FOR WORKERS’ COMPENSATION BENEFITS

Georgia law gives to the probate court "original, exclusive, and general jurisdiction" in the appointment and removal of guardians of wards except as otherwise provided by law.\textsuperscript{101} In fact, there have been legislative enactments which allow other courts or entities to appoint guardians.

With respect to workers’ compensation benefits, except as explained below, the only person capable of representing a ward or legally incompetent claimant entitled to such benefits is a conservator appointed by the judge of the probate court of the county of domicile of the claimant or by a court of competent jurisdiction outside the State of Georgia. Such guardian (conservator) is required to file with the State Board of Workers’ Compensation (“Board”) a copy of the guardianship returns filed annually with the probate court or with a court of competent jurisdiction outside the State of

\textsuperscript{97} O.C.G.A. §29-5-72(g).
\textsuperscript{98} O.C.G.A. §29-8-2.
\textsuperscript{99} O.C.G.A. §29-8-4.
\textsuperscript{100} O.C.G.A. §29-8-5.
\textsuperscript{101} O.C.G.A. §15-9-30(a).
Georgia and give notice to all parties within 30 days of any change in status.\textsuperscript{102} The Board does have authority in, and must establish procedures for, appointing temporary guardians for purposes of administering workers’ compensation rights and benefits without such guardian becoming the legally qualified guardian (conservator) of any other property, without the actions of such guardian (conservator) being approved by a court of record, and without the posting of a bond, in only the following circumstances:

1. The Board may, in its discretion, authorize and appoint a temporary guardian of a ward or legally incompetent person to receive and administer weekly income benefits on behalf of and for the benefit of said ward or legally incompetent person for a period not to exceed 52 weeks unless renewed or extended by order of the Board;

2. The Board may, in its discretion, authorize and appoint a temporary guardian of a ward or legally incompetent person to compromise and terminate any claim and receive any sum paid in settlement for the benefit and use of said ward or legally incompetent person when the net settlement amount approved by the Board is less than $50,000.00; and

3. If a ward or legally incompetent person does not have a duly appointed representative or guardian, the Board may, in its discretion, appoint a guardian-ad-litem to bring or defend an action under the Workers’ Compensation Act in the name of and for the benefit of said ward or legally incompetent person to serve for a period not to exceed 52 weeks, unless renewed or extended by order of the Board. However, no such guardian-ad-litem will be permitted to receive the proceeds from any such action except where the guardian-ad-litem becomes guardian (conservator) appointed by the judge of the probate court or the temporary guardian appointed by the Board. The Board shall have the authority to determine compensation, if any, for any such guardian ad litem.\textsuperscript{103}

12. FOREIGN GUARDIANS OR CONSERVATORS

Generally speaking, a foreign guardian or conservator of a ward may transact business in Georgia on behalf of the ward without transferring the guardianship or conservatorship to Georgia. However, a foreign guardian or conservator who desires to sell or convey property of the ward located in Georgia must seek authority to sell and convey the ward’s property in the same manner that conservators in Georgia seek such authority, that is, by filing a petition for leave to sell. At the time

\textsuperscript{102} \textit{O.C.G.A. §34-9-226(a)}.
\textsuperscript{103} \textit{O.C.G.A. §34-9-226(b)}.  

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the petition for leave to sell is filed, the foreign guardian or conservator must file with the court an authenticated copy of the guardian’s or conservator’s Letters and must post an appropriate bond. 104

A foreign guardian or conservator may also institute an action in Georgia to enforce a right or recover property of the ward. 105 The foreign guardian or conservator is to file an authenticated copy of the Letters of Guardianship or Conservatorship with the clerk of the court in which the action is filed. 106 A foreign guardian or conservator submits to the personal jurisdiction of the Georgia courts when the guardian or conservator receives money or personal property of the ward in Georgia or does any act that would have given a Georgia court jurisdiction over the guardian or conservator acting as an individual. 107

Upon application by any resident of this state who is interested as a creditor, heir or will beneficiary, a foreign conservator may be compelled to protect that interest before selling the ward’s assets or removing the ward’s assets beyond the limits of this state. 108

Any person indebted to or having possession of property of a ward may pay the debt or deliver the property to a foreign conservator of the ward, upon proof of the proper appointment and authority of the foreign conservator. Unless the debtor or possessor of property has knowledge of proceedings for the appointment of a guardian or conservator in this state, the payment or delivery of property discharges the debtor or possessor. 109

The 2005 Code contains provisions for the receipt and acceptance of a foreign guardianship or conservatorship in Georgia and for transfer of a Georgia guardianship or conservatorship to another jurisdiction. See Section 18, below.

13. POWERS AND DUTIES OF A GUARDIAN OF A WARD; RIGHTS OF WARD; REVIEW AND MODIFICATION OF GUARDIANSHIPS

13.1 Rights of Ward under Guardianship

In every guardianship, the ward has the right to:

1. A qualified guardian who acts in the best interest of the ward;
2. A guardian who is reasonably accessible to the ward;
3. Have his/her property utilized as necessary for his/her support, care, education, health, and welfare;

104 O.C.G.A. §§29-4-95 and 29-5-135.
105 O.C.G.A. §§29-4-96 and 29-5-136.
106 O.C.G.A. §§29-4-97 and 29-5-137.
108 O.C.G.A. §29-5-139.
109 O.C.G.A. §29-5-140.
4. Communicate freely and privately with persons other than the guardian, except as otherwise ordered by a court of competent jurisdiction;

5. Individually, or through the ward's representative or legal counsel, bring an action relating to the guardianship, including the right to file a petition alleging that the ward is being unjustly denied a right or privilege granted by Chapters 4 and 5 of Title 29 and including the right to bring an action to modify or terminate the guardianship pursuant to the provisions of Code Sections 29-4-41 and 29-4-42;

6. The least restrictive form of guardianship assistance, taking into consideration the ward's functional limitations, personal needs, and preferences; and

7. Be restored to capacity at the earliest possible time.

Further, the appointment of a guardian is not a determination regarding the right of the ward to vote or a determination that the ward lacks testamentary capacity.110

13.2 Rights and Privileges Removed by Guardianship

Unless the court's order specifies that one or more of the following powers are to be retained by the ward, the appointment of a guardian shall remove from the ward the power to:

1. Contract marriage;

2. Make, modify, or terminate other contracts;

3. Consent to medical treatment;

4. Establish a residence or dwelling place;

5. Change domicile;

6. Revoke a revocable trust established by the ward; and

7. Bring or defend any action at law or equity, except an action relating to the guardianship.

The appointment of a guardian alone does not revoke the powers of an agent who was previously appointed by the ward to act as an agent under a durable power of attorney for health care or health care agent under an advance directive for health care.111

13.3 Powers and Authority of a Guardian of a Ward

Except as otherwise provided by law or by the court’s order, a guardian shall make decisions regarding the ward's support, care, education, health, and welfare. A guardian shall, to the extent feasible, encourage the ward to participate in decisions, act on the his/her own behalf, and develop or

110 O.C.G.A. §29-4-20.
111 O.C.G.A. §29-4-21.
regain the capacity to manage his/her personal affairs. To the extent known, a guardian, in making decisions, shall consider the expressed desires and personal values of the ward. A guardian shall, at all times, act as a fiduciary in the ward's best interest and exercise reasonable care, diligence, and prudence.\textsuperscript{112}

A guardian must:

1. Respect the rights and dignity of the ward;
2. Become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know the ward’s capacities, limitations, needs, opportunities, and physical and mental health;
3. If necessary, petition to have a conservator appointed;
4. Endeavor to cooperate with the conservator, if any;
5. Take reasonable care of the ward’s personal effects;\textsuperscript{113}
6. Arrange for the support, care, education, health, and welfare of the ward, considering the ward’s needs and available resources;
7. Expend money of the ward that has been received by the guardian for the ward’s current needs for support, care, education, health, and welfare;
8. Conserve for the ward’s future needs any excess money of the ward received by the guardian; provided, however, that if a conservator has been appointed for the ward, the guardian must pay to the conservator, at least quarterly, money to be conserved for the ward’s future needs;
9. Within 60 days after appointment and within 60 days after each anniversary date of appointment, file with the court and provide to the conservator, if any, a personal status report\textsuperscript{114} concerning the ward, which must include:
   (a) A description of the ward’s general condition, changes since the last report, and the ward’s needs;
   (b) All addresses of the ward during the reporting period and the living arrangements of the ward for all addresses;
   (c) A description of the amount and expenditure of any funds received by the guardian; and
   (d) Recommendations for any alteration in the guardianship order;

\textsuperscript{112} O.C.G.A. §29-4-22(a).
\textsuperscript{113} Although guardians have no general authority over or responsibility for property of the ward, guardians are charged with taking reasonable care of all clothing, furniture, vehicles, and other personal effects of the ward. Muse v. Treadway, 254 Ga. App. 166 (2002).
\textsuperscript{114} See Section 16.1 below.
10. Promptly notify the court of any change in the ward’s condition that, in the opinion of the guardian, might require modification or termination of the guardianship;

11. Promptly notify the court of any conflict of interest between the ward and the guardian when the conflict arises or becomes known to the guardian and take such action as is required by Code Section 29-4-24\textsuperscript{115}; and

12. Keep the court informed of the guardian’s current address.\textsuperscript{116}

A guardian, solely by reason of the guardian-ward relationship, is not personally liable for the ward’s expenses or the expenses of those whom the ward is obligated to support, contracts entered into in the guardian’s fiduciary capacity, the acts or omissions of the ward, obligations arising from ownership or control of property of the ward, or other acts or omissions occurring in the course of the guardianship.\textsuperscript{117}

The appointment of a guardian vests in the guardian the exclusive power, without court order, to:

1. Take custody of the person of the ward and establish the ward’s place of dwelling within this state;

2. Subject to Chapters 9, 20, and 36 of Title 31 and any other pertinent law, give any consent or approval that may be necessary for medical or other professional care, counsel, treatment, or services for the ward;

3. Bring, defend, or participate in legal, equitable, or administrative proceedings, including alternative dispute resolution, as are appropriate for the support, care, education, health, or welfare of the ward in the name of or on behalf of the ward; and

4. Exercise those other powers reasonably necessary to provide adequately for the support, care, education, health, and welfare of the ward.\textsuperscript{118}

At the time of the appointment of the guardian or at any time thereafter, any of the following powers may be specifically granted by the judge of the probate court to the guardian upon such notice, if any, as the judge determines, provided that no disposition of the ward’s property shall be made without the involvement of a conservator, if any:

1. To establish the ward’s place of dwelling outside this state;

2. To change the jurisdiction of the guardianship to another county in this state that is the county of the ward’s place of dwelling, pursuant to Code Section 29-4-80;

\textsuperscript{115} The guardian must disclose any conflict of interest and seek the court’s determination whether the conflict is insubstantial or if it is in the ward’s best interest for the guardian to continue to serve. O.C.G.A. §29-4-24.

\textsuperscript{116} O.C.G.A. §29-4-22(b).

\textsuperscript{117} O.C.G.A. §29-4-22(c).

\textsuperscript{118} O.C.G.A. §29-4-23(a).
3. To change the domicile of the ward to the ward’s or the guardian’s place of dwelling, in the determination of which the court must consider the tax ramifications and the succession and inheritance rights of the ward and other parties;

4. To bring or defend an action for the divorce of the ward on any of the grounds listed in Code Section 19-5-3, except on the ground that the marriage is irretrievably broken;

5. To consent to the adoption of the ward;

6. To receive reasonable compensation from the estate of the ward for services rendered to the ward; and

7. If there is no conservator, to disclaim or renounce any property or interest in property of the ward in accordance with the provisions of Code Section 53-1-20.\textsuperscript{119}

Before granting any of the powers described immediately above, the judge must appoint a guardian-ad-litem for the ward.\textsuperscript{120} The judge must consider the property rights of the ward and the views of the conservator, or, if there is no conservator, of others who have custody of the ward’s property. The guardian must act in coordination and cooperation with the conservator or, if there is no conservator, with others who have custody of the ward’s property.\textsuperscript{121}

13.4 Review and Modification of Guardianships

13.4.1 Review of Ward’s Condition and the Guardian’s Service

Upon the petition of any interested person, including the ward, or upon the court’s own motion, the judge of the probate court may conduct a judicial inquiry into whether the ward is being denied a right or privilege provided for by Chapter 4 of Title 29 and may issue appropriate orders. Except for good cause shown, the judge shall order that notice of the inquiry be given, in whatever form the judge deems appropriate, to the ward, the guardian, the ward's attorney, if any, and the ward's conservator, if any. The judge, in his/her discretion, may appoint an attorney for the ward or a guardian-ad-litem, or both.\textsuperscript{122}

This procedure is available for the court to address any number of instances or actions that might occur during a guardianship. For example, a petition could be filed under this provision alleging that the guardian is not permitting the ward to communicate and visit with certain relatives or that the guardian in any manner is failing to properly care and provide for the ward. The authority to issue “appropriate orders” is quite broad, and the judge should be permitted under this provision to order such actions as may be in the best interest of the ward.

\textsuperscript{119} O.C.G.A. §29-4-23(b).
\textsuperscript{120} O.C.G.A. §29-4-23(c).
\textsuperscript{121} O.C.G.A. §§29-4-23(d) and (e).
\textsuperscript{122} O.C.G.A. §29-4-40.
No petition alleging that the ward is being unjustly denied a right or privilege provided for by Chapter 4 of Title 29 shall be allowed by the court within two years after the denial or dismissal on the merits of a petition alleging that the ward is being unjustly denied substantially the same right or privilege unless the petitioner shows a significant change in the condition or circumstances of the ward.

13.4.2 Modifications of the Guardianship

Upon the petition of any interested person, including the ward, or upon the court's own motion, the judge may modify the guardianship by adjusting the duties or powers of the guardian, as defined in Code Sections 29-4-14 and 29-4-15, or the powers of the ward, as defined in Code Section 29-4-13, or by making other appropriate adjustments to reflect the extent of the current capacity of the ward or other circumstances of the guardianship. Except for good cause shown, the court shall order that notice of the petition be given, in whatever form the court deems appropriate, to the ward, the guardian, the ward's attorney, and the ward's conservator, if any. In any proceeding that would expand or increase the powers of the guardian or further restrict the rights of the ward, the judge shall appoint an attorney for the ward. In all other cases, the judge, in his/her discretion, may appoint legal counsel for the ward or a guardian-ad-litem, or both.\textsuperscript{123}

If the petition for modification alleges a significant change in the capacity of the ward, it must be supported either by the affidavits of two persons who have knowledge of the ward, one of whom may be the petitioner, or of a physician, psychologist, or licensed clinical social worker, setting forth the supporting facts and determinations. If, after reviewing the petition and the affidavits, the judge of the probate court determines that there is no probable cause to believe that there has been a significant change in the capacity of the ward, the judge shall dismiss the petition.

If the petition is not dismissed, the judge shall order that an evaluation be conducted, in accordance with the provisions of subsection (d) of Code Section 29-4-11. If, after reviewing the evaluation report, the judge finds that there is no probable cause to believe that there has been a significant change in the capacity of the ward, the judge shall dismiss the petition. If the petition is not dismissed, the judge shall schedule a hearing, with notice as the judge deems appropriate.\textsuperscript{124}

If the petition for modification does not allege a significant change in the capacity of the ward, the judge in his/her discretion may modify the guardianship upon a showing that the modification is in

\textsuperscript{123} O.C.G.A. §29-4-41(a)
\textsuperscript{124} O.C.G.A. §29-4-41(b).
the ward's best interest; provided, however, that the judge may order compliance with any of the provisions above prior to granting the petition for modification.\cite{125}

In any proceeding that would expand or increase the powers of the guardian or further restrict the powers of the ward, the burden is on the petitioner to show by clear and convincing evidence that the modification is in the ward's best interest. In any proceeding that would restrict the powers of the guardian or restore powers to the ward, the burden is on the petitioner to show by a preponderance of the evidence that the modification is in the ward's best interest.\cite{126}

No petition for modification shall be allowed by the court within two years after the denial or dismissal on the merits of a petition for substantially the same modification unless the petitioner shows a significant change in the condition or circumstances of the ward.\cite{127}

14. POWERS AND DUTIES OF A CONSERVATOR OF A WARD; RIGHTS OF WARD; MODIFICATIONS OF CONSERVATORSHIP

14.1 Rights of a Ward under Conservatorship

In every conservatorship, the ward has the right to:

1. A qualified conservator who acts in the best interest of the ward;
2. A conservator who is reasonably accessible to the ward;
3. Have his/her property utilized as necessary for his/her support, care, education, health, and welfare;
4. Communicate freely and privately with persons other than the conservator, except as otherwise ordered by a court of competent jurisdiction;
5. Individually, or through the ward's representative or legal counsel, bring an action relating to the conservatorship, including the right to file a petition alleging that the ward is being unjustly denied a right or privilege granted by Chapters 4 and 5 of Title 29 and including the right to bring an action to modify or terminate the guardianship pursuant to the provisions of Code Sections 29-5-71 and 29-5-72;
6. The least restrictive form of conservatorship, taking into consideration the ward's functional limitations, personal needs, and preferences; and
7. Be restored to capacity at the earliest possible time.

Further, the appointment of a guardian is not a determination regarding the right of the ward to

\footnotesize{\begin{tabular}{l}
\textsuperscript{125} O.C.G.A. §29-4-41(c). \\
\textsuperscript{126} O.C.G.A. §29-4-41(d). \\
\textsuperscript{127} O.C.G.A. §29-4-41(e).
\end{tabular}
vote or a determination that the ward lacks testamentary capacity.\textsuperscript{128}

14.2 Rights and Privileges Removed by Conservatorship

Unless the court's order specifies that one or more of the following powers are to be retained by the ward, the appointment of a conservator shall remove from the ward the power to:

1. Make, modify, or terminate other contracts, other than the power to contract marriage;
2. To buy, sell, or otherwise dispose of or encumber property;
3. Enter into or conduct any business or commercial transactions;
4. Revoke a revocable trust established by the ward; and
5. Bring or defend any action at law or equity, except an action relating to the conservatorship.

The appointment of a conservator alone does not revoke the powers of an agent who was previously appointed by the ward to act as an agent under a durable power of attorney for health care or health care agent under an advance directive for health care.\textsuperscript{129}

14.3 Powers and Authority of a Conservator of a Ward

A conservator must receive, collect, and make decisions regarding the ward’s property. A conservator shall, to the extent feasible, encourage the ward to participate in decisions, act on his/her own behalf, and develop or regain the ability to manage his/her property. A conservator, in making decisions, shall consider the expressed desires and personal values of the ward which are known to the conservator. A conservator must, at all times, act as a fiduciary in the ward’s best interest and exercise reasonable care, diligence, and prudence.\textsuperscript{130}

A conservator must:

1. Respect the rights and dignity of the ward;
2. Be reasonably accessible to the ward and maintain regular communication with the ward;
3. Petition to have a guardian appointed if necessary;
4. Endeavor to cooperate with the guardian, if any;
5. Provide for the support, care, education, health, and welfare of the ward and persons whom the ward is obligated to support, considering available resources;
6. Give such bond as required by Code Section 29-5-40;

\textsuperscript{128} O.C.G.A. §29-5-20.
\textsuperscript{129} O.C.G.A. §29-5-21.
\textsuperscript{130} O.C.G.A. §29-5-22(a).
7. Within two months of appointment, file with the court and provide to the guardian, if any, an inventory of the ward’s property and a plan for managing the property, pursuant to the provisions of Code Section 29-5-30; See Section 14.4 below.

8. Take into account any estate plan of the ward known to the conservator in the administration of the conservatorship;

9. Keep accurate records including adequate supporting data and file annual returns as required by Code Section 29-5-60;

10. Promptly notify the court of any change in the ward’s condition that, in the opinion of the conservator, might require modification or termination of the conservatorship;

11. Promptly notify the court of any conflict of interest between the ward and the conservator when the conflict arises or becomes known to the conservator and take such action as is required by Code Section 29-5-24; and

12. Keep the court informed of the conservator’s current address.\footnote{O.C.G.A. §29-5-22(b).}

The appointment of a conservator shall not automatically cause the conservator to forfeit any rights to property. The conservator must disclose promptly any conflict of interest between the conservator and the ward when it arises or becomes known to the conservator. The conservator must seek the court’s determination as to whether the conflict is insubstantial or whether it is in the best interest of the ward for the conservator to continue to serve and not forfeit any property right. If the judge finds that the conflict of interest is substantial or contrary to the best interest of the ward, the conservator may either resign or forfeit the property interest that is the source of the conflict. A transaction affected by a substantial conflict between personal and fiduciary interests includes any sale, encumbrance, or other transaction involving the conservatorship estate entered into by the conservator or the spouse, descendant, agent, or lawyer of the conservator or a corporation or other enterprise in which the conservator has a significant beneficial interest.\footnote{O.C.G.A. §29-5-24.}

A conservator, solely by reason of the conservator-ward relationship, is not personally liable for the ward’s expenses or the expenses of those whom the ward is obligated to support, contracts entered into in the conservator’s fiduciary capacity, the acts or omissions of the ward, obligations arising from ownership or control of property of the ward, or other acts or omissions occurring in the course of the conservatorship.\footnote{O.C.G.A. §29-5-22(c).}

Unless the court’s order provides otherwise, a conservator may, without court order:

1. Make reasonable disbursements from the annual income or, if applicable, from the annual budget amount that has been approved by the court pursuant to Code Section 29-
5-30 for the support, care, education, health, and welfare of the ward and those persons whom the ward is obligated to support;

2. Enter into contracts for labor or services upon such terms as the conservator may deem best, but only to the extent that the annual compensation payable under such contracts when combined with other anticipated disbursements does not exceed the amount of the annual income or, if applicable, the annual budget amount which has been approved by the court pursuant to Code Section 29-5-30;

3. Borrow money for one year or less and bind the ward or the ward’s property, but only if the amount of the annual payments when combined with other anticipated disbursements does not exceed the amount of the annual income or, if applicable, the annual budget amount that has been approved by the court pursuant to Code Section 29-5-30 and only if done for purposes of paying the ward’s debts, providing for the support, care, education, health, or welfare of the ward, or repairing the ward’s dwelling place;

4. Receive, collect, and hold the ward’s property, additions to the ward’s property, and all related records;

5. Retain the property received by the conservator upon the creation of the conservatorship in accordance with the provisions of Code Section 29-5-31;

6. Bring, defend, or participate in legal, equitable, or administrative proceedings, including alternative dispute resolution, as are appropriate for the support, care, education, health, or welfare of the ward in the name of or on behalf of the ward;

7. Fulfill, as far as possible, or, to the extent permitted by law, disaffirm the executory contracts and comply with the executed contracts of the ward;\(^{134}\)

8. Revoke a revocable trust set up by the ward or exercise such other powers of revocation, amendment, or withdrawal that are exercisable by the ward, but only if the governing instrument allows a conservator to revoke the trust or exercise the powers;

9. Examine the will and any other estate planning documents of the ward;

10. Appoint an attorney-in-fact to act for the conservator when the conservator is unable to act; provided, however, that the conservator and the conservator’s sureties will be bound for the acts of the attorney as if the acts were the personal acts of the conservator;

\(^{134}\) An “executory contract” is one in which something remains to be done by one or more parties. An “executed contract” is one in which all the parties thereto have performed all the obligations which they have originally assumed. O.C.G.A. §13-1-2. It is assumed that the phrase “comply with the executed contracts of the ward” is intended to refer to binding contracts where there is an ongoing obligation, such as a lease.
11. Invest the ward’s property pursuant to the provisions of Code Sections 29-5-32 and 29-5-33;

12. Sell the ward’s stocks and bonds pursuant to the provisions of subsection (b) of Code Section 29-5-35;

13. Compromise any contested or doubtful claim for or against the ward if the proposed gross settlement as defined in Code Section 29-3-3 is in the amount of $15,000.00 or less; and

14. Release the debtor and compromise all debts in the amount of $15,000.00 or less when the collection of the debt is doubtful.\textsuperscript{135}

In the petition for appointment, or at any time during the conservatorship, the conservator may request the continuing power:

1. To invest the ward’s property in investments other than those authorized in Code Section 29-5-32, pursuant to the provisions of Code Section 29-5-34, without further court approval of any investment;\textsuperscript{136}

2. Sell, rent, lease, exchange, or otherwise dispose of any or all of the ward’s real or personal property without complying with the provisions of Code Section 29-5-35, other than the provisions for additional bond set forth in subsection (e) of Code Section 2-5-35;\textsuperscript{137} or

3. Continue the operation of any farm or business in which the ward has an interest.

Unless the request for the powers is made in the petition for the initial appointment of the conservator, the judge must order such hearing as the court deems appropriate. Notice must be given by personal service to the ward and a guardian-ad-litem appointed for the ward. Notice must be given by first-class mail to the guardian of the ward, if any; the surety on the conservator’s bond; and to the following relatives of the ward whose whereabouts are known: (1) The spouse of the ward and all adult children of the ward; or (2) if there is no adult child, then at least adults in the following order of priority: (a) lineal descendents of the ward; (b) parents and siblings of the ward, and (c) friends of the ward.\textsuperscript{138}

\textsuperscript{135} O.C.G.A. §29-5-23(a)
\textsuperscript{136} Note that this gives the conservator blanket authority to make any investments without court approval.
\textsuperscript{137} Note that this gives the conservator blanket authority to make any sales of property without court approval.
\textsuperscript{138} O.C.G.A. §29-5-23(b).
1. To make disbursements that exceed by no more than a specific amount the annual income or, if applicable, the annual budget amount which has been approved by the court pursuant to Code Section 29-5-30 for the support, care, education, health, and welfare of the ward;

2. To enter into contracts for labor or services for which the compensation payable under the contracts when combined with other disbursements from the estate exceeds the annual income or, if applicable, the annual budget amount which has been approved by the court pursuant to Code Section 29-5-30;

3. To make specific investments of the ward’s property that do not comply with the provisions of Code Section 29-5-32, pursuant to the provisions of Code Section 29-5-34;\(^{139}\)

4. To sell, rent, lease, exchange, or otherwise dispose of specific items of the ward’s real or personal property without complying with the provisions of Code Section 29-5-35 other than the provisions for additional bond set forth in subsection (e) of Code Section 29-5-35;

5. To compromise a contested or doubtful claim for or against the ward if the proposed gross settlement as defined in Code Section 29-3-3 is more than the amount of $15,000.00;

6. To release the debtor and compromise a debt which is in the amount of more than $15,000.00 when the collection of the debt is doubtful;

7. To use the ward’s property to build a dwelling for the ward or to make additions or renovations to the ward’s existing home;

8. To establish or add property to a trust for the benefit of the ward; provided, however, that the trust must provide that the ward may revoke the trust at any time after reaching the age of majority and, unless otherwise provided by court order pursuant to Code Section 29-5-36, the trust must terminate upon the ward’s death and any property remaining in the trust must be paid to the ward’s estate;

9. To disclaim or renounce any property or interest in property of the ward in accordance with the provisions of Code Section 53-1-20;

10. To engage in estate planning for the ward pursuant to the provisions of Code Section 29-5-36; and

11. To perform such other acts as may be in the best interest of the ward.\(^{140}\)

\(^{139}\) Note: Unlike the blanket authority, this requires a specification of the actual investments in which the conservator wishes to invest the ward’s funds.

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In granting any of the powers on a continuing or case-by-case basis as described immediately above, the judge must consider the views of the guardian, if available, or, if there is no guardian, of others who have custody of the ward. In performing any of the acts described in this Code section, the conservator must endeavor to cooperate with the guardian or, if there is no guardian, with others who have custody of the ward.\(^\text{141}\)

### 14.3 Collection and Retention of Assets by Conservator

After qualification, one of the first duties of the conservator is to ascertain and collect all of the assets belonging to the ward.\(^\text{142}\) The Letters of Conservatorship evidence the conservator’s authority to demand and receive funds or property due to the ward or to which the ward is entitled to possession and enjoyment. The conservator may need to provide certified copies of the Letters of Conservatorship to the person or entity against whom the claim or demand is being asserted. The conservator should transfer all funds on deposit and all stocks or bonds or corporate securities into the name of the conservator for the benefit of the ward. All such accounts must be properly titled and be registered in the Social Security number of the ward for the protection of the property and the ward. A conservator should collect the proceeds of any insurance policies payable to the ward and should institute any legal action necessary to secure and protect the rights of the ward.

A conservator who represents more than one ward must keep separate accounts for each of them, and, in an accounting with the wards, the conservator's accounts must disclose activities with each ward’s funds and property separately. If accounts are co-mingled, the conservator must prove each charge to have been made for one particular ward.\(^\text{143}\)

A conservator may retain the property received by the conservator on the creation of the conservatorship, including, in the case of a corporate fiduciary, stock or other securities of its own issue, even though the property may not otherwise be a legal investment and will not be liable for such retention, except for gross neglect. In the case of corporate securities, the conservator may likewise retain any securities into which the securities originally received may be converted or which may be derived therefrom as a result of merger, consolidation, stock dividends, splits, liquidations, and similar procedures; and the conservator may exercise by purchase or otherwise any rights, warrants, or conversion features attaching to any such securities.\(^\text{144}\)

It is the duty of the conservator to collect all assets of the ward of which the conservator has

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\(^\text{140}\) O.C.G.A. §29-5-23(c).

\(^\text{141}\) O.C.G.A. §29-5-23(d) and (e).

\(^\text{142}\) Note that a guardian also has some duties with regard to property. See Section 13.3 above.

\(^\text{143}\) O.C.G.A. §29-5-31(a).
knowledge. The conservator can be held liable for breach of fiduciary duty, including a failure to take all reasonable steps to marshal and collect all funds, assets and property of the ward, using the same degree of diligence he/she would use in the management of his/her own affairs.

14.4 Inventory and Asset Management Plan [GPCSF 58]

Within two months of appointment, the conservator must file with the court and provide a copy to the ward’s guardian, if any, an inventory of the ward’s property and a plan for managing, expending, and distributing the property. The inventory must describe all the assets and liabilities of the ward, shall include a list of all the personal and real property owned by the ward, and describe how the property is titled. When the inventory is filed, the conservator must swear or affirm, in addition to the usual oath on making returns, that the inventory contains a true statement of all the assets and liabilities of the ward which are known to the conservator.

The plan for managing, expending, and distributing the ward’s property (Asset Management Plan or “AMP”) must be based on the actual needs of the ward and take into consideration the best interest of the ward. The conservator must include in the AMP projections for expenses and resources and any proposals to change the title of any of the assets in the conservatorship estate. The AMP and any proposed budget for the expenditure of funds in excess of the anticipated income from the property must be approved by the judge of the probate court.

With each annual return filed thereafter, the conservator must file with the court and provide to the ward’s or ward’s guardian, if any, an updated inventory and AMP.

14.5 Development of Estate Plan for Ward

After notice to interested parties and other persons as the court may direct, and upon a showing that (1) the ward will probably remain in need of a conservator throughout the ward's lifetime and (2) that it is in the best interest of the ward, the judge of the probate court may order the conservator to apply such principal or income of the ward as is not required for the support, care, education, health, and welfare of the ward and such individuals who are entitled to support from the ward toward the establishment or continuation of an estate plan for the ward and make transfers of the ward's personal or real property, outright or in trust; provided, that the judge finds that a competent, reasonable person in the ward's circumstances would make such transfers, and there is no evidence that the ward, if not incapacitated, would not adopt such an estate plan.

Prior to authorizing such transfers, the judge shall appoint a guardian-ad-litem for the ward and

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147 O.C.G.A. §29-5-30.
shall consider:

1. The composition and value of the entire estate of the ward, other known sources of support available to the ward and individuals who are entitled to be supported by the ward, and the income produced thereby;

2. The probable expenses for the support, care, education, health, or welfare of the ward and such individuals who are entitled to be supported by the ward for the remainder of the ward's lifetime in the standard of living to which the ward and the other individuals have become accustomed;

3. The identity of the proposed transferees and, in particular, whether they are natural objects of the ward's bounty by relationship or prior behavior of the ward;

4. The purpose and estate planning benefit to be derived by the transfer as well as the possible harm to any interested party; and

5. Any previous history or predisposition toward making similar transfers by the ward.\(^{148}\)

### 14.6 Support of the Ward and Encroachments

Conservators are authorized to make reasonable disbursements from the annual income or, if applicable, from the annual budget amount that has been approved by the probate court pursuant to Code Sections 29-5-30 for the support, care, education, health and welfare of the ward and those persons who are entitled to be supported by the ward.\(^{149}\)

Conservators may not expend in excess of the annual income without authority to do so from the judge of the probate court. Authority to expend in excess of the annual income may be sought (1) in the original petition for conservatorship, (2) by the filing thereafter, on a case-by-case basis, of a petition for leave to encroach \[GPCSF 20\],\(^{150}\) or (3) by proposing a budget in excess of the anticipated annual income in an AMP filed pursuant to Code Sections 29-5-30. Whenever such authority is sought, a guardian-ad-litem must be appointed for the ward, and the judge of the probate court may, if deemed appropriate, hold a hearing.\(^{151}\) An AMP proposing a budget in excess of the anticipated annual income must be approved by the judge in order for the conservator to gain the authority in that manner.\(^{152}\)

The discretion given to the judge of the probate court with regard to expenditures of the assets of wards, especially those in excess of current income, is quite broad, and the judge may refuse to

\(^{148}\) O.C.G.A. §29-5-36

\(^{149}\) O.C.G.A. §29-5-23(a)(1).

\(^{150}\) O.C.G.A. §29-5-23(c)(1).

\(^{151}\) O.C.G.A. §29-5-23(c).

\(^{152}\) O.C.G.A. §29-5-30(c).
approve returns which reflect disbursements not authorized by law or court order.\textsuperscript{153}

\section*{14.7 Sales and Other Dispositions/Uses of Property Generally [GPCSF 14]}

A conservator may petition the court to sell, rent, lease, exchange, or otherwise dispose of property of a ward, whether real or personal or mixed. The petition must set forth the property involved and the interests therein, the specific purpose of the transaction, the proposed price, the anticipated net proceeds of the sale, and all other terms or conditions proposed for the transaction and that the proposed transaction is in the best interest of the ward. The judge of the probate court must appoint a guardian-ad-litem for the ward, and the petition and notice must be served personally on the ward and the guardian-ad-litem.\textsuperscript{154} Note that publication is not required unless ordered by the judge.

The judge of the probate court may direct any additional service or notice or extend the time to respond with respect to any proceedings covered by Title 29 as the judge may determine to be proper in the interest of due process and reasonable opportunity for any party or interest to be heard.\textsuperscript{155}

If no written objection is filed by a person entitled to notice within 30 days following the mailing of notice\textsuperscript{156} or service upon the guardian-ad-litem, the judge must order the sale summarily in the manner and under the terms petitioned; provided, however, that if real property is to be converted to personal property, the court must order the conservator to post additional bond to cover the amount of the anticipated net proceeds of the sale prior to the closing of the sale. If an objection is filed, the judge must hear the matter and grant or deny the petition for sale or make such other order as is in the best interest of the ward, which may require the sale to be private or at public auction, including confirmation of the sale by the court or otherwise. An appeal will lie as in other cases.\textsuperscript{157}

A conservator must make a full return to the court within 30 days of every sale, specifying the property sold, the purchasers, and the amounts received, together with the terms of the sale.\textsuperscript{158} The recital in the conservator’s deed of a compliance with legal provisions is prima-facie evidence of the facts recited.\textsuperscript{159} Where a conservator sells real property under the provisions of this Code section, liens thereon may be divested and transferred to the proceeds of the sale as a condition of the sale.\textsuperscript{160}

The Code Section seems to contemplate, and it is probably the best practice, to require that a contract for sale, exchange, or other disposition which has been made subject to court approval. If a

\textsuperscript{153} Id.
\textsuperscript{154} O.C.G.A. §§ 29-5-35(c) and (d). The GAL may not waive service on the ward in this case, there being a specific requirement that the ward be personally served. See O.C.G.A. §29-9-2(a).
\textsuperscript{155} O.C.G.A. § 29-9-7.
\textsuperscript{156} It is unclear to whom notice might be sent by mail unless this reference is intended to cover those whom the judge might order to be so served in addition to the ward and GAL, both of whom must be served personally.
\textsuperscript{157} O.C.G.A. § 29-5-35(e).
\textsuperscript{158} O.C.G.A. § 29-5-35(f).
\textsuperscript{159} O.C.G.A. § 29-5-35(g).
\textsuperscript{160} O.C.G.A. § 29-5-35(h).
conservator lists the property with a broker, the listing contract and any sales contract should specify that any sale is subject to court approval. A copy of the contract should be attached to the petition. However, in unusual circumstances, it certainly seems to be within the authority of the court to approve a private sale at not less than a certain price and to specify the terms (usually cash, so that the credit of the particular purchaser will not be an issue) even before there is a contract.

An emergency or temporary substitute conservator is authorized to petition the court for leave to sell or otherwise deal with the property of the estate only if good cause is shown for not waiting until a different type of conservatorship is created or the conservatorship is terminated.161

14.8 Sales of Perishable Property  [GPCSF 15]

A conservator may sell perishable property of the ward, property of the ward that is liable to deteriorate from keeping, or property of the ward that is expensive to keep as early as practicable and in such manner as the judge of the probate court determines is in the best interest of the ward, after such notice and opportunity for hearing, if any, as the judge deems practicable under the circumstances.162 Items of tangible personal property, such as furniture and automobiles, are usually sold under this procedure, as being expensive to keep, maintain or store.

A conservator must make report of every sale to the court within 30 days after each sale, specifying the property sold, the purchasers, the amounts received, and the terms of the sale.163

14.9 Sales of Listed Stocks and Bonds

Unless inconsistent with an existing court order, a conservator may sell stocks or bonds without court order,164 subject to the following requirements:

1. The securities must be listed or admitted to unlisted trading privileges on a stock exchange or be quoted regularly in any newspaper having a general circulation in Georgia.
2. The sales price cannot be less than the stock exchange bid price or the published bid price at the time of sale.
3. Reasonable brokerage commissions, not in excess of those customarily charged by stock exchange members, may be paid.165

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161 O.C.G.A. § 29-5-35(i).
162 O.C.G.A. § 29-5-35(a).
163 O.C.G.A. §29-5-35(f).
165 O.C.G.A. §29-5-35(b).
A conservator must a report of every sale to the court within 30 days after each sale, specifying the property sold, the purchasers, the amounts received, and the terms of the sale.\textsuperscript{166}

\subsection*{14.10 Investments}

A conservator is authorized to invest funds of the ward, without court order,\textsuperscript{167} in the following and will not otherwise be liable for such investment, except in the case of gross neglect:

1. Bonds issued by any county or municipality of this state which have been validated as required by law for the validation of county and municipal bonds;

2. Bonds issued by any county board of education under Subpart 1 of Part 3 of Article 9 of Chapter 2 of Title 20 for the purpose of building and equipping schoolhouses, which bonds have been validated and confirmed as required under Part 1 of Article 2 of Chapter 82 of Title 36;

3. Bonds and other securities issued by this state or by the Board of Regents of the University System of Georgia;

4. Bonds or other obligations issued by the United States government and bonds of any corporation created by an act of Congress, the bonds of which are guaranteed by the United States government;

5. Interest-bearing deposits in any financial institution located in this state, to the extent the deposits are insured by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or comparable insurance;

6. Bonds or other obligations issued by a housing authority pursuant to Article 1 of Chapter 3 of Title 8 or issued by any public housing authority or agency of the United States when such bonds or other obligations are secured by a pledge of annual contributions to be paid by the United States government or any agency thereof, as authorized by Code Section 8-3-81;

7. Bonds or other obligations issued by a housing authority in connection with a redevelopment program pursuant to Chapter 4 of Title 8, as authorized by Code Section 8-4-11;

8. Bonds issued by the Georgia Education Authority, pursuant to Part 3 of Article 11 of Chapter 2 of Title 20, as authorized by Code Section 20-2-570;

9. Bonds issued by the Georgia Building Authority (Hospital), pursuant to Article 2 of Chapter 7 of Title 31, as authorized by Code Section 31-7-27;

\textsuperscript{166} O.C.G.A. §29-5-35(f).
\textsuperscript{167} O.C.G.A. §29-5-22(a)(11).
10. Bonds issued by the Georgia Highway Authority, pursuant to Code Section 32-10-30, as authorized by Code Section 32-10-45;

11. Bonds or other obligations issued by a municipality or county pursuant to Chapter 61 of Title 36 or by any urban redevelopment agency or housing authority vested with urban redevelopment project powers under Code Section 36-61-17, provided that such bonds or other obligations are secured by an agreement between the issuer and the federal government in accordance with Code Section 36-61-13, as authorized by Code Section 36-61-13;

12. Bonds issued by the Georgia Building Authority (Penal), pursuant to Chapter 3 of Title 42, as authorized by Code Section 42-3-21;

13. Farm loan bonds issued by federal land banks or joint-stock land banks under the Federal Farm Loan Act, 12 U.S.C. Sections 2001, et seq., and any notes, bonds, debentures, or other similar obligations, consolidated or otherwise, issued by farm credit institutions pursuant to the Farm Credit Act of 1971, 12 U.S.C. Sections 2001, et seq., as authorized by Code Section 53-12-286;

14. Real property loans, as authorized by Code Section 53-12-284:
   (A) Which are not in default;
   (B) Which are secured by mortgages or deeds to secure debt conveying a first security title to improve real property;
   (C) Which are insured pursuant to the National Housing Act, 12 U.S.C. Sections 1701, et seq.; and
   (D) With respect to which loans, on or after default, pursuant to such insurance, debentures in at least the full amount of unpaid principal are issuable, which debentures are fully and unconditionally guaranteed both as to principal and interest by the United States; and

15. Any other investments which are designated under the laws of this state as lawful or legal investments for guardians or conservators.*

Whenever by law or by court order the conservator is authorized, permitted, required, or directed to invest funds in direct and general obligations of the United States government, obligations unconditionally guaranteed by the United States government, or obligations of the agencies of the United States government enumerated in Code Section 29-3-32, the conservator may invest in and hold such obligations either directly or in the form of securities or other interests in any open-end or closed-end management type investment company or investment trust registered under the Investment

* O.C.G.A. §29-5-32.

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168 O.C.G.A. §29-5-32.
Company Act of 1940, 15 U.S.C. Sections 80a-1, et seq., so long as:

1. The portfolio of such investment company or investment trust is limited to such obligations and repurchase agreements fully collateralized by such obligations;
2. Such investment company or investment trust takes delivery of such collateral, either directly or through an authorized custodian; and
3. Such investment company or investment trust is operated so as to provide a constant net asset value or price per share.

The authority granted in this Code section applies notwithstanding that a corporate fiduciary or an affiliate of the corporate fiduciary provides services to the investment company or investment trust as investment adviser, custodian, transfer agent, registrar, sponsor, distributor, manager, or otherwise and receives compensation for such services.¹⁶⁹

NOTE: The complicated language above refers to what are commonly called “mutual funds.” To be permissible investments, the mutual funds must be invested only in U. S. government backed issues.

After receiving court approval as required in subsection (b) or (c) of Code Section 29-5-23, in making investments and in acquiring and retaining those investments and managing property of the ward, the conservator must exercise the judgment and care, under the circumstances then prevailing, that a prudent person acting in a like capacity and familiar with such matters would use to attain the purposes of the account. In making such investment decisions, a conservator may consider the general economic conditions, the anticipated tax consequences of the investments, the anticipated duration of the account, and the needs of the ward or those entitled to support from the ward.¹⁷⁰

NOTE: This is what is commonly referred to as the “Prudent Investor Rule.”

Within the limitations of the standard set forth above and with prior approval by the court in accordance with Code Section 29-3-22, a conservator is authorized to acquire and retain every kind of property, including real, personal, or mixed, and every kind of investment, specifically including, but not by way of limitation, bonds, debentures and other corporate obligations, and stocks, preferred or common, including the securities of or other interests in any open-end or closed-end management investments company or investment trust registered under the Investment Company Act of 1940, 15 U.S.C. Sections 80a-1, et seq. [NOTE: Again, this is a reference to “mutual funds”; however, these funds are not restricted as to the types of investments held in the funds.] The propriety of an investment is to be determined by what the conservator knew or should have known at the time of the

¹⁶⁹ O.C.G.A. §29-5-33.
¹⁷⁰ O.C.G.A. §29-5-34(a).
decision about the inherent nature and expected performance of a particular investment, including probable yield, the attributes of the portfolio, the general economy, and the needs of the ward or ward as they existed at the time of the decision. Any determination of liability for investment performance must consider not only the performance of a particular investment but also the performance of the ward’s portfolio as a whole. Within the limitations of such standard, a conservator may retain property properly acquired without limitation as to time and without regard to its suitability for original purchase.171

A financial institution, trust company, national or state bank, savings bank, or savings and loan association described in Code Section 7-1-242 serving as a conservator is not precluded from acquiring and retaining securities of or other interests in an investment company or investment trust because the bank or trust company or an affiliate provides services to the investment company or investment trust as investment adviser, custodian, transfer agent, registrar, sponsor, distributor, manager, or otherwise and receives compensation for such services. 172

14.11 Compromise of Claims by Conservators [GPCSF 19]

Unless inconsistent with the terms of any court order relating to the conservatorship, a conservator, without court order, may compromise any contested or doubtful claim for or against the ward if the proposed gross settlement as defined in Code Section 29-3-3 is in the amount of $15,000.00 or less.173 At the time of the appointment of the conservator or at any time thereafter, and after appointment of a guardian-ad-litem for the ward and such hearing and notice as the court deems appropriate, the judge of the probate court may grant the conservator, on a case by case basis, the power to compromise a contested or doubtful claim for or against the ward if the proposed gross settlement as defined in Code Section 29-3-3, is more than $15,000.00.174 The term “gross settlement” means the present value of (1) all amounts paid or to be paid in settlement of the claim, including cash, medical expenses, expenses of litigation, attorney’s fees, and (2) any amounts paid to purchase an annuity or other similar financial arrangement.175

The issue of the amount of attorney’s fees to be awarded (usually pursuant to a contingency fee contract) is a part and parcel of the total compromise being presented to the court for approval. The judge of the probate court has jurisdiction and authority to review the attorneys’ fees, costs and other amounts being paid from the gross settlement, and the court may reduce or deny any fees and costs not

171 O.C.G.A. §29-5-34(b).
172 O.C.G.A. §29-5-34(c).
173 O.C.G.A §29-5-23(a)(13).
174 O.C.G.A §29-5-23(c)(5).
175 O.C.G.A §29-3-3(a).
14.12 Compromise of Debts

Unless inconsistent with the order of appointment, the conservator is vested with the power, without court order, to release the debtor and compromise all debts in the amount of $15,000.00 or less when the collection of the debt is doubtful.\(^{177}\)

At the time of the appointment of the conservator, or at any time thereafter, and after appointment of a guardian-ad-litem for the ward and after such notice and hearing as the court deems appropriate, the power to release the debtor and compromise all debts for which the collection is doubtful when the amount of the debt is more than $15,000.00 may be specifically granted to the conservator on a case-by-case basis.\(^{178}\)

14.13 Review and Modification of Conservatorships

14.13.1 Review of Ward’s Condition and the Conservator’s Service

Upon the petition of any interested person, including the ward, or upon the court's own motion, the judge of the probate court may conduct a judicial inquiry into whether the ward is being denied a right or privilege provided for by Chapter 4 of Title 29 and may issue appropriate orders. Except for good cause shown, the judge shall order that notice of the inquiry be given, in whatever form the judge deems appropriate, to the ward, the guardian, the ward's attorney, if any, and the ward's conservator, if any. The judge, in his/her discretion, may appoint an attorney for the ward or a guardian-ad-litem, or both.\(^{179}\)

This procedure is available for the court to address any number of instances or actions that may occur during a guardianship. For example, a petition could be filed under this provision alleging that the conservator is acting contrary to the best interest of the ward or that the conservator in any manner is failing to properly care and provide for the ward. The authority to issue “appropriate orders” is quite broad, and the judge should be permitted under this provision to order such actions as may be in the best interest of the ward.

No petition alleging that the ward is being unjustly denied a right or privilege provided for by Chapter 4 of Title 29 shall be allowed by the court within two years after the denial or dismissal on the merits of a petition alleging that the ward is being unjustly denied substantially the same right or

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\(^{177}\) O.C.G.A. §29-5-23(a)(13).
\(^{178}\) O.C.G.A. §29-5-23(c)(6).
\(^{179}\) O.C.G.A. §29-4-40.
privilege unless the petitioner shows a significant change in the condition or circumstances of the ward.

14.13.2 Modifications of the Conservatorship

Upon the petition of any interested person, including the ward, or upon the court's own motion, the court may modify the conservatorship by adjusting the duties or powers of the conservator, as defined in Code Sections 29-5-22 and 29-5-23, or the powers of the ward, as defined in Code Section 29-5-20, or by making other appropriate adjustments to reflect the extent of the current capacity of the ward or other circumstances of the conservatorship. Except for good cause shown, the judge shall order that notice of the petition be given, in whatever form the judge deems appropriate, to the ward, the guardian, the ward's attorney, and the ward's conservator, if any. In any proceeding that would expand or increase the powers of the guardian or further restrict the rights of the ward, the judge shall appoint an attorney for the ward. In all other cases, the judge, in his/her discretion, may appoint legal counsel for the ward or a guardian-ad-litem, or both.\footnote{O.C.G.A. §29-4-41(a)}

If the petition for modification alleges a significant change in the capacity of the ward, it must be supported either by the affidavits of two persons who have knowledge of the ward, one of whom may be the petitioner, or of a physician, psychologist, or licensed clinical social worker, setting forth the supporting facts and determinations. If, after reviewing the petition and the affidavits, the judge of the probate court determines that there is no probable cause to believe that there has been a significant change in the capacity of the ward, the judge shall dismiss the petition.

If the petition is not dismissed, the court shall order that an evaluation be conducted, in accordance with the provisions of subsection (d) of Code Section 29-4-11. If, after reviewing the evaluation report, the judge finds that there is no probable cause to believe that there has been a significant change in the capacity of the ward, the judge shall dismiss the petition. If the petition is not dismissed, the judge shall schedule a hearing, with notice as the judge deems appropriate.\footnote{O.C.G.A. §29-4-41(b)}

If the petition for modification does not allege a significant change in the capacity of the ward, the judge in his/her discretion may modify the guardianship upon a showing that the modification is in the ward's best interest; provided, however, that the court may order compliance with any of the provisions above prior to granting the petition for modification.\footnote{O.C.G.A. §29-4-41(c)}

In any proceeding that would expand or increase the powers of the guardian or further restrict the powers of the ward, the burden is on the petitioner to show by clear and convincing evidence that the modification is in the ward's best interest. In any proceeding that would restrict the powers of the
guardian or restore powers to the ward, the burden is on the petitioner to show by a preponderance of the evidence that the modification is in the ward's best interest.\textsuperscript{183}

No petition for modification shall be allowed by the court within two years after the denial or dismissal on the merits of a petition for substantially the same modification unless the petitioner shows a significant change in the condition or circumstances of the ward.\textsuperscript{184}

15. COMPENSATION AND EXPENSES

15.1 Guardians

At the time of the appointment of a guardian or at any time thereafter, reasonable compensation from the estate of the ward for services rendered to the ward may be specifically granted by the judge of the probate court to the guardian. If applied for after the appointment, reasonable compensation may be granted after such notice, if any, as the judge determines, provided that no disposition of a ward’s or ward’s property may be made without the involvement of a conservator, if any. Before granting compensation to the guardian, the judge must appoint a guardian-ad-litem for the ward and must give notice to any natural guardian of a ward. The judge must consider the property rights of the ward and the views of the conservator, if available, or, if there is no conservator, of others who have custody of the ward’s property. The guardian must act in coordination and cooperation with the conservator or, if there is no conservator, with others who have custody of the ward’s or the ward’s property.\textsuperscript{185}

15.2 Conservators

A conservator, other than a temporary substitute conservator, is entitled to compensation for services as follows:

1. Two and one-half percent commission on all sums of money received by the conservator on account of the estate, except on money loaned by and repaid to the conservator, and two and one-half percent commission on all sums paid out by the conservator.\textsuperscript{186}

2. An additional commission equal to one-half of 1 percent computed on the market value of the estate as of the last day of the reporting period. This commission shall be proportionately reduced for any reporting period of less than 12 months.

\textsuperscript{183}O.C.G.A. §29-4-41(d).
\textsuperscript{184}O.C.G.A. §29-4-41(e).
\textsuperscript{185}O.C.G.A. §29-4-23(b),(c),(d) and (e).
\textsuperscript{186}Note, however, that a commission may not be taken on a commission paid to the conservator by the conservator. O.C.G.A. §29-50(d).
3. Ten percent commission on the amount of interest made if, during the course of the conservatorship, the conservator receives interest on money loaned by the conservator in that capacity and includes the same on the return to the court so as to become chargeable with the interest as a part of the corpus of the estate.

4. Reasonable compensation, as determined in the discretion of the judge and after such notice, if any, as the court directs, for the delivery over of property in kind, not exceeding 3 percent of the appraised value and, in cases where there has been no appraisal, not over 3 percent of the fair value as found by the judge, irrespective of whether delivery over in kind is made pursuant to proceedings for that purpose and irrespective of whether the property, except money, is tangible or intangible or personal or real; and

5. In the discretion of the court, compensation for working land for the benefit of the ward or parties in interest, but not to exceed 10 percent of the annual income of the managed property.\(^{187}\)

A conservator may petition the court for compensation that is greater than that allowed under Code Section 29-5-50. Service of notice of the petition for extra compensation must be made to the ward and to a guardian-ad-litem appointed for the ward. Service must be made in the manner described in Chapter 9 of Title 29 and must direct the parties served to file any written objections to the petition for extra compensation with the court within ten days. After hearing any objection filed by or on behalf of the ward, the judge of the probate court may allow such extra compensation as deemed reasonable. The allowance of extra compensation is conclusive as to all parties in interest.\(^{188}\)

\(^{187}\) O.C.G.A. §29-5-50(a).

\(^{188}\) O.C.G.A. §29-5-52.
## Example of Computation of Standard Commissions

A conservator began serving at the beginning of 2008. During the first year, the conservator took control of all accounts of the ward, totaling $460,000; received annuity payments of $1,000 per month, for a total of $12,000; received Social Security benefits of $1,150.00 for 8 months and $1,198.00 for 4 months; and received interest income for the year of $5,681. The conservator paid during the year: $3,150 for the bond; itemized expenditures for the ward’s maintenance and support totaling $34,612; court costs of $41.50 for the filing and recording of the Inventory and Asset Management Plan; and $950.00 in attorney’s fees. The conservator is ready to compute and pay out the commissions on December 31, 2008 before the year ends. The computations would be:

<table>
<thead>
<tr>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total non-interest receipts:</td>
</tr>
<tr>
<td>2.5% of non-interest receipts (.025 X 485,992)</td>
</tr>
<tr>
<td>10% of interest received (.10 X 5681)</td>
</tr>
<tr>
<td>Total commissions on receipts and interest</td>
</tr>
<tr>
<td>Total expenditures BEFORE the commissions</td>
</tr>
<tr>
<td>2.5% of expenditures (.025 X 38,753.50)</td>
</tr>
<tr>
<td>Commissions on receipts and interest</td>
</tr>
<tr>
<td>Commissions on expenditures</td>
</tr>
<tr>
<td>Total</td>
</tr>
</tbody>
</table>

The conservator is also entitled to .5% of the total balance in the conservatorship on December 31, 2008. Receipts for the year were $31,673.00; expenditures were $38,753.50 plus the commissions of $13,686.74, for total expenditures of $52,439.94; the balance on 12/31 is $439,233.06 (491,673.00 – 52,439.94).

<table>
<thead>
<tr>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commission on 12/31 balance (.005 X 439,233.06)</td>
</tr>
<tr>
<td>Commissions on receipts and expenditures above</td>
</tr>
<tr>
<td>Gross Commissions for 2008</td>
</tr>
</tbody>
</table>

Therefore, the conservator may draw $15,882.91 from the account(s) as commissions. **NOTE:** If the commissions are not paid until January, 2009, the commissions on receipts and expenditures would remain the same. However, in that case, the 12/31 balance would be $452,919.80 (balance before commissions), and the commission on that balance would be $2,264.60.

In either case, the total commissions must be excluded from all other expenditures when computing the commissions, since a commission may not be paid on a commission.

Any conservator who is a domiciliary of this state may receive compensation for services, as specified below, from a corporation or other business enterprise where the estate of the ward owns an interest in the corporation or other business enterprise, provided that:

1. The services furnished by the conservator to the corporation or other business enterprise are of a managerial, executive, or business advisory nature;
2. The compensation received for the services is reasonable; and
3. The services are performed and the conservator is paid pursuant to a contract executed by the conservator and the corporation or business enterprise, which contract is approved by a majority of those members of the board of directors or other similar governing authority of the corporation or business enterprise who are not officers or employees of the conservator and are not related to the conservator and provided the contract is approved by the court of the county which has jurisdiction over the conservatorship.\textsuperscript{189}

Any conservator receiving compensation from a corporation or other business enterprise for services to it as described above, may not receive extra compensation in respect to such services as provided in Code section 29-5-52; provided, however, that nothing in Code section 29-5-53(a) prohibits the receipt by the conservator of extra compensation for services rendered in respect to other assets or matters involving the estate,\textsuperscript{190} or prohibits the receipt by conservators of normal commissions and compensation for the usual services performed by conservators pursuant to law. The purpose of Code section 29-5-53(a) is to enable additional compensation to be paid to a conservator for business management and advisory services to corporations and business enterprises pursuant to a contract, without the necessity of petitioning for extra compensation pursuant to Code section 29-5-52.\textsuperscript{191}

Whenever any portion of the dividends, interest, or rents payable to a conservator is required by law of the United States or other governmental unit to be withheld by the person paying the same for income tax purposes, the amount withheld is deemed to have been collected by the conservator.\textsuperscript{192} In other words, the commission is based on the gross amount before taxes even if the axes were withheld.

Conservators are allowed reasonable expenses incurred in the administration of the estate, including without limitation, expenses for travel, employing counsel and other agents, and the expenses and premiums incurred in securing a bond. Such reasonable expenses must be determined after such notice, if any, as the judge directs.\textsuperscript{193} The conservator’s commissions are part of the expense of administering the estate and may be charged against the corpus of the estate as well as the income of the estate.\textsuperscript{194}

\textsuperscript{189} O.C.G.A. §29-5-53(a).
\textsuperscript{190} O.C.G.A. §29-5-53(b).
\textsuperscript{191} O.C.G.A. §29-5-53(c) and (d).
\textsuperscript{192} O.C.G.A. §29-5-50(b).
\textsuperscript{193} The approval of a return showing reimbursement of expenses itemized in the return should be a sufficient order approving same.
\textsuperscript{194} O.C.G.A. §29-5-51.
15.3 Multiple, Successive, and Temporary Substitute Conservators

If there is more than one conservator serving simultaneously, the division of the compensation allowed them shall be according to the services rendered by each conservator.

Where some or all of the estate passes through the hands of several conservators by reason of the death, removal, or resignation of the first or any prior qualified conservator or otherwise, the estate will not be subject to charges for commission of each successive conservator holding and receiving in the same right; instead, commissions for receiving the estate will be paid to the first conservator who receives the property for the benefit of the estate (or that person’s representative), and commissions for paying out will be paid to the conservator who actually distributes the fund. No commissions will be paid for handing over the fund to a successor conservator. In other words, unless forfeited for some cause, the first conservator is entitled to commissions on funds actually received and paid out during that conservator’s term of service, except that no commission may be charged by the former conservator for transferring or surrendering the funds to the successor. Likewise, since a commission has already been charged for the original receipt of the funds by the first conservator, the successor conservator may not charge a commission for the receipt of those funds from the first conservator.

A temporary substitute conservator may apply to the judge of the probate court for reasonable compensation after notice to interested parties in compliance with Chapter 9 of Title 29. The judge must award reasonable compensation to a temporary substitute conservator and such compensation will be the only compensation or commission paid to the temporary substitute conservator for services performed in that capacity. For good cause, including but not limited to services performed and compensation awarded to a temporary substitute conservator, the judge may reduce the compensation otherwise due the conservator.

15.4 Forfeiture of Compensation

Conservators who fail to make annual returns as required by law forfeit all commissions for transactions during the year within which no return is made unless the judge of the probate court, upon cause shown, by special order entered on the record, relieves the forfeiture. The forfeiture for failure timely to file returns is automatic; however, the judge may allow the commissions if the circumstances warrant doing so. The approval of a return evidencing the late payment of commissions should be a sufficient order approving same.

195 O.C.G.A. §29-5-50(c).
196 O.C.G.A. §29-5-54.
197 O.C.G.A. §29-5-50(e).
15.5 Renunciation of Compensation

A conservator may renounce the right to all or any part of the compensation to which the conservator is entitled to under Code Section 29-5-50.\textsuperscript{198}

16. RETURNS AND REPORTS OF GUARDIANS AND CONSERVATORS; SANCTIONS

16.1 Reports of Guardians

The guardian of a ward must file a \textbf{personal status report} within two months after appointment and within two months after each anniversary date of appointment. The report must include:

1. A description of the ward’s general condition, changes since the last report, and needs;
2. All addresses of the ward during the reporting period and the living arrangements of the ward for all addresses;
3. A description of the amount and expenditure of any funds that were received by the guardian; and
4. Recommendations for any alteration in the guardianship order;\textsuperscript{199}

\textbf{NOTE}: There is no standard form for the personal status report. \textit{See Appendix A11-2 for a sample Personal Status Report form.}

The judge of the probate court may order a guardian to make any other reports to the court as may be determined to be in the best interest of the ward.\textsuperscript{200}

16.2 Returns and Reports of Conservators

16.2.1 Inventory and Asset Management Plan: \textit{See Section 14.4 above.}

16.2.2 Annual and Final Returns

Within 60 days after the anniversary of his appointment in each year, unless the reporting date has been changed by order of the judge of the probate court, every conservator is required to file with the court a verified return consisting of:

1. A statement of the receipts and expenditures on behalf of the estate during the year preceding such anniversary date;
2. An updated inventory consisting of a statement of the assets and liabilities;

\begin{footnotes}
\item[198] O.C.G.A. §29-5-50(f).
\item[199] O.C.G.A. §29-4-22(b)(9).
\item[200] O.C.G.A. §29-4-13(7).
\end{footnotes}
3. An updated plan for managing, expending, and distributing the property (Asset Management Plan), together with a note or memorandum of any other fact necessary to show the true condition of the estate; and

4. A statement of the current amount of bond.

The conservator must mail a copy of the return by first-class mail to the surety and the guardian, if any. If a ward has no guardian or if the guardian and the conservator are the same person, the conservator must mail a copy of the return by first-class mail to the ward. 201

Conservators are required to keep their accounts in a regular manner and to be ready always, when required, to support them with vouchers, including receipts for all funds coming into the hands of the conservator and for all expenditures made by the conservator. 202 An item not supported by a proper voucher may be disallowed in a return. The conservator's own receipt to himself/herself is not sufficient as a voucher but is merely a statement by the conservator in his/her own behalf, having no value as evidence. When the conservator is using funds of the ward for the support, education, and maintenance of the ward, he/she should present receipts showing payments for these purposes other than his own statement. If there is an objection to the return, the conservator has the burden of showing that the funds have been expended for the ward. However, in the absence of proper vouchers, a conservator may introduce oral evidence to prove such payments. 203

Each annual return should show the beginning and ending balance on hand both in cash and cash equivalents (deposits, accounts, certificates of deposit, money market accounts, etc.), as well as a detailed statement of all receipts and disbursements during the period covered by the accounting.

NOTE: The first return of a conservator must begin with a balance of zero. The conservator held nothing until the appointment and must account from that starting point forward.

All financial institutions in which funds of the ward are on deposit should be listed, with addresses and the account numbers for each account should be included. There should be sufficient information in the return for the judge and/or staff to determine with reasonable certainty the financial condition of the entire estate. The updated inventory and AMP will itemize all assets in addition to cash and cash equivalents and will show an approximate fair market value for same.

There is no standard form for the return of a conservator. See Appendix A11-3 for a sample return form. Some forms allow for “categorical” reporting, that is, the lumping of expenditures into categories such as utilities, taxes, medical, food, repairs, etc. The author of this Handbook highly recommends that categorical returns not be accepted because of the ease of hiding expenditures and of

201 O.C.G.A. §29-5-60(a) and (b).
202 O.C.G.A. §10-6-30.
forcing returns to balance which otherwise would not. The best practice would be to require that each and every item of income and expenditure be separately itemized by date, source of deposits, check number, payee, and purpose of every expenditure, much like what should be found in a properly maintained check register.

When a conservator has concluded all duties, whether by termination of the conservatorship, the expenditure of all funds and distribution of all assets, or the appointment of a successor conservator, a final return must be filed. The final return should report from the ending date of the last filed return and, therefore, might not be for a full year. It should show no assets remaining in the estate, since all assets should have been surrendered to a successor conservator, a former ward then of age, or the personal representative of a ward then deceased.

16.3 Responsibilities of Judge Concerning Returns

It is the duty of the judge of the probate court to carefully examine or cause to be carefully examined each and every return filed with the court. This essentially is an audit of the return and should involve a review of the various items of the accounting and, if necessary, the vouchers supporting them. If this duty is delegated to one or more clerks in the office, the clerks should be instructed on the subject of the authority of conservators in the expenditure of funds and should refer any questionable items to the judge for a decision. Often, a conservator can explain unclear items and/or make necessary corrections which might make a return acceptable, and the clerks should attempt to clear up any discrepancies before referring a return for formal action by the judge. In this process, it is essential to examine a return with direct reference to the file for the ward. For example, automobile repairs paid for with a ward’s funds when the ward does not own an automobile are clearly questionable; similarly, alleged payments of taxes for a ward whose estate is of such size as to expect that no taxes would be due should cause inquiry. In a simple review of a return without reference to the specific case, such expenditures might “appear” to be reasonable.

If the return is in proper form, the specific items appear proper, and no objection is filed within 30 days, the court must record the return within 60 days of its filing. If the return is found not to be correct and remains uncorrected by the conservator, the judge should take such further action as is appropriate, including the issuance of a citation as discussed below.

The probate court is to maintain a docket of all conservators liable to make returns and upon failure of any conservator to do so within the time required by law, the judge of the probate court is

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204 O.C.G.A. §29-5-60(c).
205 Id. **NOTE:** The returns of “VA guardians” must be held 60 days before recording. See Section 20.10 below.
required to cite the conservator to appear and show the reason for the delay.\footnote{O.C.G.A. §29-5-60(d).} Citing defaulting conservators for failure to comply with the reporting requirements is not a matter within the discretion of the judge but is a mandatory duty. Whenever a citation is issued to require the filing of proper accountings, not only does the conservator forfeit the commissions for the reporting period, unless good cause is shown,\footnote{Id.} but he/she becomes chargeable personally for all costs in connection with the citation and subsequent proceedings. The estate cannot be charged for costs which have resulted from the neglect or malfeasance of the conservator. Willful and continued failure to make an accounting is good cause for removal of a fiduciary.\footnote{Id.}

No time is specified as to when a conservator who fails to file a return is to be cited to appear and show cause for the delay. However, at least ten days should intervene between the date of the service of the citation and the date set for the hearing.\footnote{O.C.G.A. §15-9-86.} The citation should contain a clear statement of the failure to file the return and should indicate the date on which the return was due. Both the conservator and the registered agent for service of process for the surety should be personally served, unless the conservator is not domiciled in the state, in which case the conservator will be served by mail. It is suggested that such service be both by certified mail and by first-class mail and that the certificate of mailing so state. Every insurance company licensed to do business in the state of Georgia is required to designate a registered agent for service of process, upon whom the citation should be served.\footnote{The identity and address of the registered agent for service of any insurance company may be obtained from the Web site of the Secretary of State [http://corp.sos.state.ga.us/corp/soskb/csearch.asp] or from the Web site of the Insurance and Safety Fire Commissioner [www.gainsurance.org/insurers/companysearch.aspx].}

### 16.4 Sanctions for Breach of Duty; Citations; Release of Surety

#### 16.4.1 Guardians

Upon the petition of any interested person or whenever it appears to the court that good cause may exist to revoke or suspend the Letters of Guardianship or Conservatorship, such as the failure of a guardian to properly care for the maintenance and education of the ward, or to impose sanctions, the judge of the probate court shall cite the guardian to answer the charge. The court shall investigate the allegations, may require an accounting of funds, may appoint a temporary substitute guardian, and/or may, in its discretion:

1. Revoke or suspend the Letters of Guardianship;
2. Require additional security;

\footnote{O.C.G.A. §29-5-60(d).} \footnote{Id.} \footnote{Id.} \footnote{O.C.G.A. §15-9-86.} \footnote{The identity and address of the registered agent for service of any insurance company may be obtained from the Web site of the Secretary of State [http://corp.sos.state.ga.us/corp/soskb/csearch.asp] or from the Web site of the Insurance and Safety Fire Commissioner [www.gainsurance.org/insurers/companysearch.aspx].}
3. Reduce or deny compensation to the guardian or impose such other sanction or sanctions as the judge deems appropriate under the circumstances of the case; and
4. Issue any other order as in the judge’s judgment is appropriate under the circumstances of the case.

The revocation or suspension of the Letters will not abate any action pending for or against the guardian. Any successor guardian is to be made a party to any such action as provided in Code Section 9-11-25.211

Furthermore, if a guardian commits a breach of fiduciary duty or threatens to commit a breach of fiduciary duty, the ward or an interested person acting on behalf of the ward will have a cause of action:

1. To recover damages;
2. To compel performance of the guardian’s duties;
3. To enjoin the commission of a breach of fiduciary duty; or
4. To compel the redress of a breach of fiduciary duty by payment of money or otherwise.

If a ward’s assets are misapplied and can be traced into the hands of persons have notice of the misapplication, a trust will attach to the assets. These remedies do not preclude resort to any other remedies which may be available under law.212 The equitable remedies above may be pursued only in the superior courts or other courts of equity in this state.

**16.4.2 Conservators**

If the judge of the probate court knows or is informed that a conservator wastes or mismanages the estate, refuses to make returns or, for any cause is unfit for the trust, the judge is required to cite the conservator to answer to the charge. The court must investigate the allegations and may require such accountings it deems appropriate. The court may appoint a temporary substitute conservator during the investigation.213 Upon investigation the judge may, in his/her discretion, do any or all of the following:

1. Revoke or suspend the Letter of Conservatorship;
2. Require a settlement of accounts as discussed in Section 15.5 below;
3. Require additional security;
4. Reduce or deny compensation to the conservator or guardian or impose such other sanction or sanctions, as the court deems appropriate; and

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211 O.C.G.A. §29-4-52.
212 O.C.G.A. §29-4-53.
5. Issue any other order as in the court’s judgment is appropriate under the circumstances of the case.\textsuperscript{214}

The revocation or suspension of the Letters will not abate any action pending for or against the guardian. Any successor guardian is to be made a party to any such action as provided in Code Section 9-11-25.\textsuperscript{215}

Furthermore, if a guardian commits a breach of fiduciary duty or threatens to commit a breach of fiduciary duty, the ward or an interested person acting on behalf of the ward will have a cause of action:

1. To recover damages;
2. To compel performance of the guardian’s duties;
3. To enjoin the commission of a breach of fiduciary duty; or
4. To compel the redress of a breach of fiduciary duty by payment of money or otherwise.

If a ward’s assets are misapplied and can be traced into the hands of persons have notice of the misapplication, a trust will attach to the assets. These remedies do not preclude resort to any other remedies which may be available under law.\textsuperscript{216} The equitable remedies above may be pursued only in the superior courts or other courts of equity in this state.

A petition may be filed by any interested person alleging that cause exists to investigate, but the law also allows the court to take action on its own motion based upon information made known to the court. How such information is to be brought to the attention of the judge is not stated in the law. It seems that any communication with the court which raises concerns about the welfare and protection of the ward might be sufficient under the statute. In order to avoid improper ex parte communications, a clerk or other employee of the court should be designated to receive and review complaints about the service of guardians and conservators. Such clerk or employee would make known to the judge such facts or allegations as may warrant judicial review.

Certainly, the judge is charged with knowledge of what an examination of the court’s records would disclose. From the docket, the court can determine which conservators are in default in the filing of annual accountings. From the accountings, which the court is required to examine, information may reveal possible improper disbursements and waste.

16.4.3 Citation

The citation should be directed to the guardian and/or the conservator and the surety, setting a hearing at a specific date and time at least ten days after service and should contain a sufficient

\textsuperscript{214} Id.
\textsuperscript{215} O.C.G.A. §29-5-92.
\textsuperscript{216} O.C.G.A. §29-5-93.
specification of any charges to put the guardian or conservator on notice of the allegations. The citation should be served on the conservator or guardian in accordance with the provisions of Chapter 9 of Title 29. The citation must also be served personally upon the registered agent for service of process for the surety. See Section 16.3 above concerning the registered agents for service of process of insurance companies.

There is no standard form for the citation. See Appendix A11-3 for a sample Citation.

If one or more unsuccessful attempts at service are made by the sheriff or a deputy upon the conservator or guardian at the last known address in the court records and it appears to the judge of the probate court that further attempts are likely to be futile, then service is sufficient upon the conservator or guardian for these purposes if the citation is mailed by first-class mail to such address.217

If the citation was issued on the court’s own motion, at the hearing, the judge should explain to the conservator or guardian the deficiencies charged. If the proceeding was instituted by an interested party, that party’s counsel or that party, if pro se, should present the facts of the case. The conservator or guardian should be allowed every opportunity to present evidence in his/her own behalf. The disposition of the matter will be dependent upon what occurs at the hearing, and the judge may then enter such order as may be appropriate according to the evidence.218

16.4.4 Interest on Surcharges

When a conservator is found to have misappropriated funds, interest accrues at the rate of seven percent per year, simple interest, from the time of the loss to the ward’s estate until the judgment is issued.219 Postjudgment interest accrues at the rate of prime plus 3% from the date of the judgment until it is satisfied.220 The “prime rate” is defined in this Code Section as the “rate published by the Board of Governors of the Federal Reserve System, as published in statistical release H. 15 or any publication that may supersede it.221”

Calculation of simple interest can be accomplished by using the following formula:

1. Principal amount x interest rate = yearly interest.
2. Yearly interest ÷ by 365 = daily interest.
3. Daily interest x number of days = amount of interest.

If losses occur at different times and in different amounts, such as the conversion or misappropriations at different time, the formula would have to be applied separately for each day or

219 O.C.G.A. §7-4-2.
220 O.C.G.A. §7-4-12.
221 The “prime rate” may be found through the Federal Reserve’s Web site at www.federalreserve.gov/releases/H15/data/Daily/H15_PRIME NA.txt.
month and then be totaled. Postjudgment interest may not be charged on the portion of the judgment which consists of the prejudgment interest.\textsuperscript{222} Therefore, postjudgment interest can only accrue on the actual misappropriated amount. All payments made on the judgment are credited first against any interest due at the time the payment is made.\textsuperscript{223}

16.4.5 Release and Discharge of Surety

The surety on the bond of any conservator or, if the surety is dead, the surety’s personal representative, may at any time petition the court regarding any misconduct of the conservator in the discharge of the conservator’s trust or to show the court its desire for any reason to be relieved as surety. The death of a surety is a sufficient ground for the discharge of the surety from future liability.

Upon a petition by the surety or the surety’s personal representative, the judge of the probate court must cite the conservator to appear and show cause, if any, why the surety should not be discharged. After hearing the parties and the evidence, the court, in its discretion, may issue an order discharging the surety from all future liability and requiring the conservator to give new and sufficient security or be removed as conservator. If new security is given, the discharged surety shall be discharged only from liability for future misconduct of the conservator from the time the new security is given. However, the new surety shall be liable for past as well as future misconduct of the conservator. If new security is not given and the conservator is removed, the discharged surety is bound for a true accounting of the conservator with the successor conservator, the former ward, or the personal representative of the estate of the former ward. In all cases where Letters of Conservatorship are revoked, any surety on the bond shall be liable for all acts of the conservator to the time of the settlement with the new conservator, the former ward, or the estate of the former ward.\textsuperscript{224}

A surety is not relieved of the obligation under the bond except by court order.

16.4.6 Statute of Limitations

All actions against a guardian or conservator, except on the guardian’s or conservator’s bond, must be brought within six years of the termination of the guardianship or conservatorship of the ward, except as provided in Code Section 9-3-90.\textsuperscript{225}

\textsuperscript{222} O.C.G.A. §7-4-17.
\textsuperscript{223} Id.
\textsuperscript{224} O.C.G.A. §29-5-49.
\textsuperscript{225} O.C.G.A. §§29-4-54 and 29-5-94. Code Section 9-3-90 provides for a tolling of the statute of limitations on any cause of action held by a minor or persons legally incompetent until the removal of the disability. O.C.G.A. §9-3-90.
16.5 Interim and Final Settlements of the Accounts of Conservators; Discharge

16.5.1 Interim Settlements

At any time after the six-month period following qualification, but not more frequently than once every 24 months, a conservator may petition the court for an interim settlement of accounts. The judge of the probate court must appoint a guardian-ad-litem for the ward. The petition for interim settlement of accounts must be accompanied by a report which must set forth all of the information required by law in annual returns and, in addition thereto, must show:

1. The period which the report covers;
2. The name and address of the ward, the name and address of the minor’s guardian, if any, and the name of the surety on the conservator’s bond, with the amount of the bond; and
3. Such other facts as the court may require.226

Upon the filing of a petition for interim settlement of accounts, the judge of the probate court issues a citation requiring any objections to be filed. The ward and the guardian-ad-litem must be served personally, and the ward’s guardian, if any, and the surety of the conservator’s bond must be served by first-class mail.227

Any interested person may file an objection to the conservator’s interim settlement of accounts. Upon receipt of objections or on the court’s own motion, the judge must hold a hearing to consider all objections, hear evidence, and determine whether the conservator should be discharged from liability for the period covered by the interim settlement of accounts.228 If the judge finds that the conservator is liable to the ward, the court must enter a judgment against the conservator and any surety in the amount of such liability.229

16.5.2 Final Settlement and Discharge from Office and Liability [GPCSF 34]

A ward who has been restored to capacity, the personal representative of a deceased ward, a successor conservator, or any interested person may petition the court for an order requiring a conservator or that conservator’s personal representative to appear and submit to a final settlement of the conservator’s accounts. Alternatively, the court on its own motion may issue such an order. The settlement period must be the period of time beginning with (1) the commencement of the conservatorship or (2) the end of the period covered by the last interim settlement of accounts. If the conservator fails or refuses to appear as cited, the judge of the probate court may proceed without the

226 O.C.G.A. §29-5-61(a) and (b).
227 O.C.G.A. §29-5-61(c).
228 O.C.G.A. §29-5-62.
229 O.C.G.A. §29-5-63.
appearance of the conservator. If the conservator has been required to give bond, the surety on the bond will be bound by the settlement if the surety is given notice by first-class mail of the settlement proceeding.\textsuperscript{230}

A conservator, a former conservator, the conservator of a conservator, or the personal representative of a deceased conservator is allowed to cite the ward, a deceased ward’s personal representative, or a successor conservator to appear and be present at a final settlement of the conservator’s accounts and discharge from liability. The settlement period must be the period of time beginning with (1) the commencement of the conservatorship or (2) the end of the period covered by the last interim settlement of accounts. Notice by first-class mail of the settlement proceeding must be given to the surety on the conservator’s bond and to the ward’s guardian, if any. If a ward has not reached 18 years of age, or if the conservator is the personal representative of the estate of the deceased ward, the judge must appoint a guardian-ad-litem for the ward who must be served personally.\textsuperscript{231}

At the hearing, it is the duty of the judge:

1. Examine all the returns and accounts of the conservator during the settlement period; and

2. Hear any objection to the settlement and discharge.\textsuperscript{232}

The judge must order any property in the hands of the conservator to be delivered to the former ward, the deceased ward’s personal representative, or the successor conservator and must issue a judgment, writ of fieri facias, and execution thereon for any sums found to be due from the conservator. If the court finds that the conservator has faithfully and honestly discharged the office, an order must be entered releasing and discharging the conservator from all liability.\textsuperscript{233}

While the office of guardian or conservator of a ward expires by operation of law upon the ward attaining majority and no order severing the relationship is necessary,\textsuperscript{234} the relationship does not terminate for the purpose of settlement of accounts between the conservator and the ward.\textsuperscript{235} Termination by operation of law merely means that upon reaching majority the former ward is entitled to handle his/her own affairs even though the conservator has not been formally dismissed. The former ward does not continue to be subject to the control of the guardian or conservator after becoming of age, but still has the right to a proper accounting and settlement of the affairs with the conservator.

\begin{itemize}
\item \textsuperscript{230} O.C.G.A. §29-5-81(a).
\item \textsuperscript{231} O.C.G.A. §29-5-81(b).
\item \textsuperscript{232} O.C.G.A. §29-5-81(c).
\item \textsuperscript{233} O.C.G.A. §29-5-81(d).
\item \textsuperscript{234} Tingle v. Cate, 142 Ga. App. 467 (1977), decided before the 2005 Code.
\item \textsuperscript{235} Hayes v. Clark, 242 Ga. App. 411 (2000).
\end{itemize}
Even though annual returns have been approved by a proper order, in an application for a final settlement, such approved annual returns are only prima facie evidence of their correctness, and the ward may attack them but will carry the burden of proof of incorrectness.\textsuperscript{236} When returns have been approved by the judge of the probate court, any objections made by the ward in a final settlement with the conservator must show which items of the returns are incorrect and the grounds therefor or show that items have been omitted and specifically set forth those items.\textsuperscript{237}

Objection by a successor conservator to the final return of a predecessor amounts to a citation for settlement,\textsuperscript{238} and on such objection the judge of the probate court should require the prior conservator to appear for a settlement of accounts with the successor.

16.5.3 Discharge from Office Only [GPCSF 34]

Upon the termination of a guardianship or the resignation of a guardian, the guardian may petition the court for an order dismissing the guardian from office. The petition must include a final status report to the court which covers the period of time beginning with the latest annual status report filed by the guardian. The final status report must contain the information required for annual status reports and must otherwise comply with the provisions of Code Sections 29-4-22. Notice must be published one time and must state that any objection must be made in writing on or before the date set by which objections must be filed, which may not be less than 30 days from the date of publication. The judge of the probate court must examine any objections filed.\textsuperscript{239} If no objection is filed or if, upon hearing any objection, the judge finds that an order dismissing the guardian from office is appropriate, an order is entered dismissing the guardian from office only. However, such order does not bar an action against the guardian.\textsuperscript{240}

Upon the termination of a conservatorship or upon the resignation of a conservator, the conservator may petition the court for an order dismissing the conservator from office. The petition must include a final return to the court which covers the period beginning with the last annual return filed by the conservator. The final return must contain the information required for annual returns and must otherwise comply with the provisions of Code Section 29-5-60. Notice must be published one time and must state that any objection must be made in writing on or before the date set by which objections must be filed, which may not be less than 30 days from the date of publication. The judge of the probate court must examine any objections filed.\textsuperscript{241} If no objection is filed or if, upon hearing

\begin{itemize}
\item \textsuperscript{236} Pettigrew v. Williams, 65 Ga. App. 576 (1941).
\item \textsuperscript{237} Tucker v. Lea, 83 Ga. App. 207 (1951); Tate v. Gairdner, 119 Ga. 133 (1903).
\item \textsuperscript{238} Henson v. Jones, 66 Ga. App. 22 (1941).
\item \textsuperscript{239} O.C.G.A. §29-4-43(a).
\item \textsuperscript{240} O.C.G.A. §29-4-43(b).
\item \textsuperscript{241} O.C.G.A. §29-5-80(a).
\end{itemize}
any objection, the judge finds that an order dismissing the conservator from office is appropriate, an order is entered dismissing the conservator from office only. However, such order does not bar an action against the conservator or the conservator’s surety.\textsuperscript{242}

17. APPEALS

17.1 Non-Article 6 Probate Courts

In non-Article 6 Probate Courts, the ward, individually or by the ward's attorney, representative, or guardian-ad-litem, or the petitioner may appeal any final order of the probate court to the superior court in the county in which the proceedings were held. The appeal is in the same manner as any other appeals from the probate court to the superior court, except that the appeal is to be heard as expeditiously as possible. The appeal is \textit{de novo} unless the parties by agreement specifically limit the issues. The ward shall retain the right to counsel or to have counsel appointed; provided, however, that if counsel was appointed by the judge of the probate court, the appointment shall continue on appeal to the superior court. The burden of proof shall be upon the petitioner and the standard used by the court in reaching its decision shall be \textit{clear and convincing evidence}.\textsuperscript{243}

The Court of Appeals has held that only those persons named in Code Sections 29-4-70 and 29-5-110 may appeal an order of the probate court, \textit{i.e.}, the ward, someone on the ward’s behalf or “the petitioner.”\textsuperscript{244} Although the decision was under the pre-2005 version of Title 29, the wording of the appeals provision was the same as in the current law. In Twitty, the Court of Appeals held that the adult children of the ward, who were given notice and who intervened in the proceeding, were not “petitioners” and, hence were not entitled to file an appeal. However, these Code Sections allow appeal of any final order of the probate court, which, presumably, would include matters where there is no petitioner or where the final order imposes sanctions against a guardian or conservator, who certainly should have the Constitutional right to have the ruling of the probate court appealed. Furthermore, requiring the intervenors to file a completely new petition for guardianship or conservatorship, when there already is such a petition pending before the court, is, in the opinion of the author, a waste of resources. Nonetheless, until the statute is changed or the appellate courts rule otherwise, it is the law, and intervenors can only preserve the right of appeal by “petitioning” for guardianship or conservatorship. It would be interesting to see how the appellate courts would rule if

\textsuperscript{242} O.C.G.A. §29-5-80(b).

\textsuperscript{243} O.C.G.A. §§29-4-79(a) and 29-5-110(a). This requirement that the burden on appeal is by clear and convincing evidence would seem only to apply when that is the standard of proof in the probate court. In the usual case, in a trial \textit{de novo} in the superior court, the issues are decided in the same manner and on the same basis as in the probate court. Applying a greater standard in superior court would not seem appropriate.

the intervenors “petitioned” (specifically prayed) for appointment of someone other than the petitioner(s) in an intervention pleading or caveat.

The filing of an appeal to the superior court from the judgment of the probate court shall act as a supersedeas.\textsuperscript{245}

Pending any appeal, the superior court may appoint an emergency guardian or emergency conservator with such powers and duties as are described in Code Sections 29-4-16 and 29-5-16; provided, however, that an emergency guardian may be appointed only upon the filing of an affidavit of a physician, psychologist, or licensed clinical social worker setting forth the existence of the emergency circumstances described in subsection (d) of Code Sections 29-4-14 and 29-5-14 and after a hearing at which other evidence may be presented.\textsuperscript{246}

All rights of appeal from the superior court shall be as provided by law.\textsuperscript{247}

The appointment of an emergency guardian is not appealable.\textsuperscript{248}

17.2 Article 6 Probate Courts

In Article 6 Probate Courts, appeals do not go to the superior court for \textit{de novo} review but, instead, go to the Court of Appeals in the same manner as are appeals from the superior courts.

18. TRANSFERS OF GUARDIANSHIPS AND CONSERVATORSHIPS

18.1 Intra-State Transfers (Transfers within Georgia)

If a ward has been moved to a different county in this state, the guardian and/or conservator may file a petition to have jurisdiction over the case transferred to the probate court in the county where the ward then resides. Upon the filing of the petition for transfer to another county in this state, the judge of the probate court must appoint a guardian-ad-litem for the ward.\textsuperscript{249} The court of the county in which the guardian or conservator was originally appointed must grant the petition for removal only if the judge determines that the removal is in the best interest of the ward.\textsuperscript{250} There is no standard form petition for an intra-state transfer. \textit{See Appendix A11-5 for a sample petition}

\textsuperscript{245} O.C.G.A. §§29-4-79(c) and 29-5-110(c).
\textsuperscript{246} O.C.G.A. §§29-4-79(d) and 29-5-110(d).
\textsuperscript{247} O.C.G.A. §§29-4-79(b) and 29-5-110(b).
\textsuperscript{248} O.C.G.A. §§29-4-79(d) and 29-5-110(d). It is believed that this provision applies to any appointment of an emergency guardian or conservator, since it would not make sense to appeal an order of appointment made by the superior court on appeal from the probate court.
\textsuperscript{249} O.C.G.A. §§29-4-80(a)(b) and 29-5-120(a)(b).
\textsuperscript{250} O.C.G.A. §§29-4-80(b) and 29-3-120(b).
Before the removal of a guardianship to another county in this state, a guardian must file with the court of the county to which the guardianship is to be removed certified copies of all the records pertaining to the guardianship.\textsuperscript{251}

Before the removal of a conservatorship to another county in this state, a conservator must:

1. Give bond and good security to the court of such county as if the conservator had been first appointed by that court, and a certificate to this effect must be filed in the court in which the conservator was appointed,\textsuperscript{252} and

2. File with the court of the county to which the conservatorship is to be removed, certified copies of all the records pertaining to the conservatorship.\textsuperscript{253}

Following removal of a guardianship or conservatorship to another county in this state, the judge of the probate court of that county will have the same jurisdiction over the guardian or the conservator as if the appointment had first been made in that county. Every proceeding growing out of or affecting the guardianship or conservatorship thereafter must be heard and tried only in the county to which it has been removed.\textsuperscript{254} The foregoing notwithstanding, the original court retains jurisdiction over any actions or proceedings which were pending or about which an order for a settlement of accounts, removal, or sanction of a guardian or conservator had been entered.\textsuperscript{255}

The sureties on a conservator’s first bond are liable only for misconduct of the conservator up until the giving of new bond and security. The sureties on the new bond are liable for both past and future misconduct of the conservator.\textsuperscript{256}

\section*{18.2 Interstate Transfers to Georgia from Another State [GPCSF 60]}

Interstate transfers of adult guardianships or conservatorships will usually involve the filing of two petitions: one in the court from which the transfer will be made, seeking authority to make the transfer; and one in the court to which the transfer will be made, seeking acceptance of the transfer and assumption of jurisdiction.

For purposes of this Section, the term "guardianship" refers to a legal relationship in which a person is given responsibility by a foreign court of competent jurisdiction for the care of an incapacitated adult, referred to as the "ward," thereby becoming a guardian; the term “conservatorship” means a legal relationship in which a person is given responsibility by a (foreign) court of competent jurisdiction for the care of an incapacitated adult.

\textsuperscript{251}O.C.G.A. §29-4-80(c).
\textsuperscript{252}There would appear no reason why a rider to the existing bond, changing the obligee to the judge of the probate court to which the transfer is to be made. However, if there are any pending proceedings which might result in a judgment against the conservator for waste or mismanagement, the judge of the transferee court should be shown as an additional obligee.
\textsuperscript{253}O.C.G.A. §29-5-120(c).
\textsuperscript{254}O.C.G.A. §§29-4-80(d) and 29-5-120(d).
\textsuperscript{255}O.C.G.A. §§29-4-80(f) and 29-5-120(f).
\textsuperscript{256}O.C.G.A. §29-5-120(e).
jurisdiction for the care of the property of an incapacitated adult, who shall be referred to as the ward, and the individual thereby becomes a conservator.257

A guardian or conservator who has been appointed by a foreign court of competent jurisdiction may petition to have the guardianship or conservatorship transferred to and accepted in this state by filing a petition for receipt and acceptance of the foreign guardianship or conservatorship in the court of the county in this state where the ward resides or may reside.258 The petition shall include the following:

1. An authenticated copy of the foreign guardianship or conservatorship order including:
   (A) All attachments describing the duties and powers of the guardian or conservator; and
   (B) All amendments or modifications to the foreign guardianship or conservatorship order entered subsequent to the original order, including any order to transfer the guardianship or conservatorship;
2. The address of the foreign court which issued the guardianship or conservatorship order;
3. A listing of any other guardianship or conservatorship petitions that are pending in any jurisdiction and the names and addresses of the courts where the petitions have been filed;
4. The petitioner's name, address, and county of domicile;
5. The name, age, and address of the ward;
6. The names and addresses of the following, if living:
   (A) The spouse of the ward; and
   (B) All children of the ward; or
   (C) If there are no adult children, then at least two adults in the following order of priority:
      (i) Lineal descendants of the ward;
      (ii) Parents and siblings of the ward; and
      (iii) Friends of the ward;
7. The name and address of the person responsible for the care and custody of the ward, if other than the petitioner, and of any other conservator currently serving;

257 O.C.G.A. §§29-4-85(a) and 29-5-125(a).
258 O.C.G.A. §§29-4-85(b) and 29-5-125(b).
8. The name and address of any currently acting legal representative, other than the petitioner, including any legal counsel or guardian-ad-litem appointed by the foreign court for the ward;
9. For guardianship, the name and address of the ward's conservator, if any;
10. For conservatorship, the name and address of the ward’s guardian, if any;
11. The reason the transfer is in the ward's best interest; and
12. For conservatorship, the name and address of the surety on the conservator’s bond and, to the extent known to the petitioner, a statement of the location and estimated value of the ward’s property and the source and amount of any anticipated income and receipts.  

The petition may be combined with other petitions related to the guardianship or conservatorship, including a petition to modify the terms of the guardianship or conservatorship. Notice and a copy of the petition shall be served personally on the ward. The notice shall:
1. State that the ward has a right to a hearing on the petition;
2. Inform the ward of the procedure to exercise the ward's right to a hearing; and
3. State that the ward has the right to independent legal counsel and that the court shall appoint legal counsel for the ward unless the ward has retained counsel or legal counsel has been appointed by the foreign court to represent the ward in the transfer of the guardianship or conservatorship. Notice and a copy of the petition shall be provided to the foreign court from which the guardianship or conservatorship is to be transferred. Notice to the foreign court shall include a request that the foreign court:
1. Certify whether:
   (A) The foreign court has any record that the guardian or conservator has engaged in malfeasance, misfeasance, or nonfeasance during the guardian's appointment;
   (B) Periodic reports have been filed in a satisfactory manner; and
   (C) All bond or other security requirements imposed under the guardianship or conservatorship have been performed; and
2. Forward copies of all documents filed with the foreign court relating to the guardianship or conservatorship including but not limited to:

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259 O.C.G.A. §§29-4-85(c) and 29-5-125(c).
260 O.C.G.A. §§29-4-85(c) and 29-5-125(c). NOTE: This second reference to subsection (c) should be subsection (d), since both of these Sections have two subsection (c)s.
261 O.C.G.A. §§29-4-86(a) and 29-5-126(a).
(A) The address of the foreign court which issued the guardianship or conservatorship order;
(B) The initial petition for guardianship or conservatorship and other filings relevant to the appointment of the guardian or conservator;
(C) Reports and recommendations of guardians-ad-litem, court visitors, or other individuals appointed by the foreign court to evaluate the appropriateness of the guardianship or conservatorship;
(D) Reports of physical and mental health practitioners describing the capacity of the ward to care for himself or herself or to manage his or her affairs;
(E) Periodic status reports on the condition of the ward; and
(F) The order to transfer the guardianship or conservatorship, if any.262

Notice and a copy of the petition shall be mailed by first-class mail to all other persons named in the petition. The notice shall inform these persons of the right to object to the petition for receipt and acceptance of the guardianship or conservatorship by this state.263

The ward shall have 30 days from the date of service to request a hearing on the petition, and all other persons to whom notice is given shall have 30 days from the date of the mailing of the notice to request a hearing on the petition.264

However, the court may waive the notice requirements set forth above if (but only if):

1. The guardian or conservator has filed a petition in the foreign court for transfer and release of the guardianship or conservatorship to this state;
2. Notice was given to the ward and all interested persons in conjunction with the petition for transfer and release of the guardianship or conservatorship;
3. The petitioner provides the court with an authenticated copy of the petition filed with the foreign court and proof that service was made on the ward not more than 90 days from the date the petition for receipt and acceptance of the guardianship or conservatorship is filed in the Georgia court; and
4. The ward is represented by legal counsel with respect to the petition in the foreign court.265

On the court's own motion or upon timely motion by the ward or by any interested person, the judge of the probate court shall hold a hearing to consider the petition for receipt and acceptance of the foreign guardian or conservator. If any interested person challenges the validity of the foreign
guardianship or conservatorship or the authority of the foreign court to appoint the guardian or conservator, the judge may stay its proceeding while the petitioner is afforded the opportunity to have the foreign court hear the challenge and determine its merits.\textsuperscript{266}

The court may grant a petition for receipt and acceptance of a foreign guardianship or conservatorship provided the court finds that:

1. The guardian or conservator is presently in good standing with the foreign court; \textbf{and}
2. The transfer of the guardianship or conservatorship from the foreign jurisdiction is in the best interest of the ward.\textsuperscript{267}

The court may require the conservator to file an inventory of the ward’s property at the time of the transfer from the foreign jurisdiction.\textsuperscript{268}

In granting the petition, the judge shall give full faith and credit to the provisions of the foreign guardianship or conservatorship order concerning the determination of the ward's incapacity. At all times following the entry of the order accepting the guardianship or conservatorship, the laws of the State of Georgia shall apply to the guardianship or conservatorship; provided, however, that, in order to coordinate efforts with the foreign court to facilitate the orderly transfer of the guardianship, the judge is authorized to:

1. Delay the effective date of the receipt and acceptance for a reasonable period of time;
2. Make the receipt and acceptance contingent upon the release of the guardianship or conservatorship or the termination of the guardianship or conservatorship and the discharge of the guardian or conservator in the foreign jurisdiction;
3. Recognize concurrent jurisdiction over the guardianship or conservatorship for a reasonable period of time to permit the foreign court to release or terminate the guardianship or conservatorship and discharge the guardian or conservator in the foreign jurisdiction; or
4. Make other arrangements the court deems necessary to effectuate the receipt and acceptance of the guardianship or conservatorship.\textsuperscript{269}

The denial of a petition for receipt and acceptance of the foreign guardianship or conservatorship does not affect the right of a guardian or conservator appointed by a foreign court of competent jurisdiction to file the usual petition for guardianship or conservatorship under Georgia law.\textsuperscript{270}

\textsuperscript{266} O.C.G.A. §§29-4-87 and 29-5-127.
\textsuperscript{267} O.C.G.A. §§29-4-88(a) and 29-5-128(a).
\textsuperscript{268} O.C.G.A. §29-5-128(c).
\textsuperscript{269} O.C.G.A. §§29-4-88(b),(c),(d) and 29-5-128(b),(d),(e).
\textsuperscript{270} O.C.G.A. §§29-4-88(e) and 29-5-128(f).
18.3 Interstate Transfers to Another State from Georgia

A guardian or conservator may petition the Georgia court that has jurisdiction over the guardianship or conservatorship to transfer the guardianship or conservatorship to a foreign court of competent jurisdiction if the ward has moved permanently to the foreign jurisdiction. The ward may be presumed to have moved permanently to the foreign jurisdiction if:

1. The ward has resided in the foreign jurisdiction for more than 12 consecutive months;
2. The guardian or conservator notifies the court that the ward will move or has moved permanently to the foreign jurisdiction; or
3. A foreign court of competent jurisdiction notifies the court of the filing of a petition for guardianship or conservatorship for the ward in the foreign jurisdiction.

To facilitate the transfer, the judge of the probate court may order the guardian or conservator to file a petition for receipt and acceptance of the guardianship or conservatorship in the foreign jurisdiction. If the foreign jurisdiction does not have a procedure for receiving and accepting a foreign guardianship or conservatorship, the judge may order the guardian or conservator to file a petition for guardianship or conservatorship in the foreign jurisdiction.\(^\text{271}\)

The petition to be filed in the Georgia court to transfer a guardianship or conservatorship to a foreign jurisdiction shall include the following:

1. The name and address of the foreign court to which the guardianship or conservatorship shall be transferred and an authenticated copy of the petition for receipt and acceptance of a foreign guardianship or conservatorship if previously filed in the foreign court;
2. A listing of any other guardianship or conservatorship petitions that are pending in any jurisdiction and the names and addresses of the courts where the petitions have been filed;
3. The petitioner's name, address, and county of domicile;
4. The name, age, and current address of the ward and the new or proposed address of the ward;
5. The names and addresses of the following, if living:
   (A) The spouse of the ward; and
   (B) All children of the ward; or
   (C) If there are no adult children, then at least two adults in the following order of priority:
      (i) Lineal descendants of the ward;

\(^{271}\) O.C.G.A. §§29-4-90 and 29-5-130.
(ii) Parents and siblings of the ward; and
(iii) Friends of the ward;

6. For **guardianship**, the name and address of the person responsible for the care and custody of the ward, if other than the petitioner, and of any other guardian currently serving;

7. For **conservatorship**, the name and address of the person responsible for the care and custody of the ward, if other than the petitioner, and of any other conservator currently serving;

8. The name and address of any legal representative, other than the petitioner, including any legal counsel, guardian-ad-litem, or court visitor appointed by the foreign court for the ward;

9. For **guardianship**, the name and address of the ward's conservator, if any;

10. For **conservatorship**, the name and address of the ward’s guardian, if any;

11. For **conservatorship**, the name and address of the surety on the conservator’s bond; and

12. The reason for moving the ward and the reason the transfer of the guardianship or conservatorship is in the ward's best interest.  

Notice and a copy of the petition to transfer shall be served personally on the ward not less than ten days prior to the date set for the hearing. The notice shall:

1. State the date that the hearing shall be held; and

2. State that the ward has the right to independent legal counsel and that the court shall appoint legal counsel for the ward unless the ward has retained counsel or legal counsel has been appointed by the foreign court to represent the ward in the receipt and acceptance of the guardianship or conservatorship.

Notice and a copy of the petition to transfer shall be provided to the foreign court to which the guardianship or conservatorship is to be transferred and shall also be mailed to all other persons named in the petition. The notice shall inform these persons of the date of the hearing and of their right to file objections to the transfer of the guardianship or conservatorship from this state.

Upon the court's own motion or upon timely motion by the ward or by any interested person, the judge of the probate court shall hold a hearing to consider the petition to transfer. The court may grant a petition to transfer if the court finds that:

1. The guardian or conservator is presently in good standing with the court; and

2. The transfer to the foreign jurisdiction is in the best interest of the ward.

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274 O.C.G.A. §§29-4-93 and 29-5-133.
In order to coordinate efforts with the foreign court to facilitate the orderly transfer, the judge is authorized to:

1. Notify the foreign court of any significant problems that may have occurred including whether periodic reports and accountings have been filed in a satisfactory manner and whether all bond or other security requirements imposed under the guardianship or conservatorship have been performed; and

2. Forward copies of all documents filed with the court relating to the guardianship or conservatorship, including but not limited to:
   (A) The initial petition for guardianship or conservatorship and other filings relevant to the appointment of the guardian or conservator;
   (B) Reports and recommendations of guardians-ad-litem, court visitors, or other individuals appointed by the court to evaluate the appropriateness of the guardianship or conservatorship;
   (C) Reports of physical or mental health practitioners describing the capacity of the ward to care for himself or herself; and
   (D) Periodic status reports on the condition of the ward.

3. Require the conservator to file an inventory of the ward’s property at the time of the transfer to the foreign court.

As necessary to coordinate the transfer of the guardianship, the judge is authorized to:

1. Delay the effective date of the transfer for a reasonable period of time;

2. Make the transfer contingent upon the acceptance of the guardianship or appointment of the guardian in the foreign jurisdiction;

3. Recognize concurrent jurisdiction over the guardianship for a reasonable period of time to permit the foreign court to accept the guardianship or appoint the guardian in the foreign jurisdiction; or

4. Make other arrangements that in the sound discretion of the court are necessary to transfer the guardianship.275

19. CONFIDENTIALITY OF GUARDIANSHIP/CONSERVATORSHIP RECORDS AND MISCELLANEOUS PROVISIONS UNDER TITLE 29

19.1 Confidentiality of Guardianship/Conservatorship Records

All of the records relating to any adult guardianship or conservatorship granted under Title 29 shall be kept sealed, except for a record of the names and addresses of the ward, the guardian and/or

275 O.C.G.A. §§29-4-94 and 29-5-134.
conservator and their attorneys of record, and the dates of filing, granting, and terminating the guardianship or conservatorship. The sealed records may be examined by the ward and the ward's attorney, the guardian or conservator and their attorneys of record, and any surety for the conservator and the attorney for the surety at any time.

A request by other interested parties to examine the sealed records shall be by petition to the court and the ward and the guardian or conservator shall have at least 30 days' prior written notice of a hearing on the petition; provided, however, that for good cause shown to the court, the judge may shorten such notice period or grant the petition without notice. The matter shall come before the court in chambers. The order allowing access shall be granted upon a finding that the public interest in granting access to the sealed records clearly outweighs the harm otherwise resulting to the privacy of the person in interest, and the judge shall limit the portion of the file to which access is granted to that which is required to meet the legitimate needs of the petitioner.276

Nothing in the Code indicates that the records become open to inspection after the death of the minor. The Court of Appeals, in fact, upheld a judge’s discretionary opening of a portion of a guardianship file after the death of the ward; while not holding specifically that the file remained sealed, the Court did not declare the file to no longer be sealed following the ward’s death, holding, instead that the judge of the probate court had discretion to determine whether and what parts of the record would be disclosed.277

19.2 Disclosure and Examination of Records

Therefore, the files on any guardianship or conservatorship of an adult, are to be treated by the court as confidential and not subject to any open records request. However, the ward or the ward’s attorney, the guardian and/or conservator and their attorney(s), as well as the surety on the bond and the attorney for the surety, may examine the complete records at any time. Furthermore, the law permits certain information to be disclosed to anyone. The following information concerning any guardianship or conservatorship may be disclosed to anyone, and a record for such disclosure may be maintained:

1. The name and address of the ward;
2. The name(s) and address(es) of the guardian and/or conservator and of their attorney(s) of record; and
3. The date a petition was filed and granted and the date of a termination of the guardianship or conservatorship, if applicable.

Except as set forth in the preceding paragraph and the next paragraph, no other information may be disclosed. When a conservator has been appointed and the ward owns an interest in real estate, the certificate which is to be recorded on the deed records is such a record as may be disclosed. Otherwise, if no particular form is prepared by the court, the information may (should) be given upon request at any time. For the protection of the court, its staff, and the minor, and to assure no confusion or misunderstanding, it would seem best that the information be provided in writing, signed by a clerk.

Anyone else wishing to examine any records regarding or seeking to obtain any information about any guardianship or conservatorship of a ward must file a petition, as stated above. Disclosure should be only of such information as is necessary or appropriate to the interests of the petitioner, while protecting the privacy of the ward. For example, a title examiner will need to assure that authority has been granted to a conservator to sell the subject property. Therefore, a copy of the order granted a leave to sell should satisfy that requirement, and the title examiner should be given a certified copy of the order. This type request can be granted without a hearing or notice, if the court finds it appropriate.

The judge of the probate court is granted discretion in determining when disclosure of parts of the file may be granted, and the death of the minor does not terminate the confidentiality or sealed nature of the guardianship/conservatorship file.278

19.3 Recording

Apparently, there is some confusion about the recording of confidential or “sealed records.” All proceedings of the probate court are to be entered on the docket and minutes.279 Therefore, all pleadings, motions, orders and other matters docketed to the case must be recorded. “Sealed records” does not appear to be defined in the Code. Traditionally, sealed files were actually enclosed in an envelope, marked “sealed” and securely closed, such as in the case of a deposition which has been filed with the court. However, that does not appear to be dictated by any statute in the Code. The obvious idea is that “sealed records” are not to be maintained in any fashion which would permit unauthorized access. In order to maintain the confidentiality prescribed by the statute, the minutes (the actual recording of all docketed matters) for guardianship/conservatorship cases must be maintained in separate books from those which are open to the public. In addition, the actual file, whether maintained physically or electronically, must be kept from public inspection. Therefore, the physical files must be kept in locked file cabinets or in a part of the offices where the public does not have access or be actually sealed to prevent accidental access; electronic files must be maintained in folders

279 O.C.G.A. §15-9-37(a)(7); U.P.C.R. 207. See also Chapter 14.
which are not accessible to anyone other than court staff, so that no access occurs without court approval.

**PART II. PROBATE JUDGES AS CUSTODIANS OF CERTAIN FUNDS**

**20. PROBATE JUDGES AS CUSTODIANS OF CERTAIN FUNDS [GPCSF 22]**

The judges of the probate courts are, in their discretion, made the legal custodians and distributors of all moneys up to $15,000.00 due and owing to any incapacitated adult who has no legal and qualified conservator and are authorized to receive and collect all such moneys arising from insurance policies, benefit societies, legacies, inheritances, or any other source. Without any appointment or qualifying order, the judge is authorized to take charge of the moneys or funds of the adult by virtue of the judge's office as judge of the probate court in the county of residence of the adult; provided, however, that notice shall be given to the guardian of the adult, if any. The certificate of the judge that no legally qualified conservator has been appointed shall be conclusive and shall be sufficient authority to justify any debtor in making payment on claims made by the judge.  

The judge is authorized, in the judge's discretion, to employ counsel to bring an action to recover any amount due to an adult described above, in the adult's name or in the name of the judge as custodian, in any court having jurisdiction thereof. The judge shall have authority to pay to counsel a reasonable fee out of the funds collected for counsel's services in the proceeding which were necessary to enforce the right of the adult.  

It is the judge's duty to keep a properly indexed and complete record of all money received by the judge as custodian for adults. The record shall show from what source the funds were derived and to whom and for what the money was paid. The record shall be open for inspection by the public.  

A judge who receives funds as custodian due and owing to an adult is authorized and directed to pay from the funds so received whatever amount the judge may think necessary for the support, care, education, health, and welfare of the adult, as well as the funeral and burial expenses of the adult, in case of the individual's death, as in the judge's opinion may be proper and right. The expenditures made by the judge shall be final and no liability shall attach to the judge or the judge's bond by reason of the expenditures when made in good faith.

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280 O.C.G.A. §29-6-1.  
281 O.C.G.A. §29-6-2.  
282 O.C.G.A. §29-6-3.  
283 O.C.G.A. §29-6-4.
When deemed appropriate, the judge holding property or funds as custodian may order that a conservatorship be established in accordance with the provisions of Chapter 5 of Title 29 and shall distribute any or all of such property or funds to the conservator, when qualified.284

When any funds due and owing an adult come into the hands of the judge and the funds are not needed for the support, care, education, health, and welfare of the adult, it is the judge’s duty to place the funds in an account insured by the Federal Deposit Insurance Corporation in the name of the judge as custodian for the adult. There shall be no further liability against the judge or the judge's bond when the deposit is made in good faith.285

The judges of the probate courts shall receive as compensation for their services as custodian the fee specified in subsection (j) of Code Section 15-9-60.286 Presently that amount is a flat, one-time fee of 8% of the total fund when received.287

Judges of the probate courts shall be held accountable on their official bonds for the faithful discharge of their duties as custodians and for the proper distribution of funds coming into their hands as such custodians. It is the judge's responsibility to increase his/her official bond if necessary to cover the gross total of all custodial accounts held.288

The judge shall turn over all custodial property held pursuant to Chapter 6 to:

1. A conservator if the custodial funds exceed $15,000.00;
2. A former incapacitated adult upon restoration to capacity;
3. The personal representative of a deceased incapacitated adult; or
4. The Department of Revenue four years after the death of an incapacitated adult if no proceedings are commenced on that individual's estate.289

PART III. VETERANS AFFAIRS GUARDIANS

21. VETERANS AFFAIRS GUARDIANS

The involvement of the probate court in the appointment and supervision of VA Guardians is somewhat limited. The Department of Veterans Affairs (“DVA”) will determine the issue of incapacity of an adult or the need for the appointment of a guardian to receive benefits for a minor. The DVA will usually nominate a guardian to serve, and the judge of the probate court will generally

284 O.C.G.A. §29-6-5.
285 O.C.G.A. §29-6-6.
286 O.C.G.A. §29-6-7.
287 O.C.G.A. §15-9-60(j).
288 O.C.G.A. §29-6-8.
289 O.C.G.A. §29-6-9.
appoint the person nominated by the DVA. However, following appointment, the guardian serves under and the subsequent proceedings are governed by the general laws applicable to conservators, except that the DVA is a party to every proceeding and must receive notice of every petition or motion.

Although the term “VA guardian” is used, the position is that of a conservator under the general laws in Georgia.

21.1 Definitions

As used in this Part, the term:

1. "Benefits" means all moneys paid or payable by the United States through the United States Department of Veterans Affairs.
2. "Department" means the United States Department of Veterans Affairs, its predecessors, or its successors.
3. "Estate" means income on hand and assets acquired partially or wholly with income.
4. "Income" means moneys received from the United States Department of Veterans Affairs and revenue or profit from any property wholly or partially acquired therewith.
5. "Person" means an individual, a partnership, a corporation, or an association.
6. "Secretary" means the secretary of veterans affairs of the United States Department of Veterans Affairs or the secretary's successor.
7. "VA guardian" means a person appointed pursuant to the provisions of this chapter.
8. "Ward" means a beneficiary of the United States Department of Veterans Affairs.\(^{290}\)

21.2 DVA Secretary as a Party to Proceedings; Notice

The secretary shall be a party in interest in any proceedings for the appointment or discharge of a VA guardian and in any proceedings involving the administration of the estate of the ward. Written notice of the time and place for hearing on any petition or pleading or in connection with any proceeding pertaining to a VA guardianship shall be given by certified mail or statutory overnight delivery to the office of the Department having jurisdiction over the area in which the ward resides. The notice shall include a copy of the petition or other pleadings and shall be given so as to arrive in due course of mailing not less than 15 days before the date of a hearing or other proceedings, unless otherwise provided in Chapter 7 of Title 29.

In any proceeding involving a guardianship or conservatorship established pursuant to any other Chapter of Title 29, the office of the Department having jurisdiction over the area in which the

\(^{290}\)O.C.G.A. §29-7-1.
ward resides may, by giving written notice to the court having jurisdiction over such proceedings and to the guardian or conservator or proposed guardian or conservator, become a party in interest as to the guardianship or conservatorship or proposed guardianship or conservatorship and shall thereafter be entitled to notice as if a guardianship or conservatorship was originally established under Chapter 7 of Title 29.

The court shall mail to the Department office a copy of each order entered in any VA guardianship or other guardianship or conservatorship proceeding wherein the secretary is an interested party.291

### 21.3 DVA Determination of Need for Guardian or Conservator

Whenever, pursuant to any law of the United States or regulation of the department, the secretary requires, prior to payment of benefits, that a VA guardian be appointed for a ward, the appointment shall be made in the manner provided in Chapter 7 of Title 29.292

Where a petition is filed for the appointment of a VA guardian for a mentally incompetent ward, a certificate of the secretary or the secretary's duly authorized representative stating that such individual has been rated incompetent by the Department on examination in accordance with the laws and regulations governing the Department and that the appointment of a VA guardian is a condition precedent to the payment of any moneys due such ward by the department shall be prima-facie evidence of the necessity for the appointment of a VA guardian. The courts are authorized to appoint a VA guardian for an incompetent ward entitled to any benefits which may be payable to a ward by the Department.293

### 21.4 DVA Guardians for Minors

Where a petition is filed for the appointment of a VA guardian for a minor, a certificate of the secretary or the secretary's authorized representative setting forth the age of the minor as shown by the records of the department and the fact that the appointment of a VA guardian is a condition precedent to the payment of any moneys due the minor by the department shall be prima-facie evidence of the necessity for the appointment of a VA guardian.294

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291 O.C.G.A. §29-7-2.
292 O.C.G.A. §29-7-3.
293 O.C.G.A. §29-7-4.
294 O.C.G.A. §29-7-5.
21.5  Petition and Notice

Upon a petition for the appointment of a VA guardian being filed, notice shall be given to the department office having jurisdiction over the area in which the ward resides, to the proposed ward, and to two adult relatives of the proposed ward by certified mail or statutory overnight delivery by the court. If two adult relatives of the proposed ward cannot be located, notice to one adult relative shall be sufficient. If no adult relative can be located, the court shall give notice of the petition by publication in the legal organ of the county in which the ward resides once a week for two weeks. After notice has been given or published, the Letters of Guardianship may, in the discretion of the judge, be granted to the petitioner or to some other suitable person. If all parties entitled to notice waive further notice and consent to the notice instanter, the judge may, in his/her discretion, grant Letters of Guardianship instanter to the petitioner.295

A petition for the appointment of a VA guardian may be filed in the court having jurisdiction by or on behalf of the Department or any person designated by the secretary or the secretary's representative. The petition shall set forth:

1. The name, age, and place of residence of the ward;
2. The names and places of residence of the nearest two adult relatives, if known;
3. The fact that the ward is entitled to receive moneys payable by or through the department;
4. The amount of money then due and the amount of probable future payments;
5. The name and address of the person or institution, if any, having actual custody of the ward;
6. In the case of a mentally incompetent ward, that the ward has been rated incompetent on examination by the department in accordance with the laws and regulations governing the department; and
7. The name and address of the person or institution sought to be appointed as VA guardian of the ward and the relationship, if any, of the proposed VA guardian to the ward.

Preferences for appointment of a VA guardian shall be as provided in Code Section 29-5-3.296

21.6  Qualifications of VA guardian; Removal on Petition by DVA

Before making an appointment under this chapter, the judge hearing the petition shall be satisfied that the VA guardian whose appointment is sought is a fit and proper person to be appointed.

295 O.C.G.A. §29-7-6.  It is believed that this Code Section contains a typographical error and that it should read “waive further notice and consent to the granting of the petition instanter.”
296 O.C.G.A. §29-7-7.
The nomination of a person by the Department shall be prima-facie evidence of the person's fitness. A qualified individual shall ordinarily be preferred for appointment as VA guardian, but the judge may, in the judge's discretion, appoint any qualified person as VA guardian.\textsuperscript{297}

The following persons and entities may serve as VA guardians subject to the restrictions listed:

1. An individual deemed fit and proper by the court may be a VA guardian of that individual's children, parents, and grandparents without limitation;
2. A bank or trust company doing business in this state may serve as a VA guardian under this chapter for an unlimited number of beneficiaries;
3. A person appointed while serving as county guardian in any county in this state may serve as a VA guardian under this chapter for an unlimited number of beneficiaries; or
4. Any other person, provided that any person who is currently serving as the VA guardian for ten or more wards must so state in that person's petition to be appointed as the VA guardian for additional wards, and provided, further, the department shall have the right to direct the court in writing to deny the petition.

Upon presentation of a petition by the department alleging that the VA guardian is acting in a fiduciary capacity in violation of this Code section and requesting the discharge of that VA guardian, the court upon proof substantiating the petition shall:

1. Require a final accounting immediately from a sufficient number of VA guardianships, in reverse chronological order, to bring the VA guardian within compliance of this Code section;
2. Require final settlements of accounts immediately on the VA guardianships described in paragraph (1) of this subsection; and
3. Discharge the VA guardian in cases as the court deems proper.\textsuperscript{298}

\section*{21.7 Bond requirements; discharge of surety on bond.}

A bank or trust company doing business in this state shall not be required to file a bond for any VA guardianship unless required by the department.

Any other person serving as a VA guardian shall execute and file a bond, to be approved by the judge of the probate court, in an amount not less than the sum of the value of the estate, other than real property, at the time of the last accounting and funds estimated to become payable during the ensuing year, which bond shall be a security bond made by a solvent and acceptable surety company in the form required for bonds of guardians or conservators appointed under the general guardianship or

\textsuperscript{297} O.C.G.A. §29-7-8.
\textsuperscript{298} O.C.G.A. §29-7-9.
conservatorship laws and shall be conditioned as are such bonds. After each annual accounting, the court shall review the amount of the bond and shall order such increase or decrease as shall be warranted by the accounting. No reduction in the bond amount shall affect the liability of the surety for past waste or misconduct of the VA guardian.

A surety on a bond posted pursuant to this Code section shall not be relieved from liability merely because of the expiration of the term of the bond but shall be subject to provisions of law for discharge of a surety applicable to other bonds.\footnote{O.C.G.A. §29-7-10.}

## 21.8 Investments by VA Guardians

Every VA guardian shall invest the surplus funds of the ward's estate in such securities or property as authorized under the laws of this state but only upon prior order of the court; except that the funds may be invested, without prior court authorization, in direct unconditional interest-bearing obligations of this state or of the United States or in obligations the interest and principal of which are unconditionally guaranteed by the United States. A signed duplicate or certified copy of the petition for authority to invest surplus funds shall be furnished the proper area office of the department, and notice of hearing on the petition shall be given said office in the case of a VA guardian's account.\footnote{O.C.G.A. §29-7-11.}

## 21.9 Expenditure of ward's estate; insurance; title to new property.

A VA guardian shall not apply any portion of the estate of the ward for the support, maintenance, or education of any person other than the ward, the ward's spouse, and the children of the ward who are legally dependent on the ward, except upon order of the court after a hearing, notice of which has been given by certified mail or statutory overnight delivery to the Department not less than 30 days prior to a hearing on the petition, unless the Department consents in writing to the petition, in which case no hearing need be had.

No VA guardian shall name himself/herself as beneficiary of any insurance policy which insures the life of the ward. As to any insurance policy that is purchased after establishment of the VA guardianship where premiums are or have been paid from benefits, the VA guardian shall ensure that the beneficiary named is the estate of the ward.\footnote{Under former Code Section 29-6-11(g), unless the VA guardian was a next of kin to the ward, the VA guardian could not be named a beneficiary under the veteran’s will. That provision was not brought forward into the new Code.}

All property of a ward having a VA guardian which is purchased with benefits shall be titled in the name of the current VA guardian or any successor VA guardian for (\textbf{name of ward}), a beneficiary of the department, further indicating the fact of VA guardianship and the name of the beneficiary on
any documents of title. Any such assets which should be prudently insured shall be insured with a policy of insurance denominated in the same manner.\textsuperscript{302}

\section*{21.10 Annual accounting requirements; Failure to File; Forfeiture of Commissions}

Every VA guardian shall file with the court annually, in the same manner as provided under the general law for conservators, a full, true, and accurate accounting, on oath, of all moneys received by the VA guardian and disbursements of all moneys, showing the balance in the VA guardian's hands at the date of the accounting and how it is invested. The VA guardian shall list in each accounting all the investments of the ward's funds, showing the amount of each investment, the date made, the interest rate, the date of maturity, the dates and amounts of any liquidations, and the dates and amounts of interest payments. A certified copy of each of accounting filed with the court shall be sent by the court within ten days after the accounting is filed to the office of the department having jurisdiction over the area in which the court is located. Each accounting shall include a computation of commissions allowed and taken during the period covered by the accounting. No accounting shall be allowed or admitted to record for a period of 60 days following the date of filing the accounting.\textsuperscript{303}

If any VA guardian fails to file the accounting required, the failure shall be grounds for removal. If any VA guardian fails to file any accounting within 30 days after demand is made by the court to do so, the judge shall notify the surety for the VA guardian of the failure by certified mail or statutory overnight delivery. Thereafter, on motion of any interested party, including the surety, or on the court’s own motion, the judge may enter an order removing the VA guardian without further notice or hearing. Every VA guardian who fails or refuses to file the accounting by the due date shall receive no commission or compensation for any service during that year unless by special order of the court the VA guardian is exonerated from all fault.\textsuperscript{304}

\section*{21.11 Compensation for guardian; reimbursement for premium on bond.}

As compensation for service, a VA guardian shall earn a commission of 5 percent on all income of the ward coming into the VA guardian's hands during any months while the VA guardian serves. If the ward receives at least $350.00 per month, the minimum fee shall be $35.00 per month.

In the event the ward's monthly service connected disability compensation payment from the Department is discontinued or suspended, the VA guardian, subject to court approval, which shall be given unless it appears to the judge that the estate is unfairly prejudiced or the payment would be a manifest injustice, shall be entitled to 5 percent additional commission on all sums paid out by the VA

\textsuperscript{302} O.C.G.A. §29-7-12.
\textsuperscript{303} O.C.G.A. §29-7-13.
\textsuperscript{304} O.C.G.A. §29-7-14.
guardian from the time the disability compensation payment is discontinued or suspended until the time the disability compensation payment is resumed.

In the event that extraordinary services are rendered by the VA guardian, the judge, upon petition and after hearing thereon, may authorize additional compensation payable from the estate of the ward. Notice of the petition and hearing shall be given by certified mail or statutory overnight delivery to the Department office having jurisdiction over the area in which the ward resides not less than 30 days prior to the hearing on the petition. No compensation shall be allowed on the corpus of an estate received from a previous VA guardian.

A VA guardian shall be allowed to pay from the ward's estate reasonable premiums for any corporate surety on the VA guardian's bond.\footnote{305 O.C.G.A. §29-7-15.}

\section*{21.12 Discharge of VA guardian; role of county guardian.}

A VA guardian, upon filing a petition and making satisfactory accounting, shall be discharged when the ward dies, reaches the age of majority, or is declared competent by the department or the court.

A county guardian who ceases to serve as county guardian continues to serve as a VA guardian at the pleasure of the court for which the VA guardian formerly served as county guardian. The court may at any time require the VA guardian's final accounting and discharge as to any or all VA guardianships which the VA guardian accepted as county guardian, whereupon the judge shall appoint as successor VA guardian the new county guardian or other person as shall be requested by the department. A former county guardian may file a petition with the court, a copy of which shall be served by certified mail or statutory overnight delivery upon the area office of the Department, together with the VA guardian's final accounting, as to any or all VA guardianships; whereupon the judge shall appoint as the VA guardian's successor the new county guardian or other person as shall be designated by the department.\footnote{306 O.C.G.A. §29-7-16.}

\section*{21.13 Application of other laws; right to appeal.}

Except where inconsistent with Chapter 7 or Title 29, the general guardianship and conservatorship laws of this state and the laws establishing the practice in such matters, including the rights of appeal, shall be applicable to wards and their estates governed by this chapter.\footnote{307 O.C.G.A. §29-7-17.}
21.14 Construction.

Chapter 7 of Title 29 shall be construed liberally to secure the beneficial intents and purposes thereof and shall apply only to beneficiaries of the department who are entitled to benefits from the department.\(^{308}\)

**PART IV. PROTECTION OF DISABLED ADULTS ELDER PERSONS**

22. **Disabled Adults and Elder Persons Protection Act**

22.1 **Definitions and Reports of Abuse, Neglect, or Exploitation**

The judge of the probate court may be called upon to conduct a hearing pursuant to the Disabled Adults and Elder Persons Protection Act.\(^{309}\) Under this Act, “court” is defined as the probate court for the county of residence of the disabled adult or elder person or the county in which such person is found. In any case in which the judge of the probate court is unable to hear such a case within the time required for hearing, the judge must appoint an attorney to serve and exercise all the jurisdiction of the probate court in accordance with the Act.\(^{310}\)

The Act contains the following additional definitions\(^{311}\) pertinent to the court’s involvement:

1. “Abuse” means the willful infliction of physical pain, physical injury, mental anguish, unreasonable confinement, or willful deprivation of essential services to a disabled adult or elder person.

2. “Disabled adult” means a person 18 years of age or older who is not a resident of a long-term care facility, as defined in Article 4 of Chapter 8 of Title 31, but who is mentally or physically incapacitated or has Alzheimer’s Disease, as defined in Code Section 31-8-180, or dementia, as defined in Code Section 49-6-72.

3. “Elder person” means a person 65 years of age or older who is not a resident of a long-term care facility, as defined in Article 4 of Chapter 8 of Title 31.

4. “Essential services” means social, medical, psychiatric, or legal services necessary to safeguard the disabled adult’s or elder person’s rights and resources and to maintain the physical and mental well-being of such person. These services shall include, but not be limited to, the provision of medical care for physical and mental health needs, assistance in personal hygiene, food, clothing, adequately heated and ventilated shelter, and protection.

\(^{308}\) O.C.G.A. §29-7-18.

\(^{309}\) O.C.G.A. §30-5-1.

\(^{310}\) O.C.G.A. §30-5-3(3).

\(^{311}\) O.C.G.A. §30-5-3.
from health and safety hazards but shall not include the taking into physical custody of a
disabled adult or elder person without that person’s consent.

5. “Exploitation” means the illegal or improper use of a disabled adult or elder person or
that person’s resources through undue influence, coercion, harassment, duress, deception,
false representation, false pretense, or other similar means for another’s profit or advantage.

6. “Neglect” means the absence or omission of essential services to the degree that it
harms or threatens with harm the physical or emotional health of a disabled adult or elder
person.

7. “Protective services” means services necessary to protect a disabled adult or elder
person from abuse, neglect, or exploitation. Such services shall include, but no be limited
to, evaluation of the need for services and mobilization of essential services on behalf of a
disabled adult or elder person.

Under the Act, certain persons (often referred to as “mandatory reporters”) are mandated to
make a report to the adult protection services agency or a law enforcement agency when that person
has reasonable cause to believe that a disabled adult or elder person (1) has had a physical injury or
injuries inflicted upon him/her, (2) has been neglected or exploited, or (3) is in need of protective
services. Additionally, any other person having reasonable cause to believe that a disabled adult or
elder person is in need of protective services or has been the victim of abuse, neglect, or exploitation
may make such a report.

Upon receipt of such a report, the adult protective services agency is required to make an
investigation to determine whether the disabled adult or elder person is in need of protective services.

### 22.2 Petitions to the Probate Court

Any person conducting an investigation required by the Act who is unable to gain access to the
disabled adult or elder person as a result of interference by another person may petition the probate
court for an order authorizing the investigation and prohibiting interference. The petition must allege
specific supporting facts. If as a result of the hearing the judge of the probate court finds probable
cause to believe that the person named in the petition is a disabled adult or elder person needing
protective services and that some other person is interfering with the investigation required under the
Act, the judge may issue an order authorizing that investigation and prohibiting interference by any
person.\(^{312}\)

Also, any person providing protective services who determines that another person is
interfering with the provision of such services may petition the probate court for an order authorizing

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\(^{312}\) O.C.G.A. §30-5-5(b).
such services and prohibiting interference. Such petition must allege specific supporting facts, including, but not limited to, the results of any required investigation. If as a result of the hearing the judge of the probate court finds by clear and convincing evidence that the person named in the petition is a disabled adult or elder person needing protective services and that some other person is interfering with the provision of such services, the judge may issue an order authorizing the provision of the services and prohibiting the interference.313

Protective services may not be provided under the Act to any person who does not consent to such services or who, having consented, withdraws the consent. Nothing in the Act prohibits the Department of Human Services from petitioning for the appointment of a guardian.314

A hearing on any petition must be held no sooner than five and no later than ten days after the petition is filed, unless a continuance is granted. At least three days prior to the hearing, notice must be served on the petitioner and notice and a copy of the petition must be served on the person alleged to be a disabled adult or elder person needing protective services and on the person or persons named in the petition as interfering with the investigation or with the provision of protective services. Notice must be served either in person or by first-class mail. Any person willfully violating any order issued pursuant to the Act will be in contempt of the court and may be punished accordingly.315

The expenses of the court and the hearing officer for any hearing conducted under the Act are the same as those provided in Code Section 37-3-122316 and must be paid as provided therein. However, nothing in the Act authorizes the payment of attorney’s fees for any hearing conducted under the Act.317

If the director or other adult protection agency employee gains knowledge that a disabled adult or elder person is in need of protective services and may be in imminent danger resulting from abuse, exploitation, or neglect, the director or designee of the director may file a petition with the probate or superior court stating the grounds on which the petitioner believes that the disabled adult or elder person may be in imminent danger and seeking immediate access to such person. The judge, in his/her discretion, may issue an ex parte order requiring the caretaker or any other person at the place where the disabled adult or elder person resides to afford an adult protection agency employee immediate access to such person to determine the person’s well-being. If the adult protection agency employee is denied access to the disabled adult or elder person, the employee must immediately contact a law

313 O.C.G.A. §30-5-5(d).
314 O.C.G.A. §30-5-5(e).
315 O.C.G.A. §30-5-5(f).
316 See Chapter 12.
317 O.C.G.A. §30-5-5(g).
enforcement officer to assist the employee in enforcing such order. Any person violating such an order may be held in contempt of court.\textsuperscript{318}

The Act provides that all records pertaining to the abuse, neglect, or exploitation of disabled adults and elder persons in the custody of the Department of Human Services shall be confidential.\textsuperscript{319} No mention is made of records maintained by the court. The rationale for confidentiality of the department's records may be to protect informants; however, since all records in the custody of the department are confidential by statute, the probate court records, which will contain much of the same information, should be confidential.

**PART V. TEMPORARY HEALTH CARE PLACEMENT FOR ADULTS**

23. **Temporary Health Care Placement Decision Maker for an Adult**

The Temporary Health Care Placement Decision Maker for an Adult Act,\textsuperscript{320} passed in 1999, is intended to provide a summary or brief process for the transfer of an adult who is unable to give informed consent, and for whom there is not another person authorized to consent, from one health care facility to another without the necessity, time, and expense of guardianship. It is intended to and does apply in limited situations only.

The Act provides for the most appropriate placement of these individuals and declares an order of priority for those persons who may make the decision to transfer, admit, or discharge such adults. It provides a procedure for obtaining authorization for a transfer from the court when the patient is unable to give consent and there is an “absence of a person authorized to consent.”\textsuperscript{321}

When:

1. A physician who has personally examined the adult certifies in the patient’s medical records that (a) the adult is unable to consent for him/herself and (b) it is the physician’s belief that it is in the adult’s best interest (1) to be discharged from a hospital, institution, medical center, or other health care institution providing health or personal care for treatment of any type of physical or mental condition and (2) to be transferred to or admitted to an alternative facility or placement, including, but not limited to, nursing facilities, personal care homes, rehabilitation facilities, and home and community based programs;\textsuperscript{322} and

\begin{itemize}
\item \textsuperscript{318} O.C.G.A. §30-5-5(h).
\item \textsuperscript{319} O.C.G.A. §30-5-7.
\item \textsuperscript{320} O.C.G.A. §31-36A-1.
\item \textsuperscript{321} See O.C.G.A. §31-36A-3 for definitions of “unable to consent” and “absence of a person authorized to consent.”
\item \textsuperscript{322} O.C.G.A. §31-36A-5.
\end{itemize}
2. There is an “absence of a person authorized to consent” to the transfer, any interested person(s), including, but not limited to, any authority, corporation, partnership, or other entity operating the health care facility where the adult is present, may petition the probate court for a “health care placement transfer, admission, or discharge order.” The petition is to be filed in the probate court of the county where the adult is found, provided that the adult was not moved there solely for the purpose of obtaining jurisdiction.\footnote{O.C.G.A. §31-36A-7(a).}

The Act provides for the specific contents of the petition\footnote{Id.} and requires supporting affidavits from a physician and the discharging health care facility relating to the necessity of transfer.\footnote{O.C.G.A. §§31-36A-7(b) and 31-36A-7(c).} The judge of the probate court must review the petition and accompanying affidavits and other information to determine if all the necessary information is provided to the court as required by the Act and must enter an instanter order if the specified information is provided. The order authorizes the petitioner or the petitioner’s designee to do all things necessary to accomplish the adult’s discharge from a hospital, institution, medical center, or other health care institution and transfer to or admission to the recommended facility or placement.\footnote{O.C.G.A. §31-36A-7(d).} At the same time as issuing the order, the probate court must provide a copy of the order to the Commissioner of the Department of Community Health (“DCH”).\footnote{O.C.G.A. §31-36A-7(e).}

The order expires upon the earliest of the following:

1. The completion of the transfer, admission, or discharge and such responsibilities associated with such transfer, admission, or discharge, including, but not limited to, assisting with the completion of applications for financial coverage and insurance benefits for the health or personal care;

2. Upon a physician’s certification that the adult is able to make decisions regarding his/her placements and can communicate same by any means; or

3. At a time specified by the court not to exceed 30 days from the date of the order.\footnote{O.C.G.A. §31-36A-7(f).}

The court order is limited to authorizing the transfer, admission, or discharge and other responsibilities associated with such decision; it does not include the authority to perform any other acts on behalf of the adult not expressly authorized under the Act.\footnote{O.C.G.A. §31-36A-7(g).} Further, the adult retains all other rights under federal and state laws.\footnote{O.C.G.A. §§31-36A-6(e) and 31-36A-7(h).}

The Act expressly does not apply to involuntary examination and hospitalization for mental
It should be obvious that this Act applies only in very limited circumstances and for very limited purposes. Any order entered expires in short order and authorizes nothing more than the actual transfer and completion of related responsibilities. The adult patient retains every right to refuse treatment at the transfer facility and/or to leave the facility even against medical advice. Therefore, this procedure is not to be used to transfer a patient who simply is refusing the transfer or objecting to the proposed placement. This procedure will not obviate the necessity for guardianship when it is expected that continuing and ongoing decisions must be made for the adult.

APPENDIX TO CHAPTER 4
GUARDIANS AND CONSERVATORS OF ADULT WARDS,
PROBATE JUDGES AS CUSTODIANS OF CERTAIN FUNDS,
GUARDIANS OF VETERANS, PROTECTION OF DISABLED ADULTS
AND ELDER PERSONS, AND TEMPORARY HEALTH CARE
PLACEMENT OF ADULTS

A11-1. Guardianship Flowchart

A11-2. Sample Adult Personal Status Report

A11-3. Sample Return of Conservator

A11-4. Sample Citation

A11-5. Sample Petition for Intra-State Transfer

A11-6. Sample Temporary Healthcare Placement Petition

Important Notice

Several sample orders and forms have been included in this Appendix. These sample orders and forms have not been officially sanctioned by the Georgia Council of Probate Court Judges. They have, unless otherwise noted, been prepared by the author. They are provided solely as samples. They should be modified or adapted to the specific court for the specific purpose, with any unnecessary material being deleted and any additional material being added.

William J. Self, II
## APPENDIX A11-1 ADULT GUARDIANSHIP FLOWCHART

**The Petition must be filed by:**
- TWO interested persons having knowledge of the facts alleged; OR
- ONE interested person, together with an affidavit of a physician, psychologist or licensed clinical social worker

**Petition is reviewed by Probate Judge for probable cause**

**Dismissal for want of sufficient facts to show probable cause**

**Appoint an evaluator**
- Appoint attorney for PW if counsel is not retained by PW
- Order Evaluation (Time and Date)
- Serve PW
- Notify spouse and all adult children; if none, notify at least two next of kin or friends
- Appoint a GAL if additional powers are sought or if deemed appropriate

**Evaluation of PW no sooner than 5 days after service on PW**

**Evaluation Report to be filed within 7 days after evaluation**

**Petition and Evaluation Report are reviewed by Judge for probable cause**

**Dismissal for want of probable cause**

**Set time and date for hearing, not less than 10 days after notice to PW and others**
- Notify parties and counsel; send copies of Evaluation Report

**Evaluation Report to be filed within 7 days after evaluation**

**Petition and Evaluation Report are reviewed by Judge for probable cause**

**Dismissal for want of probable cause**

**Final Hearing**
- Held in Courtroom or other location for cause
- Exclude public for good cause
- Waive PW’s appearance only for good cause
- Proceedings must be recorded (tape/record is maintained for 45 days after hearing)
- Rules of Evidence apply
- Petitioners have burden of proof by clear and convincing evidence

**Petition DENIED and dismissed after trial**

**Post-appointment supervision and monitoring:**
- Post bond when required by court order
- Video and other training of guardian/conservator
- Personal Status Reports by guardians
- Inventory and Annual Returns by conservators
- Citations against non-compliant guardians

**Post-appointment Actions:**
- Resignation and appointment of successor
- Petition to Modify or Terminate
- Petition to sell property of ward
- Ex-Officio Administration of Intestate Estate by conservator (Cty Conservator only)
- Petition for Dismission

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Revised Handbook Ch. 11, pg. 11-101 January, 2010
IN THE PROBATE COURT OF ___________ COUNTY  
STATE OF GEORGIA

IN RE:  
DOCKET NO.______________

Ward  
PERSONAL STATUS REPORT  
Annual Report on Condition  
of Ward

Guardian

NOTE: THIS FORM MUST BE TYPED OR LEGIBLY PRINTED IN BLACK INK.

1. I/We, __________________________________________, am/are the guardian(s) of the above-named ward and my/our annual report on the condition of the ward is as follows:

2. Present age of ward: ___________  Date of Birth: ___________.

3. Living Arrangements:
   a. Current physical address of the ward is:

   b. The ward’s current residence is:
      ☐ own home/apartment  ☐ guardian’s home/apartment
      ☐ relative’s home/apartment  ☐ hospital of other medical facility
      ☐ nursing/skilled care facility  ☐ personal care/assisted living facility
      ☐ other (Specify:_______________________)

   c. The ward has been in the present residence since _________________.  If moved within the past year, state change(s) and reason(s) for change:
      ____________________________________________________________
      ____________________________________________________________
      ____________________________________________________________

   d. I/We rate the ward’s living arrangements as ☐ excellent ☐ average ☐ below average.  If below average, please explain:
      ____________________________________________________________
      ____________________________________________________________
      ____________________________________________________________

   e. I/We believe the ward is ☐ content, ☐ unhappy with the current living situation.

   f. I/We recommend a more suitable living arrangement for the ward as follows:
      ____________________________________________________________
      ____________________________________________________________

4. Physical Health
   a. The ward’s current general, physical condition is ☐ excellent ☐ good ☐ fair ☐ poor.
   b. During the past year, the ward’s physical condition has
      ☐ remained about the same
      ☐ improved; explain: __________________________________________
      ☐ worsened; explain: __________________________________________
c. During the past year, the ward received the following medical treatment (including check-ups and dental work):

<table>
<thead>
<tr>
<th>Date</th>
<th>Doctor</th>
<th>Ailment</th>
<th>Treatment</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

5. Mental Health
   a. The ward’s current general mental health is □ excellent □ good □ fair □ poor.
   b. During the past year, the ward’s mental condition has
      □ remained about the same
      □ improved; explain: ________________________________________________
      □ worsened; explain: ________________________________________________
   c. During the past year, mental health evaluation and/or treatment by a psychiatrist, psychologist, or social worker □ was □ was not provided.

6. Social Activities/Services
   a. The ward’s current social condition is □ excellent □ good □ fair □ poor.
   b. During the past year, the ward’s social condition has
      □ remained about the same
      □ improved; explain: ________________________________________________
      □ worsened; explain: ________________________________________________
   c. During the past year, the ward has participated in the following activities (explain):
      □ recreational: ________________________________________________
      □ educational: ________________________________________________
      □ social: ______________________________________________________
      □ occupational: ________________________________________________
      □ no activities available: ________________________________________
      □ ward refused to participate in activities: _________________________
      □ ward was unable to participate in activities: _______________________

7. Visits by Guardian
   a. During the past year, I/we visited personally with the ward on the following dates or occasions:
      ___________________________________________________________________
      ___________________________________________________________________
      ___________________________________________________________________
   b. The average amount of time spent on each visit was _______________________
   c. The last time I/we visited with the ward was on _______________________

8. Activities Performed for ward/minor
   a. During the past year, I/we performed the following activities/services/duties for the ward:
      ___________________________________________________________________
      ___________________________________________________________________
      ___________________________________________________________________
9. I/We believe the ward has the following unmet needs (if any):
_________________________________________________________________________

10. The guardianship ☐ should ☐ should not be continued because:
_________________________________________________________________________

11. Is the ward capable of expressing any opinions about the guardianship, the personal needs of the ward, or the services of the guardian? ☐ Yes ☐ No
   If yes, what has the ward expressed about those issues:
_________________________________________________________________________

12. ☐ I/We also serve as conservator(s) for the ward. If so, my/our accounting for the current year ☐ is filed simultaneously with this report ☐ was filed earlier on ____________ ☐ is not yet due but will be filed on ____________ ☐ has not been filed because ___________________________; OR
   ☐ I/We do not serve as conservator(s) for the ward. I/We ☐ have ☐ have not received funds for the support, care, education, health and welfare of the ward. If so, the following is a description of the amount(s) and expenditures of all such funds received by me/us during the reporting period:
_________________________________________________________________________
_________________________________________________________________________

13. My/Our current contact information is:

   Printed Name of Guardian ___________________________ Printed Name of Co-Guardian ___________________________
   Street Address ___________________________ Street Address ___________________________
   State, ZIP ___________________________ City, State, ZIP ___________________________
   Mailing Address, if different ___________________________ Mailing Address, if different ___________________________
   Home Telephone/Work Telephone ___________________________ Home Telephone/Work Telephone ___________________________
   Electronic Mail (Email) Address ___________________________ Electronic Mail (Email) Address ___________________________
Verification

The answers to the foregoing questions and the information provided with regard to the ward/minor are true and correct to the best of my/our personal knowledge and belief and are hereby made under oath.

___________________________
Guardian’s Signature

___________________________
Co-Guardian’s Signature

___________________________
Printed Name of Guardian

___________________________
Printed Name of Co-Guardian

Sworn to and subscribed before me
on __________________________

Sworn to and subscribed before me
on __________________________

___________________________
Notary Public or Clerk of Probate Court

___________________________
Notary Public or Clerk of Probate Court

ORDER ADMITTING TO RECORD

The within and foregoing Personal Status Report is hereby accepted, approved and ordered admitted to record on ____________________________.

Filed: __________________________

___________________________
Judge/Clerk of Probate Court

Recorded in the Minutes in Book _____________ Page ______

This _____ day of _____________, 20___

___________________________
Deputy Clerk
APPENDIX A11-3

PROBATE COURT OF ____________ COUNTY
Instructions for Completing
Annual/Final Return of Conservator

1. Returns of conservators must be full, complete and accurate. Estimates and rounding are not permitted.
2. The return is a report of every receipt and every expenditure of cash and is similar to a simple check register on a personal bank account.
3. If all funds are deposited into the conservatorship account(s) and all payments are made by check or drafts from those account(s), completing the return should be no more difficult than transferring the information from the bank records to these forms.
4. It is the responsibility of the conservator to fully and properly complete the returns required. **It is not the responsibility of court staff to prepare or correct returns.** Incorrect, incomplete or unbalanced returns will simply be returned to the conservator for completion or correction.
5. Please NOTE: all returns must be typed or legibly printed in black ink. Illegible returns will NOT be accepted for filing.

Page 1 of Return

1. Enter the name(s) of the Conservator(s) on the line in the box at the top of Page 1.
2. Enter the Docket No. (the case number) on the line indicated.
3. Enter the **Name** of the Ward or Minor on the line indicated.
4. Circle “Final” or “Annual” to indicate the type of return.
5. Enter the dates covered by the return. If this is the **first** return, the beginning date will be the date of your appointment. If this is not the first return, the beginning date will be the ending date from the last return.
6. Complete the Combined Summary Accounting.
   A. Enter the total beginning balance from the last accounting. If this is the first return, the beginning balance is zero; everything received will be reported under Receipts.
   B. Enter the Total Receipts in all accounts for the period covered by the return. Include all money and accounts initially transferred to and/or deposited into the conservatorship account(s) and all additional money received. Include all income received from all sources and all interest paid on any accounts or deposits. **“If you received it, you must report it.”**
   C. Add the beginning balance and the Receipts, and enter the Subtotal.
   D. Enter the Total Expenditures from all accounts for the period covered by the return. Include all money spent or paid out, including any amounts automatically deducted from accounts and any bank charges, check printing charges, service charges or other fees. Include also any money paid out in cash (a practice discouraged by the court). **“If you spent it, you must report it.”**
   E. Subtract the Expenditures from the Subtotal, and enter the ending balance on the next line.
7. You are REQUIRED to file with each Return and updated Inventory and Asset Management Plan. Check the box to indicate that you have attached it to your Return.

Page 2 of Return

1. **Transaction Register(s)**
   A. Complete a TRANSACTION REGISTER [Page 2] for EACH conservatorship account for the full period covered by your Return. If all transactions for the period covered will not fit on one page, make copies of Page 2. The period covered for each account must be the same.
   B. If you prefer, instead of the Transactions Register, you may attach a printed and complete computer software transaction report for each conservatorship account, provided it includes all of the required information.
   C. You MUST report and show all receipts and all expenditures. Any money you received, from any source, is a “Receipt,” and any money you spent or paid out is an “Expenditure.” Be sure to include any money automatically deposited into an account and any interest earned on an account. Also be sure to include any...
automatic payments from an account and all service charges, check printing charges and other bank fees. 
D. If you have more than one account, use the following Worksheet to combine the amounts from all accounts into totals for the Combined Summary on Page 1.

**WORKSHEET TO RECAP ALL ACCOUNTS**

If you have more than one account, before entering the amounts in the Combined Summary on Page 1, complete the following RECAP:

**BEGINNING BALANCES:**

<table>
<thead>
<tr>
<th>Account No.</th>
<th>____________</th>
<th>____________</th>
<th>____________</th>
<th>____________</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**TOTAL BEGINNING BALANCES (Enter on Page 1)**

**RECEIPTS:**

<table>
<thead>
<tr>
<th>Account No.</th>
<th>____________</th>
<th>____________</th>
<th>____________</th>
<th>____________</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**TOTAL RECEIPTS (Enter on Page 1)**

**EXPENDITURES:**

<table>
<thead>
<tr>
<th>Account No.</th>
<th>____________</th>
<th>____________</th>
<th>____________</th>
<th>____________</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**TOTAL EXPENDITURES (Enter on Page 1)**

**ENDING BALANCES:**

<table>
<thead>
<tr>
<th>Account No.</th>
<th>____________</th>
<th>____________</th>
<th>____________</th>
<th>____________</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**TOTAL ENDING BALANCES (Enter on Page 1)**

---

**Page 3 of Return**

1. **Bank Account Verifications:** The balances in all accounts must be verified. A certificate signed by a bank employee for each account is required unless you provide the court an original bank statement for the account showing the account balance on the ending date of the return. The bank statement will be returned to you after being copied by the staff.

2. **Verification of Investments:** All investments held by a broker or financial institution must be verified. A certificate signed by an employee of each brokerage firm or institution is required unless you provide the court an original statement of holdings showing the investments held on the ending date of the return. The statement will be returned to you after being copied by the staff.

*Serving as Conservator for another is an important job. It should be taken seriously. As a Conservator, you have taken an oath of office by which you have agreed to perform your duties as a Conservator in compliance with Georgia law. It is YOUR DUTY to file a Return each and every year as long as you serve as Conservator. It is the responsibility of the Court and its staff to assure that EVERY Conservator complies with this requirement.*
IN THE PROBATE COURT OF ______________________ COUNTY, GEORGIA

Conservator(s)

IN THE MATTER OF THE ESTATE OF ) Final - Annual RETURN OF CONSERVATOR

) From )

Ward/Minor To

COMBINED SUMMARY ACCOUNTING OF CASH TRANSACTIONS IN ALL ACCOUNTS

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. CASH BALANCES FROM ALL ACCOUNTS FROM LAST ACCOUNTING</td>
<td>$</td>
</tr>
<tr>
<td>B. ADD TOTAL DEPOSITS/RECEIPTS FOR ALL ACCOUNTS</td>
<td>$</td>
</tr>
<tr>
<td>C. SUBTOTAL</td>
<td>$</td>
</tr>
<tr>
<td>D. SUBTRACT TOTAL WITHDRAWALS FROM ALL ACCOUNTS</td>
<td>$</td>
</tr>
<tr>
<td>E. CASH BALANCES IN ALL ACCOUNTS AT END OF REPORTING PERIOD</td>
<td>$</td>
</tr>
</tbody>
</table>

(Check here) I/We have attached hereto an updated Inventory and Asset Management Plan (Required)

VERIFICATION AND CERTIFICATION BY CONSERVATOR(S)

STATE OF GEORGIA
COUNTY OF ____________

I/We, ________________, being duly sworn, depose and say that I am/we are the Conservator(s) for the Minor/Ward named above, that I/we now reside at ___________________________ and that this is a full and true account of the estate for the period stated, to the best of my/our knowledge and belief. I/We do further certify to the Court: that all bond premiums due have been paid to date; that all income tax returns required have been filed to date; and that all taxes, including ad valorem taxes, have been paid to this date.

For purposes of contacting me/us with regard to this return, my/our daytime telephone number(s) is/are ____________________________, my/our evening telephone number(s) is/are ____________________________, my/our cell telephone number(s) is/are ____________________________, and my/our email address(es) is/are ____________________________.

____ I/We also serve as guardian(s) of the ward/minor, and the Personal Status Report ( ) is filed simultaneously herewith ( ) was previously filed on ____________ ( ) is not due at the same time as this Return.

____ I/We certify that copies of this Return have been mailed by me/us to the Guardian of the Minor/Ward, if one and if different than the Conservator(s) and to the Surety on the bond of the Conservator(s).

Sworn to and subscribed before me on ____________.

(Notary or Clerk, Probate Court)

Signatures of Conservator(s)

Recorded in Imaged Records

PROBATE COURT OF ____________ COUNTY

Docket No. ________________.

Date Imaged: ________________.

RETURN FILED

Filed ________________.

(Dep.) CLERK
<table>
<thead>
<tr>
<th>DATE</th>
<th>CHECK NO.</th>
<th>Transaction Description</th>
<th>Deposit, Credit (Additions)</th>
<th>Payment, Fee, Withdrawal (Subtractions)</th>
<th>BALANCE</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Beginning Balance</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Total Deposits and Withdrawals</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Ending Balance</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

[NOTE: Please copy this page if additional space is needed. Enter the TOTALS on the last page.]
ACCOUNT VERIFICATIONS

NOTE: Use the certificates on this page to verify balances in each account held OR attach an ORIGINAL bank statement for each account showing balances on ending date. The bank statement will be returned to you.

[NOTE: Please copy this page if additional certificates are needed.]

<table>
<thead>
<tr>
<th>CERTIFICATE OF BALANCES ON DEPOSIT</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Name and Address of Bank or Financial Institution)</td>
</tr>
<tr>
<td>I do certify that on ___________________<em><strong>, 20</strong></em>, there was on deposit in this institution to the credit of the estate managed by this Conservator the following:</td>
</tr>
<tr>
<td>Checking Account Balance: $______________ Account Nos. __________________________.</td>
</tr>
<tr>
<td>Savings Account Balance: $______________ Account Nos. __________________________.</td>
</tr>
<tr>
<td>Certificate(s) of Deposit at Face Value: $______________ Certificate Nos. __________________________.</td>
</tr>
</tbody>
</table>
| Interest paid and credited to the above accounts during period of this Statement of Account totaled $______________.
[Do NOT include accrued but unpaid interest.] |
| I further certify that each account is properly titled in the Conservator’s fiduciary capacity for the benefit of the ward/minor. |
| (Signature of Certifying Official) |
| Printed Name and Title of Certifying Official |

<table>
<thead>
<tr>
<th>CERTIFICATE OF BALANCES ON DEPOSIT</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Name and Address of Bank or Financial Institution)</td>
</tr>
<tr>
<td>I do certify that on ___________________<em><strong>, 20</strong></em>, there was on deposit in this institution to the credit of the estate managed by this Conservator the following:</td>
</tr>
<tr>
<td>Checking Account Balance: $______________ Account Nos. __________________________.</td>
</tr>
<tr>
<td>Savings Account Balance: $______________ Account Nos. __________________________.</td>
</tr>
<tr>
<td>Certificate(s) of Deposit at Face Value: $______________ Certificate Nos. __________________________.</td>
</tr>
</tbody>
</table>
| Interest paid and credited to the above accounts during period of this Statement of Account totaled $______________.
[Do NOT include accrued but unpaid interest.] |
| I further certify that each account is properly titled in the Conservator’s fiduciary capacity for the benefit of the ward/minor. |
| (Signature of Certifying Official) |
| Printed Name and Title of Certifying Official |

<table>
<thead>
<tr>
<th>CERTIFICATE OF INVESTMENTS HELD</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Name and Address of Institution)</td>
</tr>
<tr>
<td>I do certify that on ___________________<em><strong>, 20</strong></em>, there were held by this institution to the credit of the estate managed by this Conservator the Investments shown on the Inventory and Asset Management Plan attached to this Return and that the cost or value at acquisition are correct. I further certify that all investments are properly titled in the Conservator’s fiduciary capacity for the benefit of the ward/minor.</td>
</tr>
<tr>
<td>(Signature of Certifying Official)</td>
</tr>
<tr>
<td>Printed Name and Title of Certifying Official</td>
</tr>
</tbody>
</table>
### Calculation of Bond Sufficiency

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Value of Personal and Intangible Property from Updated Inventory and</td>
<td></td>
</tr>
<tr>
<td>Asset Management Plan attached to Return</td>
<td>$</td>
</tr>
<tr>
<td>PLUS: Any Cash Assets Not Shown on Updated Inventory</td>
<td></td>
</tr>
<tr>
<td>TOTAL VALUE TO BE BONDED</td>
<td>$</td>
</tr>
<tr>
<td>CURRENT SURETY BOND AMOUNT</td>
<td>$</td>
</tr>
<tr>
<td>AMOUNT OF BOND EXCESS/(DEFICIENCY)</td>
<td>$</td>
</tr>
</tbody>
</table>

### RETURN AUDITED

Audited and approved on

By: ______________________________________

Fiduciary Compliance Officer/Deputy CLERK

### ORDER ADMITTING RETURN TO RECORD

The foregoing Return and its affidavit having been carefully examined and found correct, and having remained on file in office for ___________ days and no objections having been filed thereto, the same is allowed; and it is ordered that said return together with its affidavit be recorded as the law requires.

Filed ________________

Judge, Probate Court ____________ County

(Deputy) Clerk

### ORDER DIRECTING RECORDING OF RETURN

WITHOUT APPROVAL OR DISAPPROVAL

The within and foregoing return having been filed and examined and having remained on file for more than thirty days and no objection to same having been filed, but it appearing to the Court that the return may evidence waste or mismanagement, it is ordered that the return be recorded **without approval or disapproval** by the Court and that a copy of same be served upon the surety on the conservator’s bond.

Filed ________________

Judge, Probate Court ____________ County

(Deputy) Clerk
APPENDIX A11-4

IN THE PROBATE COURT OF __________ COUNTY
STATE OF GEORGIA

IN RE: : DOCKET NO. ______________

______________________________
(Decedent/Minor/Incapacitated Adult)

______________________________
(Personal Representative/Conservator)

______________________________
Surety

CITATION TO FIDUCIARY AND SURETY TO SHOW CAUSE WHY LETTERS SHOULD NOT BE REVOKED AND WHY ANY SHORTAGE OF FUNDS OR LOSSES SHOULD NOT BE ASSESSED AGAINST SAID FIDUCIARY AND SURETY

Upon information or belief, it appearing to the Court that the above-named fiduciary has either (1) failed to file annual returns, inventory, personal status reports and/or other reports as required by law or Court order, (2) made unauthorized expenditures or otherwise encroached upon corpus without leave of the Court, (3) failed to properly carry out the duties of the fiduciary, and/or (4) otherwise failed to comply with the rules and instructions of this Court, as required by law.

The above named fiduciary is hereby ordered to be and appear before this Court, in Room __________, __________ County Courthouse, __________, Georgia, at ______________, then and there to answer these charges, and to render a full and complete accounting of all money and property coming into your hands and/or all actions taken by you in your fiduciary capacity, and to show cause why you should not be removed from your fiduciary capacity in the above estate.

Notice is further given that if any property or funds are unaccounted for or have been expended improperly, you and your surety may be held jointly and severally liable for same, together with all costs of these proceedings. Notice is further given that Letters heretofore issued to you by the Court may be revoked at such hearing. If you fail to appear after proper notice then the Court will have to assume that you have violated your duties and will proceed with such evidence as may be before the Court.

You are hereby further directed to bring with you and deliver to the Clerk of this Court at or before the time of such hearing all records of your dealings and actions as estate fiduciary since the date of your last filed and accepted return or report, including, but not necessarily limited to: all bank statements; canceled checks; deposit slips; receipts; invoices; statements; and other document(s) in support of your dealings and actions as fiduciary.
SO ORDERED, on ________________.

__________________________________________
JUDGE
PROBATE COURT, _____________ COUNTY

ENTRY OF SERVICE

GEORGIA, ____________ COUNTY
This is to certify that I have this day served ___________________________ personally with a copy of the within Citation.

__________________________
Date

__________________________
Deputy Sheriff, _____________ County

ENTRY OF SERVICE

GEORGIA, ____________ COUNTY
This is to certify that I have this day served ___________________________, the registered agent for service in Georgia of ___________________________, personally with a copy of the within Citation.

__________________________
Date

__________________________
Deputy Sheriff, _____________ County

CERTIFICATE OF MAILING

I certify that I have this date, mailed by United States first-class mail, in envelope properly addressed with adequate postage affixed, a copy of the foregoing Citation to:

__________________________
Date

 ___________________________
(Dep.) CLERK, Probate Court

SEAL
APPENDIX A11-5

IN THE PROBATE COURT OF __________ COUNTY
STATE OF GEORGIA

IN RE: : DOCKET NO. ________________

____________________________
Ward/Minor :

PETITION TO ACCEPT INTRA-STATE TRANSFER OF
GUARDIANSHIP AND/OR CONSERVATORSHIP

The petition of ______________________________, Guardian and/or Conservator of
the above named (ward)(minor), respectfully shows to the Court the following:

1.

Petitioner is the duly qualified and acting Guardian and/or Conservator of the above
named ward/minor, having been duly appointed by the Probate Court of ______ County on
.

2.

Petitioner, whose current residence is in this county at ______________________ and
whose mailing address is _________________, desires to have the proceedings removed to this
county.

3.

The ward's/ minor’s current domicile is ______ County, Georgia, and the ward/minor is
presently residing at _________________________________.

4.

Petitioner herewith tenders to this court a surety bond in the amount of $___________,
which is the amount of the bond presently posted in the Probate Court of ____________ County.

5.

Upon certification by this court of the posting and acceptance of the herewith tendered
bond, petitioner will seek an order from the Probate Court of ____________ County transferring
jurisdiction over the proceedings to this court and will file with this court certified copies of all
records concerning the guardianship/conservatorship from said transferring court.
Wherefore, petitioner prays that this court enter an order certifying to the filing with and acceptance by this court of the said bond and acknowledging this court's willingness to accept a transfer of jurisdiction over the proceedings on the above-named ward/minor; and that this Court grant such other and further relief that it deems just and proper.

____________________________________  __________________________________
Signature of first petitioner            Signature of second petitioner, if any
____________________________________  __________________________________
Printed Name                           Printed Name
____________________________________  __________________________________
Address                                 Address
____________________________________  __________________________________
Telephone Number                        Telephone Number

Signature of Attorney: __________________________
Typed/printed name of Attorney: ________________
Address: ____________________________________
Telephone: _____________ State Bar # __________

VERIFICATION

GEORGIA, ___________ COUNTY

Personally appeared before me the undersigned petitioner(s) who on oath state(s) that the facts set forth in the foregoing petition are true.

Sworn to and subscribed before me
this ___ day of _________, 20__.

____________________________________
First Petitioner

NOTARY/CLERK OF PROBATE COURT

____________________________________
Printed Name

Sworn to and subscribed before me
this ___ day of _________, 20__.

____________________________________
First Petitioner

NOTARY/CLERK OF PROBATE COURT

____________________________________
Printed Name
ORDER CERTIFYING THE POSTING OF BOND AND
ACCEPTING PROPOSED TRANSFER OF
GUARDIANSHIP AND/OR CONSERVATORSHIP

A petition to accept transfer of guardianship/conservatorship having been filed in this
court concerning the above-named ward/minor, and the same having been read and considered,
and
It appearing to the court that the conservator has filed with this court a surety bond in the
amount of $__________, which bond and security are acceptable to this court, and
This court being willing to accept a transfer of jurisdiction over the proceedings from the
Probate Court of _______ County,

IT IS ORDERED that the said bond be filed, that the same is hereby approved by this
court; that a transfer of jurisdiction over the proceedings concerning the above-named
ward/minor to this court from the Probate Court of _______ County is acceptable to
this court; and that a copy of this order shall serve to so certify the same to the Probate Court of
County.

IT IS FURTHER ORDERED that, upon receipt by this court of an order transferring
jurisdiction over the said proceedings to this court entered by the Probate Court of
County, together with certified copies of all records concerning the guardianship/conservatorship
from the said transferring court, this court will assume all jurisdiction over and supervision of the
proceedings concerning the above-named ward/minor.

IT IS FURTHER ORDERED that, upon such a transfer of jurisdiction over the said
proceedings concerning the above-named ward/minor, the sureties on the bond in this court shall
be liable for both past and future misconduct, if any, of the conservator.

SO ORDERED, on ________________.

__________________________
Judge, Probate Court of
County
IN THE PROBATE COURT OF __________ COUNTY  
STATE OF GEORGIA

IN RE: ........................................

DOCKET NO. ________________

________________________________

Ward/Minor

PETITION TO AUTHORIZE INTRA-STATE TRANSFER OF 
GUARDIANSHIP AND/OR CONSERVATORSHIP

The petition of _______________________, Guardian and/or Conservator of the above-named (ward)(minor), respectfully shows to the Court the following:

1. Petitioner is the duly qualified and acting Guardian and/or Conservator of the above named ward/minor, having been duly appointed by this court on ______________________.

2. Petitioner, whose current residence is in _________________ County at _________________________ and whose mailing address is _______________________________, desires to have the proceedings removed to the Probate Court of said county.

3. The ward's/minor's current domicile is _________________ County, Georgia, and the ward/minor is presently residing at _________________________________.

4. Attached hereto as Exhibit “A” is a copy of an Order from the Probate Court of _________________ County, certifying the fact that Petitioner has filed with said court a surety bond in the amount of $ ______________, which bond has been approved by said court. The said Order further acknowledges the willingness of said court to accept a transfer of jurisdiction over the proceedings concerning the above-named ward/minor upon the entry of an order in this court authorizing same.

5. There are no matters pending in this court which would prevent the proposed transfer, and the proposed transfer will not work any undue detriment to the ward/minor or the estate.

Wherefore, petitioner prays that this court enter an order transferring jurisdiction over the proceedings concerning the above-named ward/minor to the Probate Court of _________________.
County, directing the Clerk of this court to prepare for filing in said court certified copies of all records concerning the proceedings in this court, and relieving the sureties on the bond in this court from liability for any future misconduct, if any, of the conservator, and granting such other and further relief that it deems just and proper.

____________________________________  __________________________________
Signature of first petitioner  Signature of second petitioner, if any

____________________________________  __________________________________
Printed Name  Printed Name

____________________________________  __________________________________
Address  Address

____________________________________  __________________________________
Telephone Number  Telephone Number

Signature of Attorney: _______________________________

Typed/printed name of Attorney: _______________________

Address: _____________________________

________________________
Telephone: ____________ State Bar # _____________

VERIFICATION

GEORGIA, ____________ COUNTY

Personally appeared before me the undersigned petitioner(s) who on oath state(s) that the facts set forth in the foregoing petition are true.

Sworn to and subscribed before me this ___ day of _________, 20___.

First Petitioner

NOTARY/CLERK OF PROBATE COURT  Printed Name

-----

Sworn to and subscribed before me this ___ day of _________, 20___.

First Petitioner

NOTARY/CLERK OF PROBATE COURT  Printed Name
ORDER APPOINTING GUARDIAN AD LITEM

The within and forgoing petition having been filed, read and considered,

IT IS ORDERED that ____________________ is hereby appointed as guardian-ad-litem for the ward/minor named in the proceedings.

IT IS ORDERED FURTHER that a copies of the petition, together with all Exhibits, and this Order be served upon the guardian-ad-litem, who shall make answer whether, in the opinion of the guardian ad litem, the proposed transfer of jurisdiction is in the best interest of the ward/minor.

SO ORDERED on ____________

__________________________________________

Judge, Probate Court of ______
County

ANSWER OF GUARDIAN AD LITEM

I hereby accept the foregoing appointment, acknowledge service and notice of the proceedings as provided by law, and for answer say:

__________________________________________

DATE

Signature of Guardian ad Litem

__________________________________________

Printed Name of Guardian ad Litem

__________________________________________

Address

__________________________________________

Telephone
IN THE PROBATE COURT OF ___________ COUNTY
STATE OF GEORGIA

IN RE: : DOCKET NO. _______________
: :
: :
: :
Ward/Minor : :

ORDER DIRECTING TRANSFER OF
GUARDIANSHIP AND/OR CONSERVATORSHIP

A petition to transfer guardianship/conservatorship having been filed in this court concerning the above-named ward/minor, and the same having been read and considered, and

It appearing to the court that the Petitioner has filed with this court a copy of an order from the Probate Court of ___________ County certifying the fact that the Petitioner has filed with said court a surety bond in the amount of $__________, which bond has been approved by said court, which Order further acknowledges the willingness of said court to accept a transfer of jurisdiction over the proceedings concerning the above-named ward/minor upon the entry of an order in this court authorizing same, and

It appearing to the court that there are no matters currently pending in this court which would prevent the proposed transfer, and it further appearing that the proposed transfer is in the best interest of the ward/minor,

IT IS ORDERED that jurisdiction over the proceedings concerning the above-named ward/minor be, and the same are hereby, transferred to the Probate Court of County.

IT IS FURTHER ORDERED that the Clerk of this court shall send a copy of this order, together with authenticated certified copies of all records concerning the proceedings in this court, to the Probate Court of ___________ County, which court has agreed to assume all jurisdiction over and supervision of the said proceedings.

IT IS FURTHER ORDERED that the sureties on the bond posted in this court be, and are hereby, relieved of all liability for future misconduct, if any, of the conservator. Said sureties are not hereby relieved of liability for any past misconduct, if any, of the conservator.

SO ORDERED, on _______________.

FILED: ________________

DATE

_______________________
CLERK
Chapter 12

MENTAL HEALTH, DEVELOPMENTAL DISABILITIES, AND SUBSTANCE ABUSE PROCEEDINGS

The Revised
HANDBOOK FOR PROBATE JUDGES OF GEORGIA
2010
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CHAPTER 12
MENTAL HEALTH, DEVELOPMENTAL DISABILITIES, AND ADDICTIVE DISEASES PROCEEDINGS

PART I.
MENTAL HEALTH AND ADDICTIVE DISEASES

1.0  MENTAL ILLNESS AND ADDICTIVE DISEASE
TREATMENT AND SERVICES IN GENERAL

1.1  Probate Court Involvement

The involvement of the probate courts in mental health and addictive diseases (substance abuse) can vary significantly depending upon whether there is a state regional hospital and/or a private mental health facility approved by the Department of Behavioral Health and Developmental Disabilities (DBHDD). Probate courts in counties where there is not a regional hospital or such a private facility in that county will have involvement primarily only in the assessment and evaluation stages and in the ordering and enforcement of mandated outpatient care.

1.2  Change in Name of Department of Human Resources

Effective July 1, 2009, the former Georgia Department of Human Resources was divided into a Department of Human Services and a Department of Behavioral Health and Developmental Disabilities. All matters dealing with mental health, developmental disabilities, and addictive diseases treatment and services now falls under the auspices of the new Department, hereinafter abbreviated DBHDD.¹

1.3  Definitions

An understanding of the proceedings for involuntary treatment of mental illness and addictive diseases and for habilitation, care and services for the developmentally disabled requires first an understanding of the definitions which apply to each area. The following definitions are codified in and apply to all Chapters of Title 37 of the Code:²

---

² O.C.G.A. §37-1-1
1. “Addictive disease” means a chronic, often relapsing, brain disease that causes compulsive alcohol or drug seeking and use despite harmful consequences to the individual who is addicted and to those around him/her.

2. “Board” means the Board of Behavioral Health and Developmental Disabilities.

3. "Commissioner" means the commissioner of behavioral health and developmental disabilities.

4. "Community service board" means a public mental health, developmental disabilities, and addictive diseases board established pursuant to Code Section 37-2-6.

5. "Consumer" means a natural person who has been or is a recipient of disability services.

6. "County board of health" means a county board of health established in accordance with Chapter 3 of Title 31 and includes its duly authorized agents.

7. "Department" means the Department of Behavioral Health and Developmental Disabilities and includes its duly authorized agents and designees.

8. "Developmental disability" means a severe, chronic disability of an individual that:
   a. Is attributable to a significant intellectual disability, or any combination of a significant intellectual disability and physical impairments;
   b. Is manifested before the individual attains age 22;
   c. Is likely to continue indefinitely;
   d. Results in substantial functional limitations in three or more of the following areas of major life activities:
      i. Self-care;
      ii. Receptive and expressive language;
      iii. Learning;
      iv. Mobility;
      v. Self-direction; and
      vi. Capacity for independent living; and
vii. Reflects the person's need for a combination and sequence of special, interdisciplinary, or generic services, individualized supports, or other forms of assistance which are of lifelong or extended duration and are individually planned and coordinated.

9. “Disability” means
   a. Mental or emotional illness;
   b. Developmental disability; or
   c. Addictive disease.

10. “Disability services” means services to the disabled or services which are designed to prevent or ameliorate the effect of a disability.

11. "Disabled" means any person or persons having a disability.

12. "Mental illness" means a disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life.


14. "Peace officer" means any federal, city, or county police officer, any officer of the Georgia State Patrol, or any sheriff or deputy sheriff.

15. "Penal offense" means a violation of a law of the United States, this state, or a political subdivision thereof for which the offender may be confined in a state prison or a city or county jail or any other penal institution.

16. "Physician" means any person duly authorized to practice medicine in this state under Chapter 34 of Title 43.

17. "Psychologist" means any person authorized under the laws of this state to practice as a licensed psychologist as set forth in paragraph (3) of Code Section 43-39-1.

18. "Regional board" means a regional board established in accordance with Code Section 37-2-4.1 as that Code section existed on June 30, 2002.

19. "Regional coordinator" means an employee of the department who acts as the department's agent and designee to manage community services for consumers of disability services within a mental health, developmental
disabilities, and addictive diseases region established in accordance with Code Section 37-2-3.

20. "Regional office" means an office created pursuant to Code Section 37-2-4.1. Such office shall be an office of the department and serve as the entity for the administration of disability services in a region.

21. "Regional planning board" means a planning board established in accordance with Code Section 37-2-4.1.

22. "Regional services administrator" means an employee of the department who, under the supervision of the regional coordinator, manages the purchase or authorization of services, or both, for consumers of disability services, the assessment and coordination of services, and ongoing monitoring and evaluation of services provided within a region established in accordance with Code Section 37-2-3.

23. "Regional state hospital administrator" means the chief administrative officer of a state owned or state operated hospital and the state owned or operated community programs in a region. The regional state hospital administrator has overall management responsibility for the regional state hospital and manages services provided by employees of the regional state hospital and employees of state owned or operated community programs within a mental health, developmental disabilities, and addictive diseases region established in accordance with Code Section 37-2-3.

24. "Resident" means a person who is a legal resident of the State of Georgia.

25. "State mental health facility" means, for purposes of this title and Title 31, a hospital, inpatient unit, or other institution operated by or under contract with the department for its operation, including the replacement or reorganization of the facility.

Additional definitions will apply for each of the areas covered in this Chapter of the Handbook, and those definitions will be provided in the appropriate Sections of this Chapter.
1.4 Legislative History, Findings, and Trends in Treatment

Major changes were made in the entire structure of the mental health treatment field in 1993, following the passage of House Bill 100. The national trend toward community-based treatment and services was followed in the restructuring of the former Division of Mental Health, Developmental Disabilities and Addictive Diseases under the Department of Human Resources into mental health regions, served by regional boards, with subdivisions of regions into community service areas, served by community service boards. Emphasis was placed on the “least restrictive” treatment services, with treatment and services locally in the community of the client being preferred over hospitalization or institutionalization. Various amendments have been made in 2002, 2006, and 2009.

The following is the Code Section containing the current legislative findings as to mental health, developmental disabilities, and addictive diseases treatment and services:

“The General Assembly finds that the state has a need to continually improve its system for providing effective, efficient, and quality mental health, developmental disability, and addictive disease services. Further, the General Assembly finds that a comprehensive range of quality services and opportunities is vitally important to the existence and well-being of individuals with mental health, developmental disability, or addictive disease needs and their families. The General Assembly further finds that the state has an obligation and a responsibility to develop and implement planning and service delivery systems which focus on a core set of consumer oriented, community based values and principles which include, but are not limited to, the following:

(1) Consumers and families should have choices about services and providers and should have substantive input into the planning and delivery of all services;

(2) A single point of accountability should exist for fiscal, service, and administrative issues to ensure better coordination of services among all programs and providers and to promote cost-effective, efficient service delivery and administration;

(3) The system should be appropriately comprehensive and adaptive to allow consumers and their families to access the services they desire and need;

---

(4) Public programs are the foundation of the service planning and delivery system and they should be valued and nurtured; at the same time, while assuring comparable standards of quality, private sector involvement should be increased to allow for expanded consumer choice and improved cost effectiveness;

(5) Planning should begin at the local level and include local government, consumers, families, advocates, and other interested local parties;

(6) The system should ensure that the needs of consumers who are most in need are met at the appropriate service levels; at the same time, prevention strategies should be emphasized for those disabilities which are known to be preventable;

(7) The system should be designed to provide the highest quality of services utilizing flexibility in funding, incentives, and outcome evaluation techniques which reinforce quality, accountability, efficiency, and consumer satisfaction;

(8) The functions of service planning, coordination, contracting, resource allocation, and consumer assessment should be separated from the actual treatment, habilitation, and prevention services provided by contractors;

(9) Consumers and families should have a single, community based point of entry into the system;

(10) Consumers, staff, providers, and regional planning board and community service board members should receive ongoing training and education and should have access to key management resources such as information systems and technical and professional support services; and

(11) The department is responsible for ensuring the appropriate use of state, federal, and other funds to provide quality services for individuals with mental health, developmental disabilities, or addictive disease needs who are served by the public system and to protect consumers of these services from abuse and maltreatment.

Local governments, specifically county governing authorities, have provided outstanding leadership and support for mental health, developmental disability, and addictive disease programs, and the General Assembly finds that their investments, both personal and capital, should be valued and utilized in any improved system. As such, the state and any new governing structure should take special precautions to
ensure that the county governing authorities have an expanded level of input into decision making and resource allocation and that any services or programs should continue to use and expand their use of county facilities and resources wherever appropriate and possible.

The purpose of [this restructuring] is to provide for a comprehensive and improved mental health, developmental disability, and addictive disease services planning and delivery system in this state which will develop and promote the essential public interests of the state and its citizens. The provisions of [Chapters 1 and 2 of Title 37] shall be liberally construed to achieve their purposes.”

Regrettably, these altruistic expressions of intent and high goals have yet to be brought to fruition, primarily, in the author’s opinion, because of the state’s failure to properly and fully fund implementation and to require treatment for mental illnesses and addictive diseases and services for the developmentally disabled on par with those offered for physical illnesses.

1.5 Limitation of Chapter to Involuntary Treatment

This Chapter is intended only to cover involuntary treatment of persons 17 years of age and older with mental illnesses and/or addictive diseases and probate court involvement in habilitation, community services, and day-care centers for the developmentally disabled aged 17 years or older. Voluntary treatment will not be covered in any detail and will be discussed only when appropriate to a full understanding of the involuntary process. Habilitation for the Developmentally Disabled will be covered in Part II. of this Chapter. Involuntary treatment for the mentally ill and those with addictive diseases and services for the developmentally disabled who are under the age of 17 falls under the jurisdiction of the juvenile courts and will not be covered in this Chapter.

2.0 INVOLUNTARY TREATMENT

Chapter 3 of Title 37 deals with examination, evaluation, and treatment for mental illness and related matters. Chapter 7 of Title 37 deals with examination, evaluation, and

---

treatment of alcoholics, drug dependent individuals, and drug abusers and related matters. However, to a very great extent, the two Chapters mirror each other. Therefore, involuntary treatment for mental illness and for addictive diseases will be covered together in this Part. Where there are differences in the provisions under Chapter 7, they will be set forth.

2.1 Definitions

Again, an understanding of the procedures for treatment of the mentally ill and those with addictive diseases requires first an understanding of the definitions which apply to this Part, as well as those set forth in Section 1.3 above. The following definitions apply to both Chapters 3 and 7 of Title 37 unless otherwise noted:

[Ch. 7] "Alcoholic" means a person who habitually lacks self-control as to the use of alcoholic beverages or who uses alcoholic beverages to the extent that his health is substantially impaired or endangered or his social or economic function is substantially disrupted.

[Ch. 7] "Alcoholic beverages" means alcoholic spirits, liquors, wines, beers, and every liquid or fluid, patented or not, containing alcoholic spirits, wine, or beer or any other liquid or fluid containing alcohol in any form and producing intoxication in any form or to any degree.

[Ch. 7] "Alcoholic, drug dependent individual, or drug abuser requiring involuntary treatment" means a person who is an inpatient or an outpatient.

"Available outpatient treatment" means outpatient treatment, either public or private, available in the patient's community, including but not limited to supervision and support of the patient by family, friends, or other responsible persons in that community. Outpatient treatment at state expense shall be available only within the limits of state funds specifically appropriated therefor.

"Chief medical officer" means the physician with overall responsibility for patient treatment at any facility receiving patient [under Chapters 3 or 7] or a physician appointed in writing as the designee of such chief medical officer.

"Clinical record" means a written record pertaining to an individual patient and shall include all medical records, progress notes, charts, admission and discharge data, and all other information which is recorded by a facility or other entities responsible for a patient's
care and treatment under this chapter and which pertains to the patient's hospitalization and treatment. Such other information as may be required by rules and regulations of the board shall also be included.

"Community mental health center" means an organized program for the care and treatment of the mentally ill operated by a community service board or other appropriate public provider.

"Court" means:

(A) In the case of an individual who is 17 years of age or older, the probate court of the county of residence of the patient or the county in which such patient is found. Notwithstanding Code Section 15-9-13, in any case in which the judge of such court is unable to hear a case brought under this chapter within the time required for such hearing or is unavailable to issue the order specified in subsection (b) of Code Sections 37-3-41 or 37-7-41, such judge shall appoint a person to serve and exercise all the jurisdiction of the probate court in such case. Any person so appointed shall be a member of the State Bar of Georgia and shall be otherwise qualified for his duties by training and experience. Such appointment may be made on a case-by-case basis or by making a standing appointment of one or more persons. Any person receiving such standing appointment shall serve at the pleasure of the judge making the appointment or his successor in office to hear such cases if and when necessary. The compensation of a person so appointed shall be as agreed upon by the judge who makes the appointment and the person appointed with the approval of the governing authority of the county for which such person is appointed and shall be paid from the county funds of said county. All fees collected for the services of such appointed person shall be paid into the general funds of the county served; or

(B) In the case of an individual who is under the age of 17 years, the juvenile court of the county of residence of the patient or the county in which such patient is found.

"Drug dependent individual" or "drug abuser" means a person who habitually lacks self-control as to the use of opium, heroin, morphine, or any derivative or synthetic drug of that group, barbiturates, other sedatives, tranquilizers, amphetamines, lysergic acid diethylamide or other hallucinogens, or any drug, dangerous drug, narcotic drug, marijuana,
or controlled substance, as defined in Article 2 or Article 3 of Chapter 13 of Title 16 or Chapter 3 of Title 26; or a person who uses such drugs to the extent that his/her health is substantially impaired or endangered or his/her social or economic function is substantially disrupted; provided, however, that no person shall be deemed a drug dependent individual or abuser solely by virtue of his/her taking, according to directions, any such drugs pursuant to a lawful prescription issued by a physician in the course of professional treatment for legitimate medical purposes.

"Emergency receiving facility" means a facility designated by the department to receive patients under emergency conditions as provided in Part 1 of Article 3 of Chapters 3 and 7.

"Evaluating facility" means a facility designated by the department to receive patients for psychiatric evaluation as provided in Part 2 of Article 3 of Chapters 3 and 7.

"Facility" means any state owned or state operated hospital, community mental health center, or other facility utilized for the diagnosis, care, treatment, or hospitalization of persons who are mentally ill or persons who are alcoholics, drug dependent individuals, or drug abusers; any facility operated or utilized for such purpose by the United States Department of Veterans Affairs or other federal agency; and any other hospital or facility within the State of Georgia approved for such purpose by the department.

"Full and fair hearing" or "hearing" means a proceeding before a hearing examiner under Code Sections 37-3-83 and 37-7-83 or Code Sections 37-3-93 and 37-7-93 or before a court as defined in [subsection (5) above]. The hearing may be held in a regular courtroom or in an informal setting, in the discretion of the hearing examiner or the court, but the hearing shall be recorded electronically or by a qualified court reporter. The patient shall be provided with effective assistance of counsel. If the patient cannot afford counsel, the court shall appoint counsel for him or the hearing examiner shall have the court appoint such counsel; provided, however, that the patient shall have the right to refuse in writing the appointment of counsel, in the discretion of the hearing examiner or the court. The patient shall have the right to confront and cross-examine witnesses and to offer evidence. The patient shall have the right to subpoena witnesses and to require testimony before the hearing examiner or in court in person or by deposition from any physician upon whose evaluation the decision of the hearing examiner or the court may rest. The patient shall have the right to obtain a
continuance for any reasonable time for good cause shown. The hearing examiner and the court shall apply the rules of evidence applicable in civil cases. The burden of proof shall be upon the party seeking treatment of the patient. The standard of proof shall be by clear and convincing evidence. At the request of the patient, the public may be excluded from the hearing. The patient may waive his right to be present at the hearing, in the discretion of the hearing examiner or the court. The reason for the action of the court or hearing examiner in excluding the public or permitting the hearing to proceed in the patient's absence shall be reflected in the record.

"Incapacitated by alcohol or drugs" means that a person, as a result of the use of alcoholic beverages, any drug, or any other substances listed [above under “drug dependent individual], exhibits life-threatening levels of intoxication, withdrawal, or imminent danger thereof, or acute medical problems; or is under the influence of alcoholic beverages or drugs or any other substances listed [above under “drug dependent individual] to the extent that the person is incapable of caring for himself or protecting himself due to the continued consumption or use thereof.

"Individualized service plan" means a proposal developed during a patient's stay in a facility and which is specifically tailored to the individual patient's treatment needs. Each plan shall clearly include the following:

(A) A statement of treatment goals or objectives, based upon and related to a proper evaluation, which can be reasonably achieved within a designated time interval;

(B) Treatment methods and procedures to be used to obtain these goals, which methods and procedures are related to these goals and which include a specific prognosis for achieving these goals;

(C) Identification of the types of professional personnel who will carry out the treatment and procedures, including appropriate medical or other professional involvement by a physician or other health professional properly qualified to fulfill legal requirements mandated under state and federal law;

(D) Documentation of patient involvement and, if applicable, the patient's accordance with the service plan; and
(E) A statement attesting that the chief medical officer has made a reasonable effort to meet the plan's individualized treatment goals in the least restrictive environment possible closest to the patient's home community.

[Ch. 3] "Inpatient" means a person who is mentally ill and:

(A) (i) Who presents a substantial risk of imminent harm to that person or others, as manifested by either recent overt acts or recent expressed threats of violence which present a probability of physical injury to that person or other persons; or
(ii) Who is so unable to care for that person's own physical health and safety as to create an imminently life-endangering crisis; and
(B) Who is in need of involuntary inpatient treatment.

[Ch. 7] "Inpatient" means a person who is an alcoholic, a drug dependent individual, or a drug abuser and:

(A) (i) Who presents a substantial risk of imminent harm to that person or others, as manifested by either recent overt acts or recent expressed threats of violence which present a probability of physical injury to that person or other persons; or
(ii) Who is incapacitated by alcoholic beverages, drugs, or any other substances listed [above under “drug dependent individual] on a recurring basis; and
(B) Who is in need of involuntary inpatient treatment.

"Inpatient treatment" or "hospitalization" means a program of treatment for mental illness or for an alcoholic, drug dependent individual, or drug abuser within a hospital facility setting.

"Involuntary treatment" means inpatient or outpatient treatment which a patient is required to obtain pursuant to Chapters 3 or 7].

"Least restrictive alternative," "least restrictive environment," or "least restrictive appropriate care and treatment" means that which is the least restrictive available alternative, environment, or care and treatment, respectively, within the limits of state funds specifically appropriated therefor.

"Mentally ill person requiring involuntary treatment" means a mentally ill person
who is an inpatient or an outpatient.

[Ch. 3] "Outpatient" means a person who is mentally ill and:

(A) Who is not an inpatient but who, based on the person's treatment history or current mental status, will require outpatient treatment in order to avoid predictably and imminently becoming an inpatient;

(B) Who because of the person's current mental status, mental history, or nature of the person's mental illness is unable voluntarily to seek or comply with outpatient treatment; and

(C) Who is in need of involuntary treatment.

[Ch. 7] "Outpatient" means a person who is an alcoholic, drug dependent individual, or drug abuser and:

(A) Who is not an inpatient but who, based on the person's treatment history or recurrent lack of self-control regarding the use of alcoholic beverages, drugs, or any other substances listed [above under “drug dependent individual], will require outpatient treatment in order to avoid predictably and imminently becoming an inpatient;

(B) Who because of the person's current mental state and recurrent lack of self-control regarding the use of alcoholic beverages, drugs, or any other substances listed [above under “drug dependent individual] or nature of the person's alcoholic behavior or drug dependency or drug abuse is unable voluntarily to seek or comply with outpatient treatment; and

(C) Who is in need of involuntary treatment.

"Outpatient treatment" means a program of treatment for mental illness or of alcoholics, drug dependent individuals, or drug abusers outside a hospital facility setting which includes, without being limited to, medication and prescription monitoring, individual or group therapy, day or partial programming activities, case management services, and other services to alleviate or treat the patient's mental illness or lack of self-control regarding the use of alcoholic beverages, drugs or any other substances listed [above under “drug dependent individual] so as to maintain the patient's semi-independent functioning and to prevent the patient's becoming an inpatient.

"Patient" means any mentally ill person who seeks treatment under this chapter or
any person for whom such treatment is sought.

"Private facility" means any hospital facility that is a proprietary hospital or a hospital operated by a nonprofit corporation or association approved for the purposes of this chapter, as provided herein, or any hospital facility operated by a hospital authority created pursuant to the "Hospital Authorities Law," Article 4 of Chapter 7 of Title 31.

"Psychologist" means a licensed psychologist who meets the criteria of training and experience as a health service provider psychologist as provided in Code Section 31-7-162.

"Representatives" means the persons appointed as provided in Code Sections 37-3-147 and 37-7-147 to receive notice of the proceedings for voluntary or involuntary treatment.

"Superintendent" means the chief administrative officer who has overall management responsibility at any facility receiving patients under this chapter, other than a regional state hospital or state owned or operated community program, or an individual appointed as the designee of such superintendent.

[Ch. 3] "Traumatic brain injury" means a traumatic insult to the brain and its related parts resulting in organic damage thereto which may cause physical, intellectual, emotional, social, or vocational changes in a person. It shall also be recognized that a person having a traumatic brain injury may have organic damage or physical or social disorders, but for the purposes of Chapter 3, traumatic brain injury shall not be considered mental illness as defined [above].

[Ch. 3] "Treatment" means care, diagnostic and therapeutic services, including the administration of drugs, and any other service for the treatment of an individual.

[Ch. 7] "Treatment" means the broad range of emergency, outpatient, intermediate, and inpatient services and care, including diagnostic evaluation, medical, psychiatric, psychological, and social service care, vocational rehabilitation, and career counseling, which may be extended to alcoholics, intoxicated persons, drug dependent individuals, and drug abusers.

"Treatment facility" means a facility designated by the department to receive patients for psychiatric treatment as provided in [Chapters 3 or 7].

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5 O.C.G.A. §§37-3-1 and 37-7-1.
2.2 Basic Process for Involuntary Examination, Evaluation and Treatment

There are basically four potential stages in the process leading up to and including the involuntary treatment of persons with mental illnesses and/or addictive diseases: examination, evaluation, treatment, and continued treatment. In many states, and to some extent in Georgia, this entire process is referred to as “civil commitment,” although the term “commitment” seems to connote involuntary confinement in a facility or involuntary outpatient treatment, which occurs only in the third and fourth stages.

The examination takes place at an “emergency receiving facility” designated as such by the DBHDD. The evaluation takes place at an “evaluating facility” designated as such by the DBHDD. Treatment takes place at a “treatment facility” (inpatient) designated as such by the DBHDD or at an outpatient treatment facility (outpatient). Often, the emergency receiving facility and the evaluating facility are located at and are a part of a treatment facility, performing the functions of each at the various stages discussed below.

2.2.1 The “Examination” Stage

(A) There are three ways in which a person who might be mentally ill and/or addicted to or abusing substances and in need of involuntary treatment may be examined by a mental health or addiction professional to determine whether the person is, according to legal and medical criteria, in need of inpatient or outpatient treatment:

1. A form “1013” or “2013” executed by a physician, licensed psychologist, licensed clinical social worker, or clinical nurse specialist in psychiatric/mental health. The numbers refer to DHR forms used by a physician, licensed psychologist, licensed clinical social worker, or clinical nurse specialist in psychiatric/mental health to certify an examination of the patient by that professional within the 48 hours prior to the signing of the certificate resulting in a professional opinion that the patient appears to be a

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6 O.C.G.A. §§37-3-40 and 37-7-40.
7 O.C.G.A. §§37-3-60 and 37-7-60.
8 O.C.G.A. §§37-3-80 and 37-7-80.
9 Presumably, the DBHDD will continue to use the same form numbers formerly used by DHR.
mentally ill person ("1013") or an addict, drug dependent individual or a drug abuser ("2013") requiring involuntary treatment. 10

2. An “Order to Apprehend” ("OTA") issued by a judge of the probate court based upon either an unexpired “1013” or “2013” or the affidavits of at least two persons who have seen the subject person within the preceding 48 hours and that, based upon their observations, they have reason to believe that the person is a mentally ill person or an addict, drug dependent individual or a drug abuser requiring involuntary treatment. 11  See Appendix 12-1 for a suggested form for the affidavits and the Order to Apprehend.

3. Any peace officer may take any person to a physician or psychologist in the county or in an adjoining county or to the nearest emergency receiving facility for examination if (1) the person is committing a penal offense, and (2) the peace officer has probable cause for believing that the person is a mentally ill person or an addict, drug dependent individual or a drug abuser requiring involuntary treatment. The peace officer need not file formal charges against the individual prior to taking the individual to a physician or psychologist or to an emergency receiving facility but shall execute a written report detailing the circumstances under which the person was taken into custody; and this report shall be made a part of the patient's clinical record. 12

(B) The 1013/2013 is delivered to any peace officer, typically the county sheriff, who, within 72 hours of receiving the certificate, is to make a diligent effort to take the subject person into custody and deliver the person to the nearest available emergency receiving facility, where the person shall be received for examination. 13  The OTA commands any peace officer to take such person into custody and deliver him/her either to the nearest available emergency receiving facility serving the county in which the patient is found, where such person shall be received for examination, or to a physician, licensed psychologist, licensed clinical social worker, or clinical nurse specialist in psychiatric/mental health who has agreed to examine such patient and who will provide, where appropriate, a certificate

10 O.C.G.A. §§37-3-41(a) and 37-7-41(a).
11 O.C.G.A. §§37-3-41(b) and 37-7-41(b).
12 O.C.G.A. §§37-3-42 and 37-7-42.
13 O.C.G.A. §§37-3-41(a) and 37-7-41(a).
(1013/2013) to permit delivery of such patient to an emergency receiving facility.\textsuperscript{14} Both the 1013/2013 and the OTA expire seven (7) days after execution.\textsuperscript{15} The peace officer shall execute a written report detailing the circumstances under which the person was taken into custody. The report and a copy of either the 1013/2013 or the OTA shall be made a part of the patient's clinical record.\textsuperscript{16}

(C) A patient who is admitted to an emergency receiving facility shall be examined by a physician or psychologist as soon thereafter as possible but in any event within 48 hours and may be given such emergency treatment as is indicated by good medical practice. The patient must be discharged within 48 hours of the admission unless:

1. An examining physician or psychologist concludes that there is reason to believe that the patient may be a mentally ill person or an alcoholic, drug dependent individual or drug abuser requiring involuntary treatment and executes a certificate (“\textsuperscript{1014}” or “\textsuperscript{2014}”) to that effect within such time; or

2. The patient is under criminal charges, notice of which has been given in writing to the facility, in which case the provisions of Code Section 37-7-95 shall apply.

A physician or psychologist who previously executed a certificate authorized by these provisions is not prohibited from executing any other certificate described for the same or any other patient.\textsuperscript{17} The issuance of such a certificate (1014/2014) begins the second stage of the process discussed in the next subsection.

Immediately upon arrival of a patient at an emergency receiving facility, the facility shall give the patient written notice of the right to petition for a writ of habeas corpus or for a protective order under Code Sections 37-3-148 or 37-7-148. This written notice shall also inform the patient that he/she has a right to legal counsel and that, if the patient is unable to afford counsel, the court will appoint counsel. The notice informing the patient's representatives of the patient's hospitalization in an emergency receiving facility shall include a clear notification that the representatives may petition for a writ of habeas corpus or for a

\textsuperscript{14} O.C.G.A. §§37-3-41(b) and 37-7-41(b).
\textsuperscript{15} O.C.G.A. §§37-3-41 and 37-7-41.
\textsuperscript{16} O.C.G.A. §§37-3-41(c) and 37-7-41(c).
\textsuperscript{17} O.C.G.A. §§37-3-43(a) and 37-7-43(a).
protective order under Code Sections 37-3-148 or 37-7-148.\textsuperscript{18}

(D) If the patient is discharged at this stage, notice of the proposed discharge is to be given to the patient and the patient representatives and (1) to the professional who executed the 1013, if the patient was admitted pursuant to such a certificate, (2) to the court which issued the OTA, if the patient was admitted pursuant to such an order, or (3) if the patient was under criminal charges, written notice of which had been given to the facility, by certified mail or statutory overnight delivery to the law enforcement agency originally having custody of the patient.\textsuperscript{19} NOTE: It is the experience of the author that such notice is seldom given to the court.

\textbf{2.2.2 The “Evaluation” Stage}

\textbf{2.2.2.1 Evaluation on Certificate (1014/2014)}

Within 24 hours of the execution of the certificate (1014/2014) under subsection (C)(1) above, the patient shall be transferred or transported to an evaluating facility where the patient shall be received for evaluation unless the patient has been determined and certified to meet all of the outpatient treatment requirements, discussed in Section 2.2.4 below, in which event the patient shall be discharged under the conditions discussed below (unless the patient is under criminal charges).\textsuperscript{20}

\textbf{2.2.2.2 Evaluation on Court Order}

Any person may file an application executed under oath with the community mental health center for a court ordered evaluation of a person located within that county who is alleged by such application to be a mentally ill person or an alcoholic, drug dependent individual or drug abuser requiring involuntary treatment. Upon the filing of such application, the community mental health center shall make a preliminary investigation and, if the investigation shows that there is probable cause to believe that such allegation is true, it shall file a petition with the court in the county where the patient is located seeking an involuntary admission for evaluation.

Alternatively, any person may file with the court a petition executed under oath

\textsuperscript{18} O.C.G.A. §§37-3-44 and 37-7-44.
\textsuperscript{19} O.C.G.A. §§37-3-43(c) and 37-7-43(c).
\textsuperscript{20} O.C.G.A. §§37-3-43(b) and 37-7-43(b).
alleging that a person within the county is a mentally ill person or an alcoholic, drug dependent individual or drug abuser requiring involuntary treatment. The petition must be accompanied by the certificate of a physician or psychologist stating that he/she has examined the patient within the preceding five days and has found that the patient may be a mentally ill person or an alcoholic, drug dependent individual or drug abuser requiring involuntary treatment and that a full evaluation of the patient is necessary.\textsuperscript{21}

If a petition is filed, the judge of the probate court shall review the petition and, if he/she finds reasonable cause to believe that the patient may be a mentally ill person or an alcoholic, drug dependent individual or drug abuser requiring involuntary treatment, \textit{the court shall hold a full and fair hearing} on the petition no sooner than ten days and no later than 15 days after such petition is filed. Within five days after the filing of such petition, the court shall serve notice of the hearing upon the patient and the patient’s representatives and upon the petitioner. Representatives for the patient shall be appointed pursuant to Code Sections 37-3-147 or 37-7-147; the court shall designate the second representative and, in the absence of designation of one representative by the patient, shall designate both representatives; and, in the absence of such representatives or if the DBHDD is the patient’s guardian, the court shall appoint a guardian-ad-litem. The notice shall include:

1. the time and place of the hearing;
2. notice of the patient’s right to counsel;
3. that the patient or the representatives may apply for court appointed counsel if the patient cannot afford counsel, and that the court will appoint counsel unless the patient indicates in writing that he/she does not wish to be represented by counsel; and
4. notice that the patient may waive his/her rights to a hearing.

A copy of the petition shall be attached to the notice.

The patient shall have a right to counsel. If the patient is unable to afford counsel, the court shall appoint counsel for the patient unless the patient indicates in writing that he/she does not desire to be represented by counsel. The hearing may be waived by the patient after appointment or waiver of counsel.

After a full and fair hearing or, if the hearing is waived, after a full review of the

\textsuperscript{21} O.C.G.A. §§37-3-61 and 37-7-61.
evidence, if the judge of the probate court is satisfied that immediate evaluation is necessary, the judge shall issue an order commanding any peace officer to deliver the patient forthwith to an evaluating facility designated as such by the DBHDD.\textsuperscript{22} \textbf{NOTE:} It is the experience of the author that a petition for the evaluation (“second stage”) is seldom filed; the process almost always begins at the examination (“first stage”).

\textbf{2.2.2.3 The Evaluation}

Any person who is brought to an evaluating facility under a certificate (1014) or under a court order as provided for above shall be received for evaluation and such treatment as is indicated by good medical practice.

The patient may be detained for a period \textit{not to exceed five days}, Saturdays, Sundays, and holidays excluded (\textit{i.e.}, 5 business days; the total time could equal 8 days). The patient shall be discharged upon a finding that the patient is not a mentally ill person or an alcoholic, drug dependent individual or drug abuser requiring involuntary treatment or upon a finding and certification that the patient meets all of the outpatient treatment requirements, discussed in Section 2.2.4 below, in which event the patient shall be discharged under the conditions discussed below (unless the patient is under criminal charges) but, in any event, upon the expiration of the five-day evaluation period unless:

\begin{enumerate}
  \item Within that period:
    \begin{enumerate}
      \item The patient is admitted as a voluntary patient under Code Sections 37-3-20 or 37-7-20; or
      \item The patient is admitted for involuntary inpatient treatment under Code Sections 37-3-81 or 37-7-20; or
    \end{enumerate}
  \item The patient is under criminal charges, notice of which has been given in writing to the facility, in which case the provisions of Code Sections 37-3-95 and 37-7-95 shall apply.\textsuperscript{23}
\end{enumerate}

If hospitalization appears desirable, the staff physicians or psychologists of the evaluating facility shall encourage the patient to apply for voluntary hospitalization unless the attending physician or treating psychologist finds that the patient is unable to understand

\begin{footnotesize}
\begin{itemize}
  \item[22] O.C.G.A. §§37-3-62 and 37-7-62.
  \item[23] O.C.G.A. §§37-3-64(a) and 37-7-64(a).
\end{itemize}
\end{footnotesize}
the nature of voluntary hospitalization, that voluntary hospitalization would be harmful to the patient, or that the patient is determined to be a mentally ill person or an alcoholic, drug dependent individual or drug abuser in need of involuntary treatment, which finding shall be entered in the patient's record.24

If, after evaluation of the patient, it is determined by the chief medical officer that proceedings for involuntary inpatient or outpatient treatment of the patient should be initiated, the chief medical officer shall direct that an individualized service plan (“ISP”) be developed for that patient during the five-day period of detention for evaluation in the facility.25

If the patient is discharged, notice of the discharge shall be given to the patient and representatives; to the person who filed the petition; if the patient was admitted to the evaluating facility from an emergency receiving facility, to the physician or psychologist who executed the certificate (1013/2013) or to the court which issued the OTA; if the patient was admitted directly to the evaluating facility by court order, to the court that ordered the evaluation; and, if the patient was under criminal charges of which the facility received written notification, by certified mail or statutory overnight delivery to the law enforcement agency originally having custody of the patient.26

Any patient admitted to an evaluating facility may apply to the chief medical officer of that facility for transfer at his/her own expense to any other approved evaluating facility. If the evaluating facility to which transfer is requested agrees to admit the patient, and if the patient is able to pay for evaluation at such facility, he/she shall be transferred forthwith. In such case, the time periods specified above (5 days) shall be counted from the date of admission to the evaluating facility to which the patient is transferred. Notice of the transfer shall be given to the patient's representatives; to the person who filed the original petition, if any; if the patient was admitted to the evaluating facility from an emergency receiving facility, to the physician or psychologist who executed the certificate (1013/2013) or to the court which issued the OTA; if the patient was admitted directly to the evaluating facility by court order, to the court that ordered the evaluation; and, if the patient was under criminal charges of which the facility received written notification, by certified mail or statutory

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24 O.C.G.A. §§37-3-64(b) and 37-7-64(b).
25 O.C.G.A. §§37-3-64(c) and 37-7-64(c).
26 O.C.G.A. §§37-3-64(d) and 37-7-64(d).
overnight delivery to the law enforcement agency originally having custody of the patient.²⁷

If the patient is not discharged or admitted as a voluntary patient, then stage three of the involuntary process begins.

2.2.3 The “Treatment” Stage

2.2.3.1 Certificate of Need for Treatment

Unless the patient is admitted as a voluntary patient, he/she may be detained at a facility beyond the evaluation only upon the recommendation of the chief medical officer of the evaluating facility where the patient has been examined, which recommendation is supported by the opinions of two physicians or a physician and a psychologist who have personally examined the patient within the preceding five days and who agree that the patient is a mentally ill person or an alcoholic, drug dependent individual or drug abuser requiring involuntary treatment but who does not meet the outpatient treatment requirements discussed in Section 2.2.4 below. Such recommendation of the chief medical officer and the opinions of the physicians or physician and psychologist shall be entered on a certificate (1015/2015). A physician or psychologist or a chief medical officer who has previously executed any other certificate is not prohibited from executing a certificate hereunder for the same or any other patient.

2.2.3.2 Petition for Involuntary Treatment

The certificate shall be filed along with a petition for a hearing in the court of the county in which the patient is being detained for evaluation. The certificate and petition shall be filed within five days, Saturdays, Sundays, and holidays excluded, after the patient is admitted to an evaluating facility. Such filing authorizes detention of the patient by the facility pending completion of the full and fair hearing. Copies of the certificate shall be served on the patient and representatives within five days after the certificate is filed and shall be accompanied by:

1. A notice that a hearing will be held and the time and place thereof;
2. A notice that the patient has a right to counsel, that the patient or his/her representatives may apply immediately to the court to have counsel appointed if

²⁷ O.C.G.A. §§37-3-65 and 37-7-65.
the patient cannot afford counsel, and that in such case the court will appoint
counsel for the patient unless the patient indicates in writing that he/she does not
desire to be represented by counsel;

3. A copy of the individualized service plan (ISP) developed by the facility under
this chapter shall be sent to the patient and to the patient's representative if
requested by such representative. Notice of the right to receive such plan shall be
given to the representatives at the time the service plan is sent to the patient;

4. A notice that the patient has a right to be examined by a physician or psychologist
of his/her own choice at his/her own expense and to have that physician or
psychologist submit a suggested service plan for the patient which conforms with
the requirements of Code Sections 37-3-1 and 37-7-1; and

5. A notice that the patient may waive the hearing in writing.

If the hearing is waived, the certificate shall serve as authorization for the patient to
begin treatment under the terms of the individualized service plan (ISP); and the chief
medical officer of the facility where the patient is located shall be responsible for the
supervision of the service plan.

2.2.3.3 Hearing

Unless the hearing is waived, the judge of the probate court shall hold a full and fair
hearing. The hearing shall be held no sooner than seven days and no later than 12 days after
the petition is filed with the court. The hearing must be recorded electronically or by a
qualified court reporter.²⁸

At the hearing, the judge shall determine whether the patient is a mentally ill person
or an alcoholic, drug dependent individual or drug abuser requiring involuntary treatment
and, if so, whether the patient is an inpatient or outpatient and the type of involuntary
treatment the patient should be ordered to obtain. At such hearing, if the court determines:

1. That the patient is not a mentally ill person or an alcoholic, drug dependent
   individual or drug abuser requiring involuntary treatment, the court shall order
   that the patient be immediately discharged;

²⁸ See definition of “full and fair hearing” in Section 2.1 above.
2. That the patient is an outpatient (that is, the patient meets the outpatient treatment requirements discussed in Section 2.2.4 below), the court shall further determine, based upon either the individualized service plan (ISP) prepared by the facility staff or the individualized service plan (ISP) proposed by the physician or psychologist chosen by the patient, whether there is available outpatient treatment for the patient which meets the requirements of the plan chosen by the court and whether the patient will likely obtain that treatment so as to minimize the likelihood of the patient's becoming an inpatient. If the court determines that there is such available outpatient treatment which the patient will likely obtain so as to minimize the likelihood of the patient's becoming an inpatient, then the court shall order the patient to obtain that treatment and shall discharge the patient subject to such order;

3. That the patient is an inpatient (that is, the patients meets the inpatient criteria), the court shall order that the patient be transferred or transported to a treatment facility where the patient shall be admitted for care and treatment, which order may also require that a period of such inpatient treatment be followed by available outpatient treatment if there is such outpatient treatment which will meet the requirements of the patient's individualized service plan (ISP) and the patient will likely obtain the treatment so as to minimize the likelihood of the patient's becoming an inpatient.

If, at the hearing, the judge of the probate court concludes that the patient is a mentally ill person or an alcoholic, drug dependent individual or drug abuser requiring involuntary treatment, the final order shall contain findings of fact and conclusions of law in support of that conclusion.

The court may order the hospitalization for any period not to exceed six months, subject to the power of the chief medical officer to discharge the patient. If continued hospitalization is necessary at the end of that period, the chief medical officer shall apply for an order authorizing such continued hospitalization under Code Sections 37-3-83 or 37-7-83.

The court may order the patient to obtain available outpatient treatment under the additional conditions specified in Code Sections 37-3-93 and 94 and 37-7-93 and 94.\(^\text{29}\)

\(^{29}\) O.C.G.A. §§37-3-81.1 and 37-7-81.1.
2.2.4 Involuntary Outpatient Treatment

When a physician or psychologist at a facility or on behalf of a facility certifies that there is reason to believe a patient admitted to or examined at the facility is a mentally ill person or an alcoholic, drug dependent individual, or drug abuser requiring involuntary treatment, that physician or psychologist must further certify whether there is reason to believe the patient is an "inpatient" or "outpatient." If the patient is certified to be an outpatient, the physician or psychologist must also certify whether there is available outpatient treatment.\(^{30}\)

The above certification must be made within the time period required for determining whether a patient is a mentally ill person or an alcoholic, drug dependent individual, or drug abuser requiring involuntary treatment, except that if such determination is made by a physician or psychologist at or on behalf of a community mental health center, the certification must be made within four hours after the patient is examined by the physician or psychologist.\(^{31}\) If all of the above criteria are met, the patient must be considered to be in need of "involuntary outpatient treatment."\(^{32}\) A mentally ill person or an alcoholic, drug dependent individual, or drug abuser requiring involuntary treatment who does not meet all of the above requirements must be considered to be in need of involuntary inpatient treatment.\(^{33}\)

A person who is in the physical custody of a community mental health center, emergency receiving facility, or evaluating facility and who is determined to meet all of the above outpatient treatment requirements must be discharged from that facility pending a full and fair hearing or waiver thereof. Such discharge must occur within four hours after the patient is examined at a community mental health center, within 48 hours after the patient's admission to an emergency receiving facility, or no later than the expiration of the five-day evaluation period if from an evaluating facility. Such facility must make arrangements for

\(^{30}\) O.C.G.A. §§37-3-90(a) and 37-7-90(a).
\(^{31}\) O.C.G.A. §§37-3-90(b) and 37-7-90(b).
\(^{32}\) O.C.G.A. §§37-3-90(c) and 37-7-90(c).
\(^{33}\) O.C.G.A. §§37-3-90 (d) and 37-7-90(d).
interim outpatient treatment, in accordance with an individualized service plan, pending the full and fair hearing or waiver thereof. Various notices are required prior to the hearing.34

Within three days after the original facility has discharged a patient, that facility must transmit to the facility which will administer the treatment plan a report containing certain details. Within five days after receiving such report, the facility which will administer the treatment must petition the court of the county in which the patient is located for a full and fair hearing.35 A patient detained in a treatment facility pursuant to a certificate and petition under Code Section 37-3-81 (see Section 2.2.3) may not be discharged from that facility until a full and fair hearing is held, even if the facility determines that the patient meets all the outpatient treatment requirements after the petition is filed. Such hearing may not be waived by such patient.36

Except when a hearing is waived, within 30 days after the filing of the petition and after certain notices, the court must hold a full and fair hearing as explained in Section 2.2.3.3 above, and may enter any authorized order described in that Section.37 As one alternative, the court may order the patient to obtain available outpatient treatment for any period not to exceed one year. However, the total period of involuntary treatment, including inpatient treatment, may not exceed one year.38

If it is necessary to continue available outpatient treatment beyond the period authorized, at least 60 days prior to the expiration of that period the physician or psychologist responsible for that treatment must petition the hearing examiners appointed to hold hearings under Code Section 37-3-83 for an order requiring the patient to obtain available outpatient treatment beyond the period previously ordered for the patient. Certain notices and hearing procedures are then required which are similar, but not identical, to the continued treatment hearings described in Section 2.2.5 below. After a full and fair hearing, the hearing examiner may issue any order which the court is authorized to issue as set forth in Section 2.2.3.3 above.39

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34 O.C.G.A. §§37-3-91 and 37-7-91.
35 O.C.G.A. §§37-3-91(d) and 37-7-91(d).
36 O.C.G.A. §§37-3-91(e) and 37-7-91(e).
37 O.C.G.A. §§37-3-92(a) and 37-7-92(a).
38 O.C.G.A. §§37-3-93 (a) and 37-7-93(a).
39 O.C.G.A. §§37-3-93 and 37-7-93.
Any time a patient is found by the physician or psychologist in charge of the patient's outpatient treatment no longer to be a mentally ill person requiring involuntary treatment, that physician or psychologist must discharge the patient from further compliance with the treatment.\footnote{O.C.G.A. §§37-3-94(b) and 37-7-94(b).}

If at any time during a period of ordered involuntary outpatient treatment, the physician or psychologist in charge of the patient's outpatient service plan determines that, because of a change in the patient's condition, the least restrictive alternative which would accomplish the treatment goals is hospitalization of the patient, then that physician or psychologist may execute a certificate authorizing any peace officer to take the patient into custody and to deliver him to the nearest available emergency receiving facility.\footnote{O.C.G.A. §§37-3-82(a) and 37-7-82(a).} Such a certificate has the same duration and effect as explained in Section 2.2.1 concerning emergency admissions.\footnote{Id.}

If the court places the patient on involuntary outpatient status and the patient fails or refuses to comply with the terms of his/her outpatient service plan, the physician or psychologist in charge may apply to the court originally ordering such treatment, the court of the county where the patient is found or the court of the county of the patient's residence, for an order to the sheriff to deliver the patient to the community mental health center in charge of the patient's treatment or to the nearest emergency receiving facility. The patient must be released from the community mental health center within four hours and from the emergency receiving facility within 48 hours unless the examining physician or psychologist concludes that, because of a change in the patient's condition, the least restrictive alternative which would accomplish the treatment goals is hospitalization of the patient.\footnote{Id.} The physician or a psychologist may then execute a certificate for admission to an emergency receiving facility, if the examination is done in a community mental health center, or for admission to an evaluating facility, if the examination is done in an emergency receiving facility.\footnote{Id. See Section 2.2.1 concerning delivery to an emergency receiving facility for examination, and Section 2.2.2 concerning delivery to an evaluating facility, for the duration and effect of such certificates, respectively.}
As an alternative to the physician's certificate described in the preceding paragraph, the court may issue an O.T.A. if the court determines that the patient has not complied with his/her outpatient treatment plan or that the patient reasonably appears to be an "inpatient" (see Section 2.1 for definition of inpatient).\footnote{O.C.G.A. §§37-3-82 (c) and 37-7-82(c).}

2.2.5 Continued Involuntary Treatment (Limited Probate Court Involvement)

The provisions for involuntary treatment beyond the expiration of the time of court-ordered involuntary treatment are described in this Section.

However, the probate court will have no involvement beyond the initial order for involuntary treatment, except for the appointment of counsel for a patient and/or the appointment of a guardian-ad-litem, as specifically stated below.

If it is necessary to continue involuntary treatment of a hospitalized patient beyond the end of the period during which the treatment facility is currently authorized under Chapters 3 and 7, as described above, to retain the patient, the chief medical officer, prior to the expiration of the period, shall seek an order authorizing continued treatment in the manner described hereinafter. The chief medical officer may seek such an order authorizing continued involuntary treatment involving inpatient treatment, outpatient treatment, or both under these procedures. If the chief medical officer finds that continued involuntary treatment is necessary (1) for an individual who was admitted while serving a criminal sentence but whose sentence is about to expire or (2) for an individual who was hospitalized while under the jurisdiction of a juvenile court but who is about to reach the age of 17, the chief medical officer shall seek an order authorizing such continued treatment in the manner described herein, and these procedures shall apply fully to such a patient after that time.

A Committee for Continued Involuntary Treatment Review ("CCITR") shall be established by the chief medical officer of each hospital and shall consist of not less than five persons of professional status, at least one of whom shall be a physician and at least two others of whom shall be either physicians or psychologists. The committee may conduct its meetings with a quorum of any three members at least one of whom shall be a physician. The function of this committee shall be to review and evaluate the updated individualized
treatment plan of each patient of the hospital and to report to the chief medical officer its recommendations concerning the patient's need for continued involuntary treatment. No person who has responsibility for the care and treatment of the individual patient for whom continued involuntary treatment is requested shall serve on any committee which reviews such individual's case.

If the chief medical officer desires to seek an order under this Code section authorizing continued involuntary treatment for up to 12 months beyond the expiration of the currently authorized period of hospitalization, he/she shall first file a notice of such intended action with the CCITR, which notice shall be forwarded to the committee at least 60 days prior to the expiration of that period.

Within ten days of the date of the notice, the committee shall meet to consider the matter of the chief medical officer's intention to seek an order for continued involuntary treatment. Prior to the committee's meeting, the patient and the representatives shall be notified of the following: the purpose of such meeting, the time and place of such meeting, their right to be present at such meeting, and their right to present any alternative individualized treatment plan secured at their expense. In those cases in which the patient will not or cannot appear, at least one member of the committee will make all reasonable efforts to interview the patient and report to the committee. The physician or psychologist proposing the treatment plan shall present an updated individualized treatment plan for the patient to the committee. The committee shall report to the chief medical officer or his/her designee, other than the physician or psychologist proposing the treatment plan or a member of the committee, its written recommendations along with any minority recommendations which may also be submitted. Such report will specify whether or not the patient is a mentally ill person or an alcoholic, drug dependent individual, or drug abuser requiring involuntary treatment and whether continued hospitalization is the least restrictive alternative available.

If, after considering the committee's recommendations and minority recommendations, if any, the chief medical officer or his/her designee, other than the attending physician or a member of the committee, determines that the patient is not a mentally ill person or an alcoholic, drug dependent individual, or drug abuser requiring involuntary treatment, the patient shall be immediately discharged from involuntary
hospitalization. Such person may, however, apply for voluntary admission.

If after considering the committee's recommendations and minority recommendations, if any, the chief medical officer or his designee, other than the attending physician or member of the committee, determines that the patient is a mentally ill person or an alcoholic, drug dependent individual, or drug abuser requiring involuntary treatment, he/she shall, within ten days after receiving the committee's recommendations, serve a petition for an order authorizing continued involuntary treatment along with copies of the updated individualized treatment plan and the committee's report on the designated office within the DBHDD and shall also serve such petition along with a copy of the updated individualized treatment plan on the patient. A copy of the petition shall be served on the patient's representatives. The petition shall contain a plain and simple statement that the patient or the representatives may file a request for a hearing with a hearing examiner appointed pursuant to Code Sections 37-3-84 or 37-7-84 within 15 days after service of the petition, that the patient has a right to counsel, that the patient or the representatives may apply immediately to the court to have counsel appointed if the patient cannot afford counsel, and that the court will appoint counsel for the patient unless the patient indicates in writing that he/she does not desire to be represented by counsel or has made his own arrangements for counsel.

If a hearing is not requested by the patient or the representatives within 15 days of service of the petition on the patient and the representatives, the hearing examiner shall make an independent review of the committee's report, the updated individualized treatment plan, and the petition. If the hearing examiner concludes that continued involuntary treatment may not be necessary or finds any member of the committee so concluded, then he/she shall order that a hearing be held. If the hearing examiner concludes that continued involuntary treatment is necessary, then he/she shall order continued involuntary treatment involving inpatient treatment, outpatient treatment, or both for a period not to exceed one year.

If a hearing is requested within 15 days of service of the petition on the patient and the representatives or if the hearing examiner orders a hearing, the hearing examiner shall set a time and place for the hearing to be held within 25 days of the time the hearing examiner receives the request but in any event no later than the day on which the current order of

46 O.C.G.A. §§37-3-83(g) and 37-7-83(g).
involuntary inpatient treatment expires. Notice of the hearing shall be served on the patient, the representatives, the facility, and, when appropriate, on counsel for the patient. The hearing examiner, within his/her discretion, may grant a change of venue for the convenience of parties or witnesses. Such hearing shall be a full and fair hearing, except that the patient's attorney, when the patient is unable to attend the hearing and is incapable of consenting to a waiver of his/her appearance, may move that the patient not be required to appear; however, the record shall reflect the reasons for the hearing examiner's actions. After such hearing, the hearing examiner may issue any order which the court is authorized to issue under Section 2.2.3.3 above. A patient who is an outpatient but who does not meet the requirements for discharge described in Section 2.2.3.3 shall nevertheless be discharged, provided that the hearing examiner may order the patient's continued inpatient treatment, outpatient treatment, or both for a period not to exceed one year, subject to the power to discharge the patient by the chief medical officer.

In the event that an order approving continued hospitalization is entered for an individual who was admitted while serving a criminal sentence under the jurisdiction of the Department of Corrections, but whose sentence is about to expire, the chief medical officer shall serve a copy of that order upon the Department of Corrections within five working days of the issuance of the order.

The hearing examiner for a patient who was admitted under the jurisdiction of the juvenile court and who reaches the age of 17 without having had a full and fair hearing pursuant to any provisions above or without having waived such hearing shall order that a hearing be held pursuant to the provisions above.47

3.0 APPOINTMENT OF PATIENT REPRESENTATIVES AND GUARDIANS-AD-LITEM; NOTICES

At the time a patient is admitted to any facility under Chapters 3 or 7 of Title 37, that facility must use diligent efforts to secure the names and addresses of at least two representatives, whose names and addresses must be entered in the patient's clinical record.48

The patient may designate one representative. The second representative or, in the absence

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47 O.C.G.A. §§37-3-83 and 37-7-83.
48 O.C.G.A. §§37-3-147(a) and 37-7-147(a).
of designation of one representative by the patient, both representatives must be selected by the facility. If the facility is to select both representatives, it must designate the first representative from among the following persons in the order listed: the patient's legal guardian, spouse, adult child, parent, attorney, adult next of kin, or adult friend. If, however, a representative or representatives has/have been appointed by the court as described above, the facility may not select a different representative. The second representative must also be selected from the above list but without regard to the order of listing, provided that the second representative may not be the person who filed the petition to have the patient admitted to the facility.\textsuperscript{49}

If the facility is unable to secure at least two representatives after diligent search or if the DBHDD is the patient’s guardian, that fact must be entered in the patient's clinical record and the facility must apply to the court in the county of the patient's residence for the appointment of a guardian-ad-litem. The court may also appoint a guardian-ad-litem for a patient for whom two representatives have been named whenever the court deems the appointment of a guardian-ad-litem necessary for protection of the patient's rights. Such guardian-ad-litem shall also act as representative of the patient and shall have the powers granted to representatives by under Chapters 3 and 7.\textsuperscript{50}

At any time notice is required to be given to the patient's representatives, such notice shall be served on the representatives designated in accordance with the procedure set forth above. The patient's guardian-ad-litem, if any, shall likewise be served. Unless otherwise provided, notice may be served in person or by first-class mail. When notice is served by mail, a record shall be made of the date of mailing and shall be placed in the patient's clinical record. Service shall be completed upon mailing.\textsuperscript{51}

At any time notice is required to be given to the patient, the date on which notice is given shall be entered on the patient's clinical record. If the patient is unable to comprehend the written notice, a reasonable effort shall be made to explain the notice to him.\textsuperscript{52}

\textsuperscript{49} O.C.G.A. §§37-3-147(b) and 37-7-147(b).
\textsuperscript{50} O.C.G.A. §§37-3-147(c) and 37-7-147(c).
\textsuperscript{51} O.C.G.A. §§37-3-147(d) and 37-7-147(d).
\textsuperscript{52} O.C.G.A. §§37-3-147(e) and 37-7-147(e).
At the time a court enters an order pursuant to Chapters 3 or 7, such order and notice of the date of entry of the order shall be served on the patient and the representatives as set forth above.53

Notice of an involuntary patient’s admission to a facility shall be given to the representatives in writing. If such involuntary admission is to an emergency receiving facility, notice shall also be given by that facility to the patient’s representatives by telephone or in person as soon as possible.54

In every instance in which a court shall appoint a guardian-ad-litem for any person pursuant to the terms of Chapters 3 or 7, such appointment shall be for the limited purpose stated in the order of the court and shall expire automatically after 90 days or after a lesser time stated in the order. The responsibility of the guardian-ad-litem shall not extend beyond the specific purpose of the appointment.55

4.0 RIGHTS AND PRIVILEGES OF PATIENTS AND REPRESENTATIVES

4.1 Patient Rights

Patients shall retain all rights and privileges granted other persons or citizens. Notwithstanding any other provision of law to the contrary, no person who is receiving or has received services for a mental illness shall be deprived of any civil, political, personal, or property rights or be considered legally incompetent for any purpose without due process of law.56

It shall be the responsibility of the department to see that every patient is given the opportunity to secure legal counsel at his own expense to represent him in connection with private, personal, domestic, business, civil, criminal, and all other legal matters in which he may be involved during hospitalization.57

Each patient in a facility shall have the right to communicate freely and privately with persons outside the facility and to receive visitors inside the facility. Except as otherwise provided in this Code section, each patient shall be allowed to receive and send sealed, unopened mail; and no patient's incoming or outgoing mail shall be opened, delayed, held, or

53 O.C.G.A. §§37-3-147(f) and 37-7-147(f).
54 O.C.G.A. §§37-3-147(g) and 37-7-147(g).
55 O.C.G.A. §§37-3-147(h) and 37-7-147(h).
56 O.C.G.A. §§37-3-140 and 37-7-140.
57 O.C.G.A. §§37-3-141 and 37-7-141.
censored by the facility.

If there are reasonable grounds to believe that incoming mail contains items or substances which may be dangerous to the patient or others, the chief medical officer may direct reasonable examination of such mail and, after examination, may regulate the disposition of such items or substances found therein. All writings must be presented to the patient within 24 hours of inspection.

The chief medical officer may apply to the court for a temporary order to restrict outgoing mail. If the court determines that probable cause exists that such mail is dangerous to the patient or others, the court may order such mail temporarily restricted, provided that a full and fair hearing shall be held within five days after the issuance of such temporary order to determine whether or not an order of restriction for an extended time shall issue. In no event shall mail be restricted pursuant to such temporary order for more than five days after the date of the temporary order. A full and fair hearing shall be held after the issuance of the temporary order. If, at such hearing, the patient's outgoing mail is determined to be dangerous to the patient or others, the court may order such mail restricted for an extended period not to exceed 30 days. Restrictions for extended periods may be renewed for additional periods not to exceed 30 days each, provided that no such restriction shall be renewed except upon a renewed finding at another full and fair hearing for each such renewal that such mail is dangerous to the patient or others.

If an injunction against the sending of mail by a patient is issued by a court, the chief medical officer shall restrict outgoing mail as provided by the order of the court. No restriction of either incoming or outgoing mail under subsection (c) or (d) of this Code section shall exceed a period of five days, notwithstanding the authority to restrict such mail for longer periods, provided that such restrictions may be continued as necessary for periods not to exceed five days each upon determination by the chief medical officer, prior to each continuation, that such mail continues to be dangerous to the patient or others; provided, further, that, in the case of outgoing mail, such continuation periods in the aggregate shall not exceed the restriction period authorized in the court order.

Correspondence of the patient with his attorney shall not be restricted in any manner under this Code section. Correspondence of the patient with public officials shall not be restricted in any manner under subsection (c) of this Code section.
Each time a patient's incoming mail is ordered examined by the chief medical officer and each time a patient's outgoing mail is ordered examined by a temporary court order, written notice of such order and notice of a right to a full and fair hearing within five days after such temporary court order shall be served on the patient and his representatives as provided in Code Section 37-3-147. A voluntary patient may waive in writing such notice to his representatives.

The circumstances surrounding the examination of any mail under subsection (c), (d), (e), or (f) of this Code section shall be recorded on the patient's clinical record.

The chief medical officer is authorized to establish reasonable regulations governing visitors, visiting hours, and the use of telephones by patients.58

A patient's rights to his personal effects shall be respected. The chief medical officer may take temporary custody of such effects when required for medical reasons. The facility shall make reasonable efforts to assure the safety of the patient's belongings, but no employee or staff member shall be responsible for loss of or damage to such property where reasonable safety precautions have been taken.59

Each patient in a facility who is eligible to vote shall be given his right to vote in primary, special and general elections and in referendums. The superintendent or regional state hospital administrator of each facility shall permit and reasonably assist patients:

(1) To obtain voter registration forms, applications for absentee ballots, and absentee ballots;

(2) To comply with other requirements which are prerequisite for voting; and

(3) To vote by absentee ballot if necessary.60

If a patient wishes to be employed outside a facility and if such employment will aid in the patient's treatment, he shall be assisted in his efforts to secure suitable employment and all benefits flowing from such employment. The department shall encourage such employment of patients and shall promote the training of patients for gainful employment after discharge. All benefits of such employment shall accrue solely to the patient.61

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58 O.C.G.A. §§37-3-142 and 37-7-142.
59 O.C.G.A. §§37-3-143 and 37-7-143.
60 O.C.G.A. §§37-3-144 and 37-7-144.
61 O.C.G.A. §§37-3-145 and 37-7-145.
4.2 **Habeas Corpus**

At any time and without notice, a person detained by a facility or a relative or friend on behalf of such person may petition, as provided by law, for a writ of habeas corpus to question the cause and legality of detention and to request any court of competent jurisdiction on its own initiative to issue a writ for release, provided that, in the case of any such petition for the release of a person detained in a facility pursuant to a court order under Code Section 17-7-130 or 17-7-131, a copy of the petition along with proper certificate of service shall also be served upon the presiding judge of the court ordering such detention and the prosecuting attorney for such court, which service may be made by certified mail or statutory overnight delivery, return receipt requested.

While Code Sections 17-7-130 and 17-7-131 provide for specific proceedings for the criminal detainee to seek discharge, it has been held that a criminal detainee need not exhaust the remedies available thereunder before seeking a writ of habeas corpus under Code Section 9-14-19 (the general habeas corpus statute applicable to a person detained in a mental facility).\(^{62}\)

4.3 **Protective Orders to Secure Patient Rights**

A patient or his representatives may file a petition in the appropriate court alleging that the patient is being unjustly denied a right or privilege granted by this chapter or that a procedure authorized by this chapter is being abused. Upon the filing of such a petition, the court shall have the authority to conduct a judicial inquiry and to issue appropriate orders to correct any abuse under Chapters 3 or 7.\(^{63}\)

Each facility shall establish procedures whereby complaints of the patient or complaints of the staff concerning treatment of the patient can be speedily heard, with final decisions to be made by the superintendent, the regional state hospital administrator, or an advisory committee, whichever is appropriate. The board shall establish reasonable rules and regulations for the implementation of such procedures. However, the patient shall not be required to utilize these procedures in lieu of other available legal remedies.\(^{64}\)

\(^{63}\) O.C.G.A. §§37-3-148 and 37-7-148.
\(^{64}\) O.C.G.A. §§37-3-149 and 37-7-149.
4.4 Medical and Behavioral Health Care

The patient's dignity as an individual shall be respected at all times and upon all occasions, including any occasion wherein the patient is taken into custody, detained, or transported. Mentally ill patients, alcoholics, drug dependent individuals and drug abusers or those suspected of being mentally ill, alcoholics, drug dependent individuals and drug abusers shall, to the maximum extent reasonably possible, be treated at all times as medical patients. All patients shall be treated by a physician or psychologist acting within the scope of his or her license. Except where required under conditions of extreme urgency, those procedures, facilities, vehicles, and restraining devices normally utilized for criminals or those accused of crime shall not be used in connection with the mentally ill, alcoholic, drug dependent individuals or drug abusers.

It is the policy of the state that the least restrictive alternative placement be secured for every patient at every stage of his medical treatment and care. It shall be the duty of the facility to assist the patient in securing placement in non-institutional community facilities and programs.

Each patient in a facility and each person receiving services for mental illness, alcoholism, drug dependency or drug abuse shall receive care and treatment that is suited to his needs and is the least restrictive appropriate care and treatment. Such care and treatment shall be administered skillfully, safely, and humanely with full respect for the patient's dignity and personal integrity.

Each patient shall have the right to participate in his/her care and treatment. The board shall issue regulations to ensure that each patient participates in his/her care and treatment to the maximum extent possible. Unless the disclosure to the patient is determined by the chief medical officer or the patient's treating physician or psychologist to be detrimental to the physical or mental health of the patient, and unless a notation to that effect is made a part of the patient's record, the patient shall have the right to reasonable access to review his/her medical file, to be told the diagnosis, to be consulted on the treatment recommendation, and to be fully informed concerning medications, including side effects and available treatment alternatives.

65 O.C.G.A. §§37-3-160 and 37-7-160.
66 O.C.G.A. §§37-3-161 and 37-7-161.
It is the duty of the chief medical officer to ensure that each patient receives such medical attention as is suitable to his/her condition and that no treatment shall be given which is not recognized as standard psychiatric treatment, except upon the written consent of the patient or, if applicable, his/her guardian having capacity to give such consent. If such consent is given by someone other than the patient or such guardian, court approval must be obtained after a full and fair hearing.

If a patient hospitalized under this chapter is able to secure the services of a private physician or psychologist, he/she shall be allowed to see his physician or psychologist at any reasonable time. The chief medical officer is authorized and directed to establish regulations designed to facilitate examination and treatment which a patient may request from such private physician or psychologist,

Every patient admitted to a facility under this chapter shall be examined by the staff of the admitting facility as soon as possible after admission.67

It shall be the policy of this state to recognize the personal physical integrity of all patients.

4.4.1 Consent to Medical Treatment and Surgery

Except as provided in subsections (b) and (e) of Code Sections 37-3-163 and 37-7-163, consent to medical treatment and surgery shall be obtained and regulated by Chapter 9 of Title 31.

In cases of grave emergency where the medical staff of the facility in which a mentally ill individual, an alcoholic, a drug dependent individual or a drug abuser has been accepted for treatment determines that immediate surgical or other intervention is necessary to prevent serious physical consequences or death and where delay in obtaining consent would create a grave danger to the physical health of such person, as determined by at least two physicians, then essential surgery or other intervention may be administered without the consent of the person, the spouse, next of kin, attorney, guardian, or any other person. In such cases, a record of the determination of the physicians shall be entered into the medical records of the patient and this will be proper consent for such surgery or other intervention. Such consent will be valid notwithstanding the type of admission of the patient and it shall

67 O.C.G.A. §§37-3-163 and 37-7-163.
also be valid whether or not the patient has been adjudged incompetent. This is intended to apply to those individuals who, as a result of their advanced age, impaired thinking, or other disability, cannot reasonably understand the consequences of withholding consent to surgery or other intervention as contemplated by Code Sections 37-3-163 and 37-7-163. Any physician, agent, employee, or official who obtains consent or relies on such consent, as authorized by this Code section, and who acts in good faith and within the provisions of Chapters 3 or 7 shall be immune from civil or criminal liability for actions in connection with the obtaining of or the relying upon such consent. Actual notice of any action taken pursuant to this Code Sections 37-3-163 and 37-7-163 shall be given to the patient and the spouse, next of kin, attorney, guardian, or representative of the patient as soon as practicably possible.68

4.4.2 Refusal of Medications

It shall be the policy of this state to protect, within reason, the right of every individual to refuse medication except in cases where a physician determines that refusal would be unsafe to the patient or others. If the patient continues to refuse medication after such initial emergency treatment, a concurring opinion from a second physician must be obtained before medication can be continued without the patient's consent. The provisions for the involuntary administration of anti-psychotic medications, including all of the policies and procedures applicable thereto, have been held not to violate the substantive or procedural due process rights of the patient.69

Further, in connection with any hearing under Chapters 3 and 7, the patient has the right to appear and testify as free from any side effects or adverse effects of the medication as is reasonably possible.

Any patient objecting to the treatment being administered shall have a right to request a protective order pursuant to Code Sections 37-3-148 and 37-7-148.

4.5 Rights of Representatives, Guardians-ad-Litem, and Guardians

As used in Code Sections 37-3-164 and 37-7-164, the term:

68 O.C.G.A. §§37-3-163 and 37-7-163.
(1) "Representative" means the representative designated by the patient or, in the absence of such designation, the person selected as a representative in the order of listing under subsection (b) of Code Sections 37-3-147 or 37-7-147 but shall not mean the patient's legal guardian. At the time of designation or selection, such representative shall be notified of the right to notice and to consultation under this Code Sections 37-3-164 or 37-7-164. In order to exercise such rights, the representative shall notify the department on a form supplied by the department of an election to exercise such rights. Upon receiving such notice, the department shall thereafter provide the representative the notification and consultation required until that representative notifies the department to the contrary. A patient need not be notified of such representative's rights unless such representative has elected to exercise such rights.

(2) "Substantial change" means a significant change including, but not limited to, the transfer within a facility of a patient from a unit primarily serving patients under 18 years of age to a unit primarily serving patients 18 years of age or over or the transfer of a patient from one facility to another but shall not include:

a. Changes in the routine day-to-day care of the patient;
b. Routine or periodic changes or adjustments in patient medication;
c. Changes relating to routine or necessary medical care needs of the patient;
d. Formulation of the patient's initial individualized service plan;
e. Changes specifically contemplated in a service plan regarding which the representative has already received notification; or
f. Discharge of the patient from the facility.

At the time an adult patient's representative is designated or selected under Code Sections 37-3-147 or 37-7-147 and at least every 12 months thereafter, such patient shall be notified that, unless objected to by the patient, such representative will be permitted to consult with the facility regarding the development of the patient's individualized service plan and the patient's treatment under such plan. The representative of a minor patient and the representative of an adult patient not objecting to consultation may consult with the
facility regarding the development of such patient's individualized service plan and the patient's treatment under such plan.

At least seven days prior to any substantial change in the individualized service plan or treatment thereunder of an adult patient, the facility to which the patient has been admitted shall notify the patient that it will notify his/her representative of such change, unless the patient objects to such notification within 24 hours. A patient's representative shall be notified at least five days prior to any substantial change in such patient's individualized service plan or the treatment under such plan unless such patient is an adult and objects to such notification.

In an emergency where the delay due to providing prior such notification would create serious damage to the health of the patient, such a substantial change may be made without such prior notification. The patient's record shall specify the circumstances surrounding the emergency. Within 48 hours after the change, an adult patient shall be notified of the right to object within 24 hours to the representative’s being notified of such change. A patient's representative shall be notified of such change within five days after such change occurs unless the patient is an adult and objects to such notification.

Notification to representatives may be made by telephone if the date and time of such notification is entered on the patient's clinical record and if such notification is followed within 15 days by written notification.

A patient's legal guardian shall have the consultation and notification rights of a patient's representative as set forth above regardless of whether the patient objects to such consultation or notification. A patient for whom a legal guardian has been appointed shall not be notified of any right to object under this Code section. 70

A legal guardian does not have the authority to consent to involuntary treatment of the ward. A voluntary patient who was admitted to a facility by his/her legal guardian may independently request discharge from the facility, personally or through his/her attorney or representatives, without the consent of the guardian; when such a request is made, the facility must either discharge the patient or initiate involuntary treatment proceedings within 72 hours. 71

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70 O.C.G.A. §§37-3-164 and 37-7-164.
4.6  Use of Physical Restraints

Mistreatment, neglect, or abuse in any form of any patient is prohibited. Medication in quantities that interfere with the patient's treatment program is prohibited. All medication, seclusion, or physical restraints are to be used solely for the purposes of providing effective treatment and protecting the safety of the patient and other persons.

Physical restraints shall not be applied unless they are determined by an attending physician, a psychologist involved in the care and treatment of a patient, or a clinical nurse specialist in psychiatric/mental health involved in the care and treatment of the patient to be absolutely necessary in order to prevent a patient from seriously injuring himself/herself or others and are required by the patient's medical needs. Such determination shall expire after 24 hours. An attending physician, a psychologist involved in the care and treatment of a patient, or a clinical nurse specialist in psychiatric/mental health involved in the care and treatment of the patient must then make a new determination before the restraint may be continued. Every use of a restraint and the reasons therefor shall be made a part of the clinical record of the patient. A copy of each such entry or a summary of such entries shall be forwarded to the chief medical officer for review. A patient placed in physical restraint shall be checked at least every 30 minutes by staff trained in the use of restraints and a written record of such checks shall be made. When the application of a restraint is necessary in emergency situations to protect the patient from immediate injury to himself/herself or to others, restraints may be authorized by attending staff who must immediately report the action taken to the physician and any psychologist involved in the care and treatment of the patient. The facility shall have written policies and procedures which govern the use of restraints and which clearly delineate, in descending order, the personnel who can authorize the use of restraints in emergency situations.

For the purposes of this Code section, those devices which restrain movement, but are applied for protection from accidental injury or required for the medical treatment of the patient's physical condition or for supportive or corrective needs of the patient, shall not be considered physical restraints. However, devices used in such situations must be authorized and applied in compliance with the facility's policies and procedures. The use of such

devices shall be a part of the patient's individualized service plan.\textsuperscript{72}

\textbf{5.0 CONFIDENTIAL NATURE OF COURT RECORDS}

All files and records in the probate court of a proceeding under Chapters 3 or 7 of Title 37 must be sealed and remain sealed and are open to inspection only upon an order of the court issued after notice to the patient. \textit{This provision controls over the Open Records Act.}\textsuperscript{73} If any official or employee of any court or archival facility assists a person who is not an official or employee of that court or facility in attempting to gain access to any court record which the official or employee knows concerns examination, evaluation, treatment, or commitment for mental illness, such record was created prior to September 1, 1978, and such record contains no information concerning the patient which is ordinarily public, such as the fact that a guardianship was created, such official or employee must seal the record if it is in the possession of the court or facility and inform the person seeking access that if such a record exists it is open to inspection only upon order of the court issued after petition by, or notice to, the patient and subject to the provisions of Code Sections 37-3-166 and 37-7-166 pertaining to the medical portions of the record.\textsuperscript{74}

Except as provided in subsection (b) of Code Sections 37-3-162 or 37-7-162, every patient shall have the right to examine all medical records kept in the patient's name by the department or the facility where the patient was hospitalized or treated. Every patient shall have the right to request that any inaccurate information found in the medical record be corrected. The board shall promulgate reasonable rules and regulations to implement subsections (a) and (b) of Code Sections 37-3-162 or 37-7-162. Nothing contained in this provision shall be construed to require the deletion of information by the department nor constrain the department from destroying patient records after a reasonable passage of time.

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Notwithstanding paragraphs (7) and (8) of Code Section 15-9-37 or any provision of the Open Records Act, all files and records of a court in a proceeding under Chapters 3 and 7 shall remain sealed and shall be open to inspection only upon order of the court issued after notice to the patient and subject to the provisions of Code Sections 37-3-166 and 37-7-166 pertaining to the medical portions of the record, provided that the court may refer to such
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\textsuperscript{72} O.C.G.A. §§37-3-165 and 37-7-165.
\textsuperscript{73} O.C.G.A. §§37-3-167(d)(1) and 37-7-167(d)(1).
\textsuperscript{74} O.C.G.A. §§37-3-167(d)(2) and 37-7-167(d)(2).
files and records in any subsequent proceeding under Chapters 3 or 7 concerning the same patient, on condition that the files and records of such subsequent proceeding will then be sealed in accordance with this subsection. The court may permit authorized representatives of recognized organizations compiling statistics for proper purposes to inspect and make abstracts from official records, but without personal identifying information and under whatever conditions upon their use and distribution that the court may deem proper; and the court may punish by contempt any violations of those conditions. Otherwise, inspection of the sealed files and records may be permitted only by an order of the court upon petition by the person who is the subject of the records and only by those persons named in the order.\textsuperscript{75}

The patient's attorney shall have the right, at reasonable times, to interview the physician or psychologist and staff who have attended or are now attending the patient in any facility and to have the patient's records interpreted by them. The chief medical officer is authorized and directed to establish reasonable regulations to make available to the patient's attorney all such information in the possession of the facility as the attorney requires in order to advise and represent the patient concerning his/her hospitalization.\textsuperscript{76}

The court may refer to its sealed files and records in any subsequent proceedings pertaining to the same patient under Chapters 3 and 7 of Title 37, all of which records will then be sealed. The court may permit authorized representatives of recognized organizations compiling statistics to inspect and make abstracts from official records, but without personal identifying information, under conditions which the court may deem proper. Violators of these conditions may be punished for contempt by the court.\textsuperscript{77}

Since the above provisions require that all files and records of the court concerning these matters remain sealed and open to inspection only upon order of the court, no other court can order inspection and no subpoena of these records is permissible. The use of the phrase "after notice to the patient" implies that someone other than the patient could petition to open the record. The court should allow inspection by the person who is the subject of a record unless there are compelling reasons why it should not, but should require someone other than the person who is the subject of a court record to show compelling reasons why the record should be opened. If access is granted, the court order must restrict dissemination.

\textsuperscript{75} O.C.G.A. §§37-3-167 and 37-7-167.
\textsuperscript{76} O.C.G.A. §§37-3-168 and 37-7-168.
\textsuperscript{77} O.C.G.A. §§37-3-167(d)(4) and 37-7-167(d)(4).
of the information to certain persons or for certain purposes or both.\textsuperscript{78} As to the medical portions of a court record, the court must either comply with the provisions of Code Sections 37-3-166 or 37-7-166 or refer the person seeking access to the medical portions of the record to the facility having custody of the medical records. \textbf{There should be no medical record in the court record which is not a part of the patient's clinical record.}

Under the provisions of Chapter 3 of Title 37, the judge and all other personnel of the probate court must protect the identity of all persons alleged to be mentally ill, alcoholic, drug dependent individuals or drug abusers for whom involuntary intervention is sought by proceedings in such court. This will involve locked filing cabinets and sealed envelopes, limitation of access to such documents to court personnel who need to have such information to perform their duties, and identification of files by the patient's initials or an identifying number when other personnel may come in contact with such information.

Another problem which faces the court is the elimination of personal identifying information from its bookkeeping records concerning costs received for hearings and payment of fees for guardians-ad-litem and attorneys to represent the patient. This probably can be resolved by obtaining the approval of the governing authority of the county, which is particularly interested in its fiscal responsibility in these cases, for the use of identifying numbers only. No names of the patients should appear on any accounting records of the court nor upon requests for payment of county funds when the patient or responsible parties are unable to pay, nor should any docket be maintained of proceedings under Chapters 3 and 7 for use by the public (or by any clerks of the court other than those specifically assigned to such cases).

AIDS confidential information must not be included in the mental health records unless it is relevant to involuntary intervention issues.

5.1 \textbf{Notice to GBI of Involuntary Treatment}

Under the Brady Handgun Violence Prevention Act (the “Brady Act”)\textsuperscript{79} and the Gun Control Act of 1968, codified as Chapter 44 of Title 18 of the United States Code, prohibits the possession or receipt of a firearm or ammunition by any person “who has been

\textsuperscript{78} O.C.G.A. §§37-3-167(d)(3) and 37-7-167(d)(3).
\textsuperscript{79} Public Law 103-159.
adjudicated as a mental defective or who has been committed to a mental institution.”80 The term or phrase “adjudicated a mental defective” means “a determination by a court, board, commission, or other lawful authority that a person, as a result of a marked subnormal intelligence, or mental illness, incompetency, condition, or disease: (1) is a danger to himself or to others; or (2) lacks the mental capacity to contract or manage his own affairs.”81 The term includes “(1) a finding of insanity by a court in a criminal case; and (2) those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to” the Uniform Code of Military Justice (UCMJ).82 The term or phrase “committed to a mental institution” means: “A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitment for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.”83 “Mental institution” includes “mental health facilities, mental hospitals, sanitariums, psychiatric facilities, and other facilities that provide diagnosis by licensed professionals of mental retardation or mental illness, including a psychiatric ward in a general hospital.”84

Georgia law prohibits the issuance of a Georgia Firearms License to anyone prohibited under 18 U.S.C. §922.85 In order to register the fact of the commitment of a person in Georgia to a mental institution, the probate court which orders such commitment should send a notice of the commitment to the Georgia Bureau of Investigation (GBI) for inclusion in the National Instant Criminal Background Check System (NICS). Under the above definitions, involuntary commitment exists only at the stage of involuntary treatment as an inpatient or an outpatient (the “Treatment” stage referred to in Section 2.2.3 above and the “Involuntary Outpatient Treatment” stage referred to in Section 2.2.4 above); it does not include the examinations resulting from orders to apprehend or the subsequent evaluations.

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81 27 CFR, Ch. 11, §478.11.
82 Id.
83 Id.
84 Id.
85 O.C.G.A. §16-11-129(b)(1).
6.0 REVIEW OF ISP; TRANSFER OF STATUS; DISCHARGE AND NOTICE

Each individualized service plan for a patient receiving involuntary inpatient treatment must be reviewed at regular intervals. At any time a patient receiving involuntary inpatient treatment is found by the chief medical officer, after consideration of the recommendations of the treatment team, no longer to be a mentally ill person, alcoholic, drug dependent individual or drug abuser requiring involuntary inpatient treatment, the chief medical officer may, subject to certain conditions:

1. Discharge the patient from involuntary inpatient or outpatient treatment, or both;
2. Discharge the patient from involuntary inpatient treatment and require that the patient obtain available outpatient treatment for the remaining period the patient was to have received inpatient treatment; or
3. Transfer the patient to voluntary status at the patient's request.86

The chief medical officer may designate in writing another physician to make the discharge decisions. The designee may be the attending physician. The chief medical officer makes the final determination if the decision of the designee is contrary to the recommendation of the treatment team. If the designee and treatment team concur, the decision of the designee becomes final.87

Notice of discharge or transfer of status must be given to the patient, his/her representatives and to the court which issued the order for hospitalization.88 This notice should be attached to the confidential file maintained by the court on the patient. NOTE: It is the experience of the author that such notice is seldom given to the court.

7.0 PLACEMENT, TRANSFER AND TRANSPORTATION OF PATIENTS

The department may designate the state owned or state operated facility to which a patient is to be admitted under Chapters 3 and 7. The department may instead designate a private facility, approved under Code Sections 37-3-6 or 37-7-6, to which the patient is to be admitted, if the department has obtained the prior agreement of the private facility and of the patient or his/her representatives.

86 O.C.G.A. §§37-3-85(b) and 37-7-85(b).
87 O.C.G.A. §§37-3-85 (c) and 37-7-85(c).
88 O.C.G.A. §§37-3-85 (d) and 37-7-85(d).
A patient hospitalized in a state owned or state operated facility under Chapters 3 or 7 may apply for transfer at his/her own expense to a private facility approved under Code Sections 37-3-6 or 37-7-7 if he/she is able to pay for treatment at such private facility. If the private facility agrees to accept the patient, the department shall transfer the patient to that facility.

If a private facility requests the department to take custody of a patient who has been hospitalized therein under Chapters 3 or 7 and if the patient meets the criteria for admission, then the department shall accept the patient and designate the state owned or state operated facility to which the patient shall be admitted.

When the needs of the patient or efficient utilization of any facility so requires, a patient may be transferred from one facility to another. At the time of any such transfer, notice shall be given in writing to the patient and to his/her representatives and the patient shall be advised in writing of the reasons for the transfer. A voluntary patient may be transferred only with his/her consent.

A patient hospitalized in a private facility, approved under Code Sections 37-3-6 or 37-7-7 or that patient's representative may request that facility to transfer the patient to a state owned or operated facility. That private facility shall then request the department to take custody of the patient. If the patient meets the criteria for admission, then the private facility shall transfer the patient and the department shall accept the patient and designate the state owned or operated facility to which the patient shall be admitted.\footnote{89 O.C.G.A. §§37-3-100 and 37-7-100.}

The governing authority of the county where the patient is found or located shall arrange for initial emergency transport of a patient to an emergency receiving facility. Except as otherwise authorized as explained below, the governing authority of the county of the patient's residence shall arrange for all required transportation for mental health purposes subsequent to the initial transport. The type of vehicle employed shall be in the discretion of the governing authority of the county, provided that, whenever possible, marked vehicles normally used for the transportation of criminals or those accused of crimes shall not be used for the transportation of patients. The court shall, upon the request of the community mental health center, order the sheriff to transport the patient in such manner as the patient's condition demands. At any time the community mental health center is satisfied that the
patient may be transported safely by family members or friends, such private transportation shall be encouraged and authorized. In nonemergency situations, no female patient shall be transported at any time without another female in attendance who is not a patient, unless such female patient is accompanied by her husband, father, adult brother, or adult son.  

Notwithstanding the foregoing, when a patient is under the care of a facility, the facility shall have the discretion to determine the type of vehicle to safely transport the patient and to arrange for such transportation without the need to obtain the prior approval of the governing authority of the county of the patient's residence, the court, or the community mental health center. This shall not prevent the facility from requesting and receiving transportation services from the governing authority of the county of the patient's residence and shall not relieve the county sheriff of the duty of providing transportation. Persons providing transportation are authorized to transport a patient from a sending facility to a receiving facility but shall not release the patient under any circumstances except into the custody of the receiving facility. The use of physical restraints to ensure the safe transport of the patient shall comply with the requirements of Code Sections 37-3-165 or 37-7-165. When transportation is not provided by the county sheriff, the expense of such transportation shall not be billed to the county governing authority but may be billed to the patient and, unless agreed to in writing by the facility, shall not be billed to or considered an obligation of the facility.

If a patient ordered to be hospitalized pursuant to this chapter is eligible for hospital care or treatment by the United States Department of Veterans Affairs or any other federal agency, the department shall transfer the patient to the custody of the nearest such agency with available bed space for diagnosis, care, or treatment. When any such patient is admitted under Chapters 3 or 7 to any such hospital or institution within or outside the state, the patient shall be subject to the rules and regulations of such agency. Upon notification from the superintendent or the chief medical officer of the United States Department of Veterans Affairs Medical Center for those patients therein who may require involuntary treatment pursuant to Chapters or 7, the patient will be evaluated, while remaining in the physical custody of the United States Department of Veterans Affairs Medical Center, by the nearest

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90 O.C.G.A. §§37-3-101(a) and 37-7-101(a).
91 O.C.G.A. §§37-3-101(b) and 37-7-101(b).
emergency receiving facility. The superintendent and chief medical officer of any hospital or institution operated by such agency in which the individual is so hospitalized shall, with respect to such individual, be vested with the same powers and duties as the superintendent and chief medical officer of facilities within this state with respect to all matters under Chapters 3 or 7. Jurisdiction is retained in the appropriate courts of this state at any time to inquire into the mental condition of an individual so hospitalized to determine the necessity for continuance of hospitalization and to order a patient’s release; and every transfer of a patient by the department hereunder is so conditioned. 

An order of a court of competent jurisdiction of another state, territory, or possession or of the District of Columbia authorizing hospitalization of a patient by any agency of the United States shall have the same force and effect as to the patient while in this state as in the jurisdiction in which is situated the court entering the order; and the courts of the state, territory, possession, or district issuing such order shall be deemed to have retained jurisdiction of the patient so hospitalized for the purpose of inquiring into his/her mental condition and determining the necessity for continuance of hospitalization, as is provided herein with respect to patients ordered hospitalized by the courts of this state. Consent is given for the application of the law of the state, territory, possession, or district in which is located the court issuing the order for hospitalization with respect to the authority of the chief medical officer of any hospital or institution operated in this state by the United States Department of Veterans Affairs or any other federal agency to retain custody, transfer, furlough, or discharge the patient therein hospitalized.

Upon application to the department by a parent, spouse, next of kin, or guardian or by an agency of another state in which the patient is hospitalized, a patient shall be eligible to be hospitalized in the State of Georgia if found by the department to be a legal resident of this state. The department shall designate a hospital to which such patient is to be transported at no expense to the State of Georgia. The regional state hospital administrator of such hospital and the next of kin or guardian of the patient shall be notified of this action. The chief medical officer shall be authorized to hospitalize the patient for a period not to exceed five days unless prior to the expiration of such period the patient shall have voluntarily agreed to

92 O.C.G.A. §§37-3-102(a) and 37-7-102(a).
93 O.C.G.A. §§37-3-102(b) and 37-7-102(b).
hospitalization or involuntary proceedings shall have been instituted under Chapters 3 or 7. After a thorough physical and mental examination has been made by the medical staff of such hospital, the chief medical officer of the hospital or his/her designee is authorized to sign an application for involuntary hospitalization if necessary. Such application shall be forwarded to the court of the county in which that hospital is located for action pursuant to the provisions of Chapters 3 or 7 relative thereto.\textsuperscript{94}

If a hospitalized patient is discovered not to be a resident, the regional state hospital administrator of the treatment facility in which the patient is hospitalized shall seek the transfer of the patient to the custody of authorities of the state of his/her residence or to a publicly owned or publicly operated psychiatric hospital in that state. Notwithstanding an individual's status as a nonresident, nothing herein shall prevent the voluntary hospitalization of such individual for which due payment is made by such individual or others on his/her behalf nor shall it prevent the transfer, custody, care, or treatment of such individual in accordance with the terms of any reciprocal agreement between the State of Georgia and any other state, the District of Columbia, or any territory or possession of the United States. This provision shall not apply to persons confined to any facility operated by or under the control of the United States Department of Veterans Affairs or any other federal agency.\textsuperscript{95}

\textbf{8.0 \ EXPENSES OF CARE, TRANSPORTATION AND HEARINGS}

It is the stated policy of Georgia that no person shall be denied care and treatment for mental illness, alcoholism, drug dependency, or drug abuse nor shall services be delayed at a facility of the state or a political subdivision of the state because of inability to pay for such care and treatment.\textsuperscript{96}

Responsibility for the payment of the expenses of care and treatment of a patient are covered in Chapter 9 of Title 37 and are not covered in any detail in this Section.

The responsibility for paying the expenses for transporting, examining, and caring for patients, not provided for under Chapter 9 of Title 37, shall be in the following order:

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    \item The patient or his/her estate;
    \item Persons legally obligated or legally responsible for the support of the patient;
\end{enumerate}

\textsuperscript{94} O.C.G.A. §§37-3-103 and 37-7-103.

\textsuperscript{95} O.C.G.A. §§37-3-104 and 37-7-104.

\textsuperscript{96} O.C.G.A. §§37-3-120 and 37-7-120.
(3) The county of the patient’s legal residence, provided that the county governing authority passes an appropriate resolution assuming such responsibility; and

(4) The department, when the General Assembly appropriates funds for such purpose.

The patient or those legally obligated for his/her support shall not be responsible for such expenses as described above when they were incurred in transporting a patient who is released by a court or a facility before involuntary treatment as not being a mentally ill person, an alcoholic, a drug dependent individual, or a drug abuser in need of involuntary treatment.97

Except as otherwise provided, the expenses of any hearing held under Chapters 3 or 7 by a court or by a hearing examiner, including attorneys' fees and hearing officer fees and expenses authorized as set forth below, shall be paid by the county in which the patient has his/her residence or, if the patient is a transient, by the county in which the patient was initially taken into the custody of the state. Payment by such county of the hearing expenses shall only be required if the person who actually presides over the hearing executes an affidavit or includes a statement in the final order relating to the hearing that the assets of the patient, his/her estate, and any persons legally obligated to support the patient appear to be insufficient to defray such expenses, based upon all relevant information available to the person who actually presides over the hearing. Such affidavit or statement may include the patient's name, address, and age. The cost on appeal to the appropriate court shall be the same as provided for in other appeals from the probate courts.

Expenses of any hearing held under Chapters 3 or 7 shall include:

(1) The fee to be paid to an attorney appointed to represent a patient at such hearing. Such fee shall be as agreed between the attorney and the appointing court but shall not exceed an amount determined under the fee schedule followed by the county when computing the fees to be paid to an attorney who has been appointed to represent an indigent criminal defendant plus actual expenses which an attorney may incur and which have been approved by the court holding the hearing. In exceptional circumstances, the attorney may apply to the superior court of the judicial circuit in which the hearing was held

97 O.C.G.A. §§37-3-121 and 37-7-121.
for an order granting reasonable fees in excess of the amounts specified in this paragraph;

(2) The fee to be paid to the court, which fee shall be to defray the cost of clerical help and the cost of any additional office space and equipment required for the conduct of such hearing. In hearings conducted pursuant to Code Sections 37-3-83 or 37-7-83 such fee shall be $20.00 and in all other hearings under Chapters 3 or 7 such fee shall be $40.00, excluding attorneys' fees and expenses of the hearing officer; and

(3) The fee to be paid to the hearing officer appointed to conduct a hearing shall be as agreed between the hearing officer and the appointing court but shall not exceed an amount determined under the fee schedule followed by the county when computing the fees to be paid to an attorney who has been appointed to represent an indigent criminal defendant plus actual expenses which the hearing officer may incur and which have been approved by the court holding the hearing. In exceptional circumstances, the hearing officer may apply to the superior court of the judicial circuit in which the hearing was held for an order granting reasonable fees in excess of the amounts specified in this paragraph. The $40.00 court cost authorized above is to defray the cost of clerical help and additional office space and equipment required for the conduct of such hearings.

The expenses incurred by a county for a mental health hearing held by a judge of the probate court or an attorney on the probate court staff for an out-of-county patient shall be reimbursed by the county in which the patient has his/her residence. Such amount shall not exceed the amount which would have been paid by the county to a non-county employed hearing officer, plus any other authorized expenses in connection with the hearing.98

9.0 INTERACTION OF PROBATE COURT WITH CRIMINAL TRIAL PROCEEDINGS

If a defendant in a criminal case is sent to a regional hospital for an evaluation of his/her competency to stand trial, and the evaluating physician finds that the person is not

98 O.C.G.A. §§37-3-122 and 37-7-122.
competent to stand trial and that there is not a substantial probability that he/she will become competent in the foreseeable future to stand trial but appears to be an appropriate subject for involuntary treatment, the following procedure is used.

The regional hospital should petition the probate court of the county in which the hospital lies for a hearing on the issue of the patient's need for involuntary treatment. A certificate executed by the chief medical officer and two physicians, or a physician and a psychologist, who have personally examined the patient within five days preceding the execution, stating that the patient is a mentally ill person requiring involuntary treatment would have to be filed with the petition. Unless a hearing is waived, one would be held as in other involuntary treatment cases. If the patient waives a hearing, the certificate serves as authorization for him to begin treatment for mental illness as an inpatient at the regional hospital. The patient can be hospitalized pursuant to the certificate (or hearing if not waived) for a period not to exceed six months, and if the hospital determines that he/she needs continued hospitalization, the procedure discussed in Section 2.2.5 must be followed. Should the patient become mentally competent to stand trial or should he/she improve to the extent that he/she no longer meets the criteria for continued hospitalization, the committing court and the law enforcement agency originally having custody of the patient must be notified and the patient returned to the custody of that agency unless the charges against him/her have been dismissed.

If the defendant stands trial, but is found to be either "not guilty by reason of insanity at the time of the crime" or "guilty but mentally ill at the time of the crime," the defendant’s present mental condition is evaluated; civil commitment at this stage has been held proper. Depending upon which of the above two findings was made and upon the evaluation report, various procedures are followed which do not involve the probate court. Even a petition for judicial protection of rights under Code Sections 37-3-148(b) or 37-7-248(b) will not be properly filed in the probate court, when the patient is under commitment for having been

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99 O.C.G.A. §17-7-130(c).
100 O.C.G.A. §§37-3-81(a) and 37-7-81(a).
101 O.C.G.A. §§37-3-81 (b) and 37-7-81(b).
102 O.C.G.A. §§37-3-81.1(c) and 37-7-81(c).
103 O.C.G.A. §§17-7-130 (d), 37-3-85, 37-3-95, 37-7-85 and 37-7-95.
105 O.C.G.A. §17-7-131.
found not guilty by reason of insanity; the committing court has been held to be the proper court for continuing monitor of the insanity defendant." 106

The execution of a civil order to apprehend has been held not to constitute a criminal arrest, and evidence found in a search of the subject of such an order was declared not to be “incident to an arrest,” thereby making the evidence inadmissible in a criminal trial involving the evidence seized. 107

10.0 APPEAL TO SUPERIOR COURT

The patient, his/her representatives, or his/her attorney may appeal any order of the probate court or hearing officer rendered in a proceeding under Chapters 3 or 7 of Title 37. The petitioner may also appeal. The appeal is to the superior court of the county in which the proceeding was held. The appeal to the superior court must be made in the same manner as other appeals from the probate court to the superior court, except that the appeal must be heard before the court sitting without a jury as soon as practicable but not later than 30 days after the appeal is filed. The patient has a right to counsel and, if unable to afford counsel, must have counsel appointed for him by the court. 108 This applies also in Article 6 Probate Courts, since under Code Sections 37-3-150 and 37-7-150 there is no right to a jury trial in the superior court on appeal. 109

The confidentiality provisions concerning the files and records of a court in any proceedings under Chapter 3 or 7 of Title 37 will apply also to the files and records on appeal to the superior courts. 110

108 O.C.G.A. §§37-3-150 and 37-7-150.
110 O.C.G.A. §§37-3-167(d) and 37-7-167(d).
PART II.
DEVELOPMENTAL DISABILITIES

11.0 SERVICES AND CARE FOR THE DEVELOPMENTALLY DISABLED

11.1 In General

The provisions of Chapter 4, 5 and 6 of Title 37 deal with services and care for persons with “developmental disabilities” as defined in Section 1.3. This term is broader in scope and replaces the formerly used term “mentally retarded.” Chapters 5 and 6 deal with community-based services and day-care centers for the developmentally disabled; the probate court is not involved in any of those provisions, and those Chapters are not covered in this Handbook. Chapter 4 deals with what is termed “habilitation,” which refers to programs designed to assist the developmentally disabled to acquire and maintain life skills which will enable them to cope more effectively with their own situation and environment and increase their physical, mental, social and vocational abilities.

NOTE: Except for the change in terminology from mentally retarded to developmentally disabled and the change from the Department of Human Resources to the Department of Behavioral Health and Developmental Disabilities (DBHDD), no change has occurred in the laws governing these issues and no reported cases have been found by the author. There appears to be very little current use in the State of the provisions of Chapter 4. (In the author’s 20 years’ experience on the bench, only two such cases were filed in the Probate Court of Bibb County.) Therefore, the following Sections have been copied from the old Handbook, with only the modifications in terminology, certain other obvious modifications in context, and the change in Section designations.

The provisions of Chapter 4 of Title 37 continue to be utilized by the Department of Behavioral Health and Developmental Disabilities (DBHDD)\textsuperscript{111} to secure court-ordered commitments (or residential placements) to institutions as bed space is available. However, in response to the Governor’s “redirection” of certain budget expenditures in the 1997-1998

\textsuperscript{111} Formerly, mental health, mental retardation, and substance abuse were under the Department of Human Resources (DHR).
fiscal year, Georgia’s care system for the developmentally disabled is gradually changing toward “Medicaid waiver” group homes. Perhaps the most obvious example of this change is closure of Brook Run, one of the largest state institutions for the developmentally disabled, during 1997 and 1998. In addition, with the advent and maturing of the provisions of House Bill 100,¹¹² decisions formerly made by the central office of DBHDD (formerly DHR) have been delegated to Regional Boards which were designed to be more responsive to local needs.

The national trend continues to serve developmentally disabled persons in smaller, less restrictive settings. Accordingly, Georgia, through DBHDD and the Department of Community Health (DCH),¹¹³ has over the past few years applied for “waivers” of the federal rules which require that Medicaid funds be used for institutional care. “Waiver” applications normally specify that they will only apply to a specific number of beds and once those beds are filled, there are no further “waiver” slots available. This policy has necessarily limited the movement of clients into group homes. Also, in Georgia, there is no established legal mechanism for movement of developmentally disabled clients directly from their family home to a group home. The traditional route to a group home placement is that a client must first be institutionalized, then found not to require institutionalization, before he/she can access a less restrictive group home alternative.

Although Georgia recognizes in its statutory scheme the desirability for clients to live in their home communities and for community-based alternatives to total institutional care,¹¹⁴ the Legislature has not funded a wholesale move to a community system of care, except to approve the Governor’s “redirection” of existing line item budget items, such as the entire budget of the Brook Run facility. Regional Boards, either through private vendors or their local Community Service Board, provide, according to their budgeted priorities, a range of other services for the developmentally disabled, including evaluations, in-home assistance, transportation needs and day services. These services are accessed through the agencies, procedures and customs established by each particular Regional Board.

¹¹³ Formerly the Department of Medical Assistance (DMA).
¹¹⁴ O.C.G.A. §37-4-40(e). For example, see the “Declaration of Policy” provisions of the unfunded Community Services Act for the Developmentally Disabled at O.C.G.A. §37-5-2.
Although the need for community residential alternatives to institutional care exceeds available placements, the Code directs DBHDD to develop, for each client found by the court after a hearing to be in need of services, an individualized program plan which is “an alternative to care in a facility.” 115 If the program is “available,” the court may “issue appropriate orders to implement the plan.” 116 The legislation therefore permits developmentally disabled persons and their families to utilize the probate court in an effort to secure appropriate court ordered non-institutional services or a “limited period of residence in a facility followed by a community services program.” 117 The provisions and procedures of Chapter 4 of Title 37 have, in that context, considerable influence over the conditions of such non-institutional care.

Legislation providing for treatment of the developmentally disabled is separate and distinct from legislation dealing with treatment for the mentally ill. This distinction recognizes that developmental disability differs substantially from mental illness and is reflected in the legislative definitions, the medical definitions and the treatment protocols. The funding mechanism for receiving services for the developmentally disabled, and thus the legislative scheme, is organized by a finite number of “slots” such that once the “slots” are filled with clients, theoretically, no more funds exist for service provision. 118 This is different from services for the mentally ill which expand to some extent with the number of persons entering the system.

Until the full restructuring if DBHDD is complete, DBHDD is directly responsible for services provided in the institutional setting. The county boards of health, which receive substantial funding from DBHDD, operate community services, such as day services, community residential services and sheltered employment.

11.2 Definitions

Many of the terms used in Chapter 4 of Title 37 are defined in Code Sections 37-1-1, which definitions apply to all of Title 37, and 37-4-2, which definitions apply specifically to Chapter 4. The person to receive services, or the developmentally disabled person, is

115 O.C.G.A. §37-4-40(e).
116 Id.
117 O.C.G.A. §37-4-40(f).
118 One of the criteria for receiving court ordered services in an institution is that the court be notified by DBHDD that a “bed appropriate to the specific needs of the client” is available. O.C.G.A. §37-4-40(e)(3).
referred to as a “client.” This is in contrast to the provisions concerning the mentally ill where the person receiving services is referred to as a “patient.”

For purposes of Chapter 4 of Title 37 “developmental disability” means “a severe, chronic disability of an individual that:

(A) Is attributable to a significant intellectual disability, or any combination of a significant intellectual disability and physical impairments;
(B) Is manifested before the individual attains age 22;
(C) Is likely to continue indefinitely;
(D) Results in substantial functional limitations in three or more of the following areas of major life activities:
   a. Self-care
   b. Receptive and expressive language;
   c. Learning;
   d. Mobility
   e. Self-direction; and
   f. Capacity for independent living; and
(E) Reflects the person’s need for a combination and sequence of special, interdisciplinary, or generic services, individualized supports, or other forms of assistance which are of lifelong or extended duration and are individually planned and coordinated.”

Also note the differences in physical restraint protocol for the mentally ill and for the developmentally disabled.

The term for treatment of the developmentally disabled in the legislative scheme is “habilitation.” While habilitation can occur in a community setting as well as in an institutional one, the legislative scheme is presently used primarily for obtaining admission to, and continuation of habilitation in, a facility. The term “facility” refers to a state owned and operated institution utilized 24 hours a day for the residence and habilitation of

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119 O.C.G.A. §37-4-2(1).
120 O.C.G.A. §37-3-1(13).
121 O.C.G.A. §37-1-1(8).
122 O.C.G.A. §37-3-165.
123 O.C.G.A. §37-4-124.
124 O.C.G.A. §37-4-2(10).
developmentally disabled persons, as well as facilities operated by the US Department of Veterans Affairs for such purpose, and any other facility approved by DBHDD for such purpose.\textsuperscript{125}

“Court” means, in the case of an individual 17 years of age or older, the probate court of the county of residence of the client or the county in which the client is found.\textsuperscript{126} In the case of an individual under 17 years of age, “court” means the juvenile court of the county of residence of the client or the county in which such client is found.\textsuperscript{127}

12.0 PROCEDURES FOR OBTAINING SERVICES FOR THE DEVELOPMENTALLY DISABLED FROM DBHDD

Chapter 4 of Title 37 provides procedures for access to the following services:

1. Voluntary admission of minor children who are developmentally disabled, by their parent or guardian.\textsuperscript{128}

2. Court ordered services for adults who are developmentally disabled, by the filing of a petition by any person for a developmentally disabled citizen of this state.\textsuperscript{129}

3. Temporary and immediate care of a minor or an adult in a facility by the filing of a certificate of a physician or psychologist.\textsuperscript{130}

4. Continued court ordered habilitation.\textsuperscript{131} This procedure is generally handled administratively by a hearing examiner who generally operates under the direction of the Office of Administrative Appeals for DBHDD.\textsuperscript{132} The probate court's involvement is required only in appointing an attorney for the client when the petition for continued habilitation is filed and for the payment of costs. The court where the client is hospitalized appoints such attorney and then bills the county of the client's residence for the fees of the attorney and the cost of the hearing.

\textsuperscript{125} O.C.G.A. §37-4-2(8).
\textsuperscript{126} O.C.G.A. §37-4-2(5)(A).
\textsuperscript{127} O.C.G.A. §37-4-2(5)(B).
\textsuperscript{128} O.C.G.A. §37-4-20.
\textsuperscript{129} O.C.G.A. §37-4-40.
\textsuperscript{130} O.C.G.A. §§37-4-40.1 through 37-4-40.5.
\textsuperscript{131} O.C.G.A. §37-4-42.
\textsuperscript{132} O.C.G.A. §37-4-43.
5. Respite services.\textsuperscript{133} No involvement is required by the court for this type of admission.

6. Dental services.\textsuperscript{134} No involvement is required by the court for this type of service.

\section{Least Restrictive Alternative Placement Policy}

It is the policy of this state that the least restrictive alternative placement be secured for every client at every stage of the client's habilitation. It is the duty of the facility to assist the client in obtaining placement in non-institutional community facilities and programs.\textsuperscript{135}

This policy pervades every procedure for services in Chapter 4. Under the 1991 fiscal year appropriations bill,\textsuperscript{136} language was inserted and passed which would allow some state funding used for institutional care of a client to “follow the client” for care in the community. This law states, “Provided, it is the intent of this General Assembly that the Department of Human Resources is authorized to allow eligible individuals with mental retardation to be served in the least restrictive community setting possible in lieu of a state mental retardation hospital and that existing funds appropriated herein for mental retardation hospitals be utilized in serving any mentally retarded client who is moved from a state mental retardation hospital to a community setting.”\textsuperscript{137}

Chapter 5 of Title 37, entitled “Community Services for the Developmentally Disabled,”\textsuperscript{138} is the clearest embodiment of the policy that community-based alternatives should replace institutional care. The statute does not limit availability of or entitlement to services based on availability of appropriated funds. The enforceability of this law has not been tested although a federal court has ruled that the state does not have a general constitutional obligation to provide developmentally disabled persons with community-based services.\textsuperscript{139}

\begin{footnotesize}
\begin{enumerate}
\item O.C.G.A. §37-4-21.
\item O.C.G.A. §37-4-22.
\item O.C.G.A. §37-4-121.
\item 1991 Ga. Laws 1944.
\item 1991 Ga. Laws 2007-08. DHR is now DBHDD, and mental retardation and mentally retarded are now developmental disability and developmentally disabled.
\item O.C.G.A. §§37-5-1 through 37-5-10.
\item S.H. and P.F. v. Edwards, 886 F.2d 292 (11th Cir. 1989).
\end{enumerate}
\end{footnotesize}
13.0 CONFIDENTIAL NATURE OF COURT RECORDS

The confidentiality provisions\textsuperscript{140} are substantially the same as to those for the mentally ill, alcoholics, drug dependent individuals and drug abusers. See Section 5.0 above. Note that in a court hearing concerning habilitation, a physician is subject to the provisions of Code Section 24-9-40 concerning privileged communications.\textsuperscript{141}

14.0 COURT ORDERED ADULT SERVICES

14.1 Petition

Any person may file a petition with the court for services for a developmentally disabled citizen of this state. The petition must be executed under oath and be filed either in the court of the county where the developmentally disabled person resides or where such person is found.\textsuperscript{142} In the most common scenarios, this procedure is used by institutions which desire to admit an adult client and have a bed available, or when a client currently in the institutional setting who was admitted voluntarily by his/her parents reaches the age of 18, or when an admission under the temporary and immediate care provisions\textsuperscript{143} expires. Another use for this procedure is when a developmentally disabled person is found incarcerated or in a facility for treatment of the mentally ill (as opposed to the developmentally disabled) and for any reason is not receiving adequate services as required by the statute, and a physician or psychologist is unable or unwilling to sign a certificate for temporary and immediate care.

The petition must contain the following:

1. An assertion that the person is developmentally disabled;
2. A statement that the petitioner is either the parent, guardian or person standing in loco parentis of the client and is unable to obtain adequate services for the habilitation of the client as set forth in Code Section 37-5-3 and Code Section 20-2-131 (the Quality Basic Education or “QBE” statute), or a statement that the petitioner is someone other than the parent, guardian or person standing in

\textsuperscript{140} O.C.G.A. §§37-4-125, 37-4-126.
\textsuperscript{141} O.C.G.A. §37-4-125(b).
\textsuperscript{142} O.C.G.A. §37-4-40(a).
\textsuperscript{143} O.C.G.A. §§37-4-40.1 through 37-4-40.5.
loco parentis, and believes that the parent or other guardian has failed or is unable to secure such adequate services;

3. A statement of facts providing the basis of the above-referenced allegations;

4. The names and addresses, if known, of any witnesses having knowledge of any relevant facts; and

5. The names and addresses, if known, of the nearest relatives and the guardian, if any, of the client.¹⁴⁴

Upon filing and review of the petition, if the court finds reasonable cause to believe that the client is in fact a developmentally disabled person who is not receiving adequate services (care, training, education, habilitation or other specialized services), the court must issue an order within 72 hours of the filing of the petition that the client be examined by a comprehensive evaluation team.¹⁴⁵ Notice of the order must be sent to the client and the client's two representatives appointed by the court.¹⁴⁶

If the client and his representatives fail to comply with the order for evaluation within five days, Saturdays, Sundays and holidays excluded, after the date set by the court order for the client to be evaluated, the comprehensive evaluation team must notify the court of such failure, with any underlying explanation. The court can then take appropriate action to facilitate the evaluation, provided it is done in the least restrictive environment available. The court can issue subpoenas for witnesses before the evaluation team and can compel attendance in the same manner as if the evaluation were a regular court proceeding.¹⁴⁷

Within ten days, Saturdays, Sundays, and legal holidays excluded, after examining the client, the team must file a written report with the court, which must contain any dissenting opinions.¹⁴⁸ If a majority of the team concludes the client is developmentally disabled and in need of services which he/she is not receiving, then the report must take the form of an individualized program plan (IPP) for the client.¹⁴⁹ The IPP states the client's diagnosis (medical and psychiatric), needs and strengths, the least restrictive alternative placement for provision of services and who is responsible for each service, and other

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¹⁴⁴ O.C.G.A. § Error! Bookmark not defined.37-4-40(a).
¹⁴⁵ O.C.G.A. §37-4-40(b).
¹⁴⁶ Id. See Section 15.0 below.
¹⁴⁷ Id.
¹⁴⁸ O.C.G.A. §37-4-40(c).
¹⁴⁹ Id.
information.\textsuperscript{150} The IPP contains a signature line for each member of the team indicating consent or dissent.

Regardless of the finding of a majority of the team, when the team's report is filed the court sets a hearing on the petition and serves notice of the hearing within 72 hours after the filing of the report upon the petitioner, the client, and the client's representatives (or guardian as provided in Code Section 37-4-107). Such notice must be accompanied by the following:

1. A copy of the petition;
2. A notice that the client has a right to counsel and that the client will have counsel appointed for him/her unless the client notifies the court that the client has retained counsel or waives the right to counsel;
3. A copy of the IPP; and
4. A notice that the client has the right to be examined by a comprehensive evaluation team of the client's choice and at the client's expense, which may submit its own IPP, provided that it conforms with the requirements of Code Section 37-4-2(9).\textsuperscript{151}

The hearing must be held within ten to 15 days, Saturdays, Sundays, and holidays excluded, after the date the team report is filed, with continuances allowed for reasonable cause.\textsuperscript{152}

The threshold questions to be resolved at the hearing are as follows:

1. Whether the client is developmentally disabled; and
2. Whether the client is in need of care, training, education, habilitation or other specialized services other than that which the client is then receiving.

If the court finds in the negative to either of the above questions, the petition must be dismissed. If the court finds, however, that the client meets both criteria, the court must make a finding on the following additional criteria:

1. Based upon the recommendation indicated in the IPP for an alternative to care in the facility (institution), the court must make a determination as to whether such alternative is available and whether such alternative presents a reasonable expectation for the client to accomplish the goals stated in the IPP.

\textsuperscript{150} O.C.G.A. §37-4-2(9).
\textsuperscript{151} O.C.G.A. §37-4-40(d).
\textsuperscript{152} Id.
2. If the court determines that the facility would be the least restrictive available alternative for accomplishment of the client’s treatment goals, the court may not order an admission unless it further specifically finds as follows:
   a. The client requires direct medical services;
   b. The client needs 24 hour training in a residential care facility (institution); and
   c. There is a bed available appropriate to the specific needs of the client and the services indicated in the IPP can be provided.\textsuperscript{153}

   With respect to the above findings, there is no statutory definition of “direct medical services.” In addition, the determination of “a bed appropriate to the specific needs of the client” has taken on a definition of something other than a mere bed. Institutions label beds according to how many “slots” they have for services. A certain small number of beds may be set aside as “temporary and immediate care beds” for clients requiring those services.

   The court may tailor an order if, based upon the evidence, it finds that the client requires only a limited period of institutionalization followed by participation in a community services program. The order may require that the client remain in a facility for a period not to exceed six months, subject to the regional state hospital administrator’s authority to discharge the client after a periodic review under Code Section 37-4-44. The order should contain findings of fact and conclusions of law in support of the ruling. If at the end of such six-month period the client requires further institutional care, the facility must apply for an order for continued habilitation in a facility as provided in Code Section 37-4-42, which must be heard by a hearing examiner (not the court).\textsuperscript{154}

14.2 Court Ordered Services - Noncompliance

If there is a failure by the client to comply with the order for services, or if the program for habilitation is not sufficient to meet the client's needs, then the person in charge of the client's care may initiate a new procedure for services under Code Section 37-4-40. If the client, or the client's representatives, make an oral allegation that the client's rights or privileges are being violated, then the facility is responsible for assisting the client in

\textsuperscript{153} O.C.G.A. §37-4-40(e).
\textsuperscript{154} O.C.G.A. §37-4-40(f). See also appointment of hearing examiners for continued habilitation under O.C.G.A. §37-4-43.
preparing a petition to the court for determination of reasonable cause and for an order for evaluation.\textsuperscript{155}

\section*{15.0 APPOINTMENT OF PATIENT REPRESENTATIVES AND GUARDIANS-AD-LITEM}

The provisions for appointment of patient representatives and guardians-ad-litem are similar in all respects, except nomenclature, to the corresponding provisions for the mentally ill, alcoholic, drug dependent individuals, and drug abuser set forth in Section 3.0 above.\textsuperscript{156}

In the event that there is a medical recommendation for serious medical intervention which does not qualify as a grave emergency under Code Section 37-4-123(e), and the client does not have at least two representatives, some facilities have adopted the practice of petitioning the court for the appointment of a guardian-ad-litem for the sole purpose of investigation of and possible consent to such medical treatment. This is a dubious practice. Under Code Section 37-4-123(d), there is no authority for the guardian-ad-litem, the representatives or anyone else to consent to medical treatment or surgery except in accordance with Code Section 31-9-2, which sets forth certain rules of priority regarding who can consent to medical treatment on behalf of another person. Code Section 31-9-2 does provide, in the fourth rank of priority, that any “guardian” may consent to a recommended medical procedure on behalf of his ward. However, this probably refers to a duly appointed guardian, not a guardian-ad-litem, since no client who is receiving treatment may be considered legally incompetent without due process of law.\textsuperscript{157}

\section*{16.0 TEMPORARY AND IMMEDIATE CARE}

The temporary and immediate care (TIC) provisions of Chapter 4 of Title 37 became effective on July 1, 1986.

\subsection*{16.1 Certificate of Physician or Psychologist}

Any physician or psychologist licensed in Georgia who has personally examined a client within 48 hours may issue a certificate indicating that the client is developmentally

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{155} O.C.G.A. §37-4-41.
\item \textsuperscript{156} O.C.G.A. §37-4-107. See O.C.G.A. §37-3-147 concerning the mentally ill.
\item \textsuperscript{157} O.C.G.A. §37-4-100.
\end{itemize}
\end{footnotesize}
disabled and requires temporary and immediate care. The certificate expires seven days after it is executed.\textsuperscript{158}

Upon receipt of the certificate, any responsible family member or the representative indicated in the certificate can transport the client to the nearest facility which serves the county in which the client is found. If the family member or representative is unable or unwilling to transport the client, then any peace officer, within 72 hours of receipt of the certificate, must make efforts to take the client into custody for delivery to such facility. The peace officer upon delivery must provide a report of such custody and delivery which must be made a part of the client's record.\textsuperscript{159} As a practical matter, a family member is usually willing to deliver the client in order to obtain services.

16.2 Admission, Discharge and Petition for Final Disposition

Upon delivery to the facility, the client is examined by a physician as soon as possible. The client must be discharged within 48 hours, excluding Saturdays, Sundays and holidays, unless the regional state hospital administrator admits the client and files a petition for a full and fair hearing with the court in the county in which the facility is located.\textsuperscript{160}

Notice of discharge after examination must be given to the client and the client's representatives as well as to the physician or psychologist who executed the certificate.\textsuperscript{161}

16.3 Notice of Rights of Client

Upon admission under the certificate, the facility must immediately give the client written notice of the client's right to petition for a writ of habeas corpus or for a protective order under Code Section 37-4-108, the right to legal counsel and the right to appointment of counsel by the court. A copy of such written notice must be sent to the client's representatives within 24 hours of admission under the certificate.\textsuperscript{162}

\textsuperscript{158} O.C.G.A. §37-4-40.1(a).
\textsuperscript{159} O.C.G.A. §37-4-40.1(b).
\textsuperscript{160} O.C.G.A. §37-4-40.2(a).
\textsuperscript{161} O.C.G.A. §37-4-40.2(b).
\textsuperscript{162} O.C.G.A. §37-4-40.3.
16.4 Evaluation after Filing Petition

Upon the filing of the petition for temporary and immediate care, the facility is authorized to continue admission of the client until the completion of a full and fair hearing. Within five days after the filing of the petition, excluding Saturdays, Sundays and holidays, representatives of the facility and representatives of the county developmental disability program in the client's community must evaluate the client, develop an IPP and file the evaluation and the IPP with the court.163

16.5 Hearing

The hearing to determine the need for temporary and immediate care must be held within 20 days after the filing of the petition.164 Service of notice of the hearing must be made upon the client, the client's representatives and the petitioner at least seven days before the hearing date. The notice must be accompanied by a copy of the petition, notice of right to counsel, and a copy of the evaluation report and the IPP.165

At the hearing the court must address the same questions and issues as in the hearing for court ordered services under Code Section 37-4-40(e) and (f). After the hearing, the court may take any action allowed under Code Section 37-4-40(e) and (f), and may discharge the client from the facility.166

One of the possible conclusions that the court may make after a hearing is that the client meets all of the criteria with the exception of either the need for direct medical services or the availability of a bed. While courts have denied the petition where there is such a finding, it is not required that the court then also require discharge. In fact, the facility will often continue admission even after such an order because there is no other available placement that is safe for the client, let alone appropriate to the client's special habilitation needs.

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163 O.C.G.A. §37-4-40.4
164 O.C.G.A. §37-4-40.5(a).
165 O.C.G.A. §37-4-40.5(b).
166 O.C.G.A. §37-4-40.5(c).
16.6 Exampes Where Procedure Is Used

The temporary and immediate care procedure is designed to allow quick admissions for evaluation and can be used by physicians or psychologists to facilitate evaluations of developmentally disabled persons who are in another, less appropriate system of care, or who are incarcerated.

For example, a client who has a primary diagnosis of developmental disability may be found in a psychiatric care facility where professionals are not trained in the particular needs of the developmentally disabled. As another example, a client may suffer from both developmental disability and mental illness. These clients are sometimes referred to as “dually diagnosed.”

Because an adult client may have the mental age of a child, treatment in an adult psychiatric treatment center may be inappropriate. Therefore, this procedure would allow for a quick evaluation process and for a determination as to whether the client could be served by the developmental disability system of care. A client in an inappropriate system of care may be prohibited from receiving appropriate developmental disability services under the temporary and immediate care procedure because a bed is not available in the appropriate developmental disability facility. Such client may then be forced back into the mental health system, or possibly discharged because the client does not fit the criteria for continued treatment in the mental health system. Because the two systems are operated under the same Department (DBHDD), the competing interests presented by such a petition are difficult to examine.

16.7 Continuing Court Ordered Habilitation after Temporary and Immediate Care

After an admission period (up to six months) ordered as the result of a hearing for temporary and immediate care, the facility normally petitions for court ordered services under Code Section 37-4-40. See Section 11.6 above.

17.0 CONTINUING COURT ORDERED HABILITATION

If there is a need for continued habilitation in a facility after the period (up to six months) of court ordered services pursuant to Code Section 37-4-40 expires, there is a
procedure which is initiated prior to the expiration of the previous order. This is a petition for continued habilitation in the institution.\textsuperscript{167}

17.1 Committee for Continued Habilitation Review

Under this procedure, the regional state hospital administrator appoints a Committee for Continued Habilitation Review, consisting of at least five persons. This committee makes recommendations to the administrator after a review of the IPP. The persons on this committee must be different from those persons on the comprehensive evaluation team and cannot have any responsibility for the individual client to be reviewed.\textsuperscript{168} In that sense, this committee provides a fresh review of the client's status.

If the regional state hospital administrator desires to seek an order authorizing continued habilitation for a client for up to 12 months, the administrator forwards a notice to the Committee for Continued Habilitation Review.\textsuperscript{169} The committee, after appropriate investigation, makes a report to the administrator with any minority recommendations noted.\textsuperscript{170} The administrator upon review of the committee's recommendation may determine that the client's admission should not continue and then discharge the client to another facility or make an appropriate alternative placement.\textsuperscript{171} However, if after such review the administrator desires to continue habilitation in the institution, the administrator must, within ten days after receiving the committee's recommendation, forward a petition for such an order, with the IPP and the committee's report, to DBHDD's representative, who is generally the hearing examiner designated by the Office of Administrative Appeals. The client and the committee are also forwarded a copy of the petition.\textsuperscript{172}

17.2 Hearing

The client or his representatives may request a hearing and counsel within 15 days after service of the petition.\textsuperscript{173} There is a danger that a developmentally disabled adult may inadvertently “waive” a hearing by failing to request one. Better practice would be to

\textsuperscript{167} O.C.G.A. §37-4-40(f).
\textsuperscript{168} O.C.G.A. §37-4-42(b).
\textsuperscript{169} O.C.G.A. §37-4-42(c).
\textsuperscript{170} O.C.G.A. §37-4-42(d).
\textsuperscript{171} O.C.G.A. §§37-4-42(e) and 37-4-44(b).
\textsuperscript{172} O.C.G.A. §37-4-42(f).
\textsuperscript{173} O.C.G.A. §37-4-42(h).
schedule a hearing unless it is waived in the presence of the hearing officer or through client's counsel. Alternatively, if the hearing examiner determines that continued habilitation may not be necessary or if any member of the committee so concludes, then the hearing examiner must order a hearing.\textsuperscript{174} The hearing is to be held in accordance with the procedures set forth in Code Section 37-4-40. The hearing must take place within 25 days of the time the hearing examiner receives a request for hearing but not later than the time the current habilitation order expires. The continuation hearing must address the same criteria as a hearing for court ordered services or temporary and immediate care and similar orders are therefore authorized after the hearing.\textsuperscript{175}

The hearing examiner, upon determining that a client being currently served by a facility has reached the age of 17 without having had the benefit of a due process hearing as allowed under Chapter 4 of Title 37, must order such a hearing.\textsuperscript{176}

17.3 Hearing Examiner's Authority

The hearing examiner for continued habilitation review has authority to:

1. Administer oaths and affirmations;
2. Sign and issue subpoenas;
3. Rule upon offers of proof;
4. Regulate the course of the hearing;
5. Provide for the taking of testimony by deposition;
6. Reprimand or exclude persons for improper conduct;
7. Apply to superior court for an order that a subpoena be obeyed;
8. Apply to the court in the county in which the hearing is held for appointment of counsel if desired by an indigent client to be paid by the county of the client's legal residence; and
9. Make all appropriate orders authorized by Chapter 4 of Title 37.\textsuperscript{177}

\textsuperscript{174} O.C.G.A. §37-4-42(g).
\textsuperscript{175} O.C.G.A. §37-4-42(h).
\textsuperscript{176} O.C.G.A. §37-4-42(i).
\textsuperscript{177} O.C.G.A. §37-4-43.
18.0 RIGHTS AND PRIVILEGES OF DEVELOPMENTALLY DISABLED
PERSONS UNDERGOING HABILITATION

Developmentally disabled persons who are receiving, or who have received, services
are entitled to every civil, political, personal and property right, notwithstanding any
provision of law to the contrary.\textsuperscript{178}

In addition, a developmentally disabled person is not considered incompetent for any
purpose unless there has been a due process determination.\textsuperscript{179}

When a client is in a facility, the client has certain rights relating to his treatment, as
follows:

1. The right to suitable, skillful, safe, and humane treatment, in the least
   restrictive manner appropriate, with full respect for the client's dignity and
   personal integrity.\textsuperscript{180}

2. The right to participate in his habilitation. This includes the right to
   reasonable access to the client's medical file, the right to be told the client's
   diagnosis, the right to be consulted in the habilitation recommendation and the
   right to be fully informed concerning the client's medication (including
   possible side effects and alternatives available), provided such participation is
   not harmful to the client's mental and physical health and a notation thereof is
   made a part of the client's clinical record.\textsuperscript{181} There is a limited right to refuse
   medication.\textsuperscript{182} Immediate medical intervention by the medical staff at a
   facility, with no prior notification to the client, or anyone else, is authorized in
   case of a grave emergency, provided two physicians make such a
determination in accordance with the statute.\textsuperscript{183}

3. While the client is in a facility, the client has a right to secure the services of a
   private physician and the right to be allowed to see such physician at any
   reasonable time. The superintendent or regional state hospital administrator

\textsuperscript{178} O.C.G.A. §37-4-100.
\textsuperscript{179} Id.
\textsuperscript{180} O.C.G.A. §37-4-122(a).
\textsuperscript{181} O.C.G.A. §37-4-122(c).
\textsuperscript{182} O.C.G.A. §37-4-123(b).
\textsuperscript{183} O.C.G.A. §37-4-123(e).
must establish regulations designed to facilitate such examination when a client so requests.\textsuperscript{184}

4. The right to examination by staff of the admitting facility as soon as possible after admission.\textsuperscript{185}

5. The right to have transmitted to the regional state hospital administrator or the administrative head of the facility an oral statement by the client that the rights and privileges under Chapter 4 of Title 37, and the specified program for habilitation, are being violated and the further right to have assistance from the facility to prepare a petition under Code Section 37-4-40.\textsuperscript{186}

6. The right to freedom from physical restraint unless allowed under the provisions of the statute.\textsuperscript{187}

7. The right to not have medication interfere with the client's habilitation program; the right that medication, seclusion or physical restraint be used solely for the purposes of habilitation and safety of the client and other persons, rather than for punishment, convenience of staff or as a substitute program.\textsuperscript{188}

A client in a facility also has the following general rights:

1. The right to secure legal counsel, at the client's own expense, for representation in any matter in which the client may be involved while in a facility. DBHDD has the responsibility to provide that opportunity to the client.\textsuperscript{189}

2. The right to communicate freely and privately with persons outside the facility and to receive visitors inside the facility.\textsuperscript{190} However, this right is limited by the reasonable regulations established by the superintendent of the facility or regional state hospital administrator.\textsuperscript{191}

\textsuperscript{184} O.C.G.A. §37-4-122(d).
\textsuperscript{185} O.C.G.A. §37-4-122(e).
\textsuperscript{186} O.C.G.A. §37-4-41.
\textsuperscript{187} See restrictions set forth in O.C.G.A. §37-4-124(b) through (d). Compare with the less protective procedure for the mentally ill set forth in O.C.G.A. §37-3-165(b).
\textsuperscript{188} O.C.G.A. §37-4-124(a).
\textsuperscript{189} O.C.G.A. §37-4-101.
\textsuperscript{190} O.C.G.A. §37-4-102(a).
\textsuperscript{191} O.C.G.A. §37-4-102(j).
3. The right to have no interference with mail sent or received.\textsuperscript{192} However, if there is reason to believe that dangerous substances or items are being transmitted by mail, reasonable examination is permitted provided the client receives actual writings within 24 hours.\textsuperscript{193} The superintendent or regional state hospital administrator may apply for a temporary order restricting mail within the time limitations set forth in the statute and provided a “full and fair hearing” is held in accordance with Code Section 37-4-2(7) and in accordance with the further provisions related to future examination of a client’s mail.\textsuperscript{194}

4. The right to personal property. The facility is responsible for making reasonable efforts to assure the client's personal property rights. If such reasonable efforts are made, the staff is generally not responsible for loss or damage.\textsuperscript{195}

5. The right to vote. This right includes the responsibility of the facility to reasonably assist the client with obtaining registration forms, absentee ballots, and in complying with other requirements which are prerequisites for voting.\textsuperscript{196}

6. The right to seek, and be assisted with efforts to secure, employment outside the facility provided such employment aids in the client's habilitation. The client is further entitled to all benefits of such employment.\textsuperscript{197}

7. The right of any child receiving habilitation in a facility to an appropriate education at public expense. The Department of Education is responsible for provision of these services and for coordinating its program with DBHDD.\textsuperscript{198}

8. The right to two representatives.\textsuperscript{199}

\textsuperscript{192} O.C.G.A. §37-4-102(b).
\textsuperscript{193} O.C.G.A. §37-4-102(c).
\textsuperscript{194} O.C.G.A. §37-4-102(d) through (i).
\textsuperscript{195} O.C.G.A. §37-4-103.
\textsuperscript{196} O.C.G.A. §37-4-104.
\textsuperscript{197} O.C.G.A. §37-4-105.
\textsuperscript{198} O.C.G.A. §§37-4-4, 37-4-106. A child between the ages of three and twenty-one is entitled to a free and appropriate education related to the child's special needs, as indicated in that child's Individualized Education Program. 20 U.S.C. §1412. The “Individuals with Disabilities Education Act” is codified at 20 U.S.C. §§1400 through 1485.
\textsuperscript{199} O.C.G.A. §37-4-107. See Section 18.7.
9. The right of the client or a relative or friend, at any time and without notice, to petition the probate or superior court for a writ of habeas corpus alleging unlawful detention. However, if the client is detained pursuant to a court order under Code Section 17-7-130 or 17-7-131, the petition and a certificate of service by certified mail, return receipt requested, or statutory overnight delivery must be served upon the presiding judge of the court ordering the detention as well as the prosecuting attorney.\(^{200}\)

10. The right of the client or the client's representatives to petition the court for a protective order, alleging denial of a right or privilege granted by Chapter 4 of Title 37 or alleging that a procedure authorized by such chapter is being abused. If such allegation is made orally to a staff member, the staff member must then immediately transmit such statement to the superintendent, the regional state hospital administrator, or the administrative head of the facility, or other person in charge of the client's habilitation plan, who is then responsible for assisting the client in the preparation of the petition. Upon such filing the court is authorized to conduct a judicial inquiry and to enter appropriate orders to correct such abuse.\(^{201}\) Any client objecting to the treatment being administered to him has the right to request such protective order.\(^{202}\)

11. The right of the client, the client's representatives, or attorney, to appeal. The petitioner may also appeal.\(^{203}\) Any order of a probate court or of a hearing officer may be appealed to the superior court. Appeals to the superior court must be heard by the court sitting without a jury not later than 30 days from the date the appeal is filed with the clerk of the superior court. The client is responsible for paying filing costs or, in lieu thereof, filing a pauper's affidavit. For appeals, the client has the right to counsel. If the client is unable to afford counsel, the client has the right to have counsel appointed by

\(^{200}\) O.C.G.A. §37-4-108(a). O.C.G.A. §17-7-130 concerns pleas of mental incompetency to stand trial; O.C.G.A. §17-7-131 concerns pleas of insanity or mental incompetency at the time of the crime.

\(^{201}\) O.C.G.A. §37-4-108(b).

\(^{202}\) O.C.G.A. §37-4-123(c).

\(^{203}\) O.C.G.A. §37-4-110.
the court at no cost to the client.\textsuperscript{204} The laws which eliminated de novo appeals from probate courts in certain counties do not affect developmental disability cases because such laws only eliminated de novo appeals when there is a right to jury trial in the superior court.\textsuperscript{205}

12. The right to individual dignity and the right to be free from restraining devices such as those normally used for those accused of a crime, except in extreme urgency.\textsuperscript{206}

13. The right to the least restrictive alternative placement available at every stage of habilitation. This right is coupled with the duty of the facility to assist the client in securing such placement in non-institutional community facilities and programs.\textsuperscript{207}

14. The right of the client's attorney, at reasonable times, to interview persons in charge of the client's habilitation in the facility.\textsuperscript{208}

19.0 EXPENSES OF HEARINGS AND COSTS

The provisions of the applicable Code section\textsuperscript{209} are identical to those for expenses of hearings and costs relating to the mentally ill as set forth in Section 8.0 above, except for nomenclature.

20.0 Liability for Expenses of Care and Transportation

The provisions of the applicable Code section\textsuperscript{210} are identical to those concerning liability for expenses for care and transportation of mentally ill patients as set forth in Section 8.0 except for nomenclature.

21.0 OTHER MISCELLANEOUS PROVISIONS

The applicable Code sections dealing with placement, transfer, and transportation and dealing with out-of-state residents are substantially similar, with the exception of

\begin{footnotesize}
\begin{enumerate}
\item[204] Id.
\item[205] See O.C.G.A. §§15-9-120(1)(C), 37-4-110.
\item[206] O.C.G.A. §37-4-120.
\item[207] O.C.G.A. §37-4-121.
\item[208] O.C.G.A §37-4-127.
\item[209] O.C.G.A. §37-4-82.
\item[210] O.C.G.A. §37-4-81.
\end{enumerate}
\end{footnotesize}
nomenclature, to the corresponding sections for the mentally ill, alcoholics, drug dependent individuals, and drug abusers.\textsuperscript{211}

\textbf{APPENDIX TO CHAPTER 12}
\textbf{MENTAL HEALTH, DEVELOPMENTAL DISABILITIES AND SUBSTANCE ABUSE}

1. Sample Affidavits and Order to Apprehend………………………………. A12-1

\textbf{Important Notice}

Several sample orders and forms have been included in this Appendix. These sample orders and forms have not been officially sanctioned by the Georgia Council of Probate Court Judges. They have, unless otherwise noted, been prepared by the author. They are provided solely as samples. They should be modified or adapted to the specific court for the specific purpose, with any unnecessary material being deleted and any additional material being added.

William J. Self, II

\textsuperscript{211} Designation of admission facility (O.C.G.A. §37-4-60); transportation (O.C.G.A. §37-4-61); transfer of client to custody of federal agency (O.C.G.A. §37-4-62); procedure for transfer of Georgia residents from out-of-state facilities (O.C.G.A. §37-4-63); transfer of out-of-state client (O.C.G.A. §37-4-64). See Sections 19.2.21 through 19.2.23.
Appendix A12-1

Patient/Subject: _____________________   File or ID No. ___________________

Affidavits in support of orders by the Judge of the Probate Court, under Code Sections 37-3-41; 37-3-41 and 37-7-42 of The Official Code of Georgia Annotated.

AFFIDAVIT

STATE OF GEORGIA
COUNTY OF BIBB

COMES NOW, _______________________________________________, who resides at ________________________________, and who states that I am resident of ________ County, and the State of _________. Over a period of ________ (mos.)(yrs.), I have known ________________________________, age _____, who resides at ________________________________, to/with whom I have the following relationship: _____________. I have had an opportunity to observe his/her demeanor and conduct BY ACTUALLY SEEING HIM/HER WITHIN THE PRECEDING 48 HOURS.

Predicated on what I HAVE ACTUALLY OBSERVED HIM/HER DO OR HEARD HIM/HER SAY, it is my confirmed lay opinion that he/she is:

1.  ( ) A MENTALLY ILL PERSON requiring involuntary treatment AND
   ( ) (a) who presents a substantial risk of imminent harm to himself or others as manifested by either recent overt acts or recently expressed threats of violence which present a possibility of physical injury to himself or to others persons,
   OR
   ( ) (b) who is so unable to care for his/her own physical health and safety as to create an imminently life-endangering crisis.

2.  ( ) AN ALCOHOLIC requiring involuntary treatment AND
( ) (a) who presents a substantial risk of imminent harm to himself or others as manifested by either recent overt acts or recent expressed threats of violence which present a probability of physical injury to himself or to other persons, OR 

( ) (b) who is incapacitated by alcohol on a recurring basis.

3. ( ) A DRUG DEPENDENT individual or DRUG ABUSER requiring involuntary AND 

( ) (a) who presents a substantial risk of imminent harm to himself or others as manifested by either recent overt acts or recent expressed threats of violence which present a probability of physical injury to himself or to other persons, OR 

( ) (b) who is incapacitated by drug use on a recurring basis.

More particularly, the aforesaid _______________ has ACTUALLY DONE OR SAID the following things which form the basis for this declaration, to wit:

__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________
__________________________________________________________________________
The condition is so serious that he/she should be examined forthwith at an Emergency Receiving Facility according to law.

I have offered myself as a witness for examination before the Probate Court of this County, so that the truth and particular facts of these allegations may be more fully explored by said Court.

I understand that this document is a sworn statement and I further understand that Section 16-5-43 of the Official Code of Georgia Annotated provides that a person who maliciously causes the confinement of a sane person, knowing such person to be sane, in any asylum, public or private, shall, upon conviction, be punished by imprisonment for not less than one nor more than ten years.

________________________________
Signature of Affiant

Sworn to and subscribed before me on ______________________

________________________
Clerk of the Probate Court

REFERRAL made to the Probate Court by ________________________________ of (agency) _______________________ after having made/not made a home visit.

Other information concerning referral: ______________________________________

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________
IN THE PROBATE COURT OF ____________ COUNTY
STATE OF GEORGIA

ORDER TO APPREHEND AND TRANSPORT
TO EMERGENCY RECEIVING FACILITY

IN RE: ____________________________________________ (Patient’s Name)

_______________________________________________________(Address/Location at which to apprehend)

Sex ______ Race ___________________ Age ____ S.S.N. ____________________________

Physical Desc. or Remarks: ______________________________________________________
____________________________________________________________________________

TO: Any Peace Officer in Said County

YOU ARE HEREBY COMMANDED, pursuant to my authority under Title 37 of O.C.G.A., to
apprehend the person of the patient named above, who is alleged, upon affidavits on file in this office, to be

( ) a MENTALLY ILL PERSON requiring involuntary treatment AND

( ) who presents a substantial risk of imminent harm to himself or others as manifested by either
recent overt acts or recently expressed threats of violence which present a probability of physical
injury to himself or others,
OR
( ) who is so unable to care for his own physical health and safety as to create an imminently life-
endangering crisis:   AND/OR

( ) an ALCOHOLIC, a DRUG DEPENDENT INDIVIDUAL, or a DRUG ABUSER requiring
involuntary treatment AND

( ) who presents a substantial risk of imminent harm to himself or others as manifested by either
recent overt acts or recently expressed threats of violence which present a probability of physical
injury to himself or others,
OR
( ) who is incapacitated by alcohol or other drug(s) on a recurring basics:

and to transport the said patient forthwith to ______________________, an Emergency Receiving Facility, for
examination and assessment as prescribed by law. If, for any cause, the patient cannot be assessed and
evaluated as such facility, the patient shall be transported forthwith to the next nearest available Emergency
Receiving Facility.

This Order EXPIRES at __________ __. M. seven days after this date.

SO ORDERED, this ____ day of ____________________, 20____.

_____________________________________________
JUDGE, PROBATE COURT OF BIBB COUNTY

Patient Representatives: ________________________________

Address: __________________________________________

Telephone: _________________________________________

______________________________________________

______________________________________________
ENTRY OF SERVICE ON
ORDER TO APPREHEND AND TRANSPORT
TO EMERGENCY RECEIVING FACILITY

I have executed the foregoing Order to Apprehend ____________________________
and to transport him/her to an Emergency Receiving Facility. The subject was transported to
_________________________________________ as designated in the foregoing Order.

Date: ___________, at ______  .M., being within seven days of the date of said Order.

____________________________________
Deputy Sheriff, ____________ County, Georgia

(THIS MUST BE RETURNED TO PROBATE COURT)
Chapter 13

VITAL RECORDS, LICENSES, PERMITS, AND CERTIFICATES OF RESIDENCE

The Revised
HANDBOOK FOR PROBATE JUDGES OF GEORGIA
2010
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Chapter 13
Vital Records, Licenses, Permits,
And Certificates of Residence

PART I. Vital Records

1. PROBATE JUDGES AS VITAL RECORDS CUSTODIANS

As noted in Chapter 1 of this Handbook at Section 1.2.4, some judges of the probate courts serve as the vital records custodian, also known as “Local Custodian,” for the county by virtue of appointment by the State Registrar. The Local Custodian maintains and certifies local records of births and deaths.¹

As such, the judge of the probate court reports to the State Office of Vital Records, supervised by the State Registrar, a division of the state Department of Community Health (“DCH”), and the duties and responsibilities are governed by Chapter 10 of Title 31 of the Official Code of Georgia Annotated. Certain Rules and Regulations of the Department of Human Services [formerly Human Resources (“DHR”)] apply to DCH.²

The subject of the duties and responsibilities of Local Custodians is not covered by this Handbook.

However, with regard to certain matters, discussed below, the probate courts have certain jurisdiction concerning vital records which will apply in all probate courts. Hence, those subjects are covered below.

2.0 PROCEDURE FOR DELAYED BIRTH CERTIFICATES

2.1 Process through State Registrar

When a certificate of birth of a person has not been filed before the person’s first birthday, an application for the issuance of a delayed birth certificate may be filed with the

---

¹ O.C.G.A. §31-10-1(10).
² The Georgia Rules and Regulations may be found at http://sos.georgia.gov/rules_regs.htm.
State Registrar. The application must be accompanied by documentary evidence establishing the fact of the birth acceptable under the appropriate regulations issued by DHR. Under those regulations, the name of the person, the date of birth, place of birth, and parentage must be substantiated by documentary evidence acceptable to the State Registrar.\(^3\)

If the evidence is sufficient and acceptable, the State Registrar will issue a birth certificate, marked “Delayed” on its face and showing the date of the delayed registration. A summary of the evidence submitted is to be endorsed on the delayed certificate.\(^4\)

If the application is not completed within one year of the date of filing the application or if the documentation submitted by the applicant does not meet the minimum requirements, the State Registrar may, within his/her discretion, dismiss the application.\(^5\)

No delayed certificate may be issued for a deceased person.\(^6\)

When an applicant does not submit the minimal documentation or when the State Registrar has reasonable cause to question the validity and adequacy of the applicant’s sworn statement or the documentary evidence, which deficiencies are not corrected, the application is denied by the State Registrar. The denial must state the reasons for the denial and advise the applicant of the right to judicial appeal, covered in the next Section.\(^7\)

### 2.2 Judicial Procedure

If a delayed certificate of birth is rejected as set forth above, a petition signed and sworn to by the petitioner may be filed in either the superior court or the probate court in the county of residence of the person for whom a delayed certificate of birth is sought. The petition seeks an order establishing a record of the date and place of the birth and the parentage of the person whose birth is to be registered and shall allege:

1. That the person for whom a delayed certificate of birth is sought was born in this state;

2. That no certificate of birth of such person can be found in the files of the State Office of Vital Records or the office of any local custodian of vital records;

---

\(^3\) DHR Rules 290-1-3-.09 and 290-1-3-.10.

\(^4\) O.C.G.A. §31-10-11(a) through (c). See DCH Regs 290-1-3-.06 through .13.

\(^5\) O.C.G.A. §31-1-11(e) and DCH Regs 290-1-3-.13.

\(^6\) O.C.G.A. §31-10-11(f).

\(^7\) O.C.G.A. §31-10-11(d).
3. That diligent efforts by the petitioner have failed to obtain the evidence required in accordance with Code Section 31-10-11 and regulations adopted pursuant thereto;
4. That the State Registrar has refused to register a delayed certificate of birth; and
5. Such other allegations as may be required.\footnote{O.C.G.A. §31-10-12(a).}

The petition shall be accompanied by a statement of the State Registrar denying the application as set forth above and all documentary evidence which was submitted to the State Registrar in support of such registration.\footnote{O.C.G.A. §31-10-12(b).}

The superior court or probate court, as the case may be, shall fix a time and place for hearing the petition and shall give the State Registrar not less than ten days' notice of said hearing. The State Registrar or an authorized representative may appear and testify in the proceeding.\footnote{O.C.G.A. §31-10-12(c).}

If the superior court or probate court finds, from the evidence presented, that the person from whom a delayed certificate of birth is sought was born in this state, it shall make findings as to the place and date of birth, parentage, and such other findings as may be required and shall issue an order, on a form prescribed and furnished by the State Registrar, to establish a delayed certificate of birth. The order shall include the birth data to be registered, a description of the evidence presented as prescribed by Code Section 31-10-11, and the date of the court's action.\footnote{O.C.G.A. §31-10-12(d).}

The clerk of superior court or the probate court, as the case may be, shall forward the order to the State Registrar not later than the tenth day of the calendar month following the month in which it was entered. Such order shall be registered by the State Registrar and shall constitute the certificate of birth from which certified copies may be issued in accordance with this chapter.\footnote{O.C.G.A. §31-10-12(e).}
3.0 AMENDMENTS TO RECORDS AND REPORTS

3.1 Amendments by State Office

Unless otherwise specified by law, a certificate or report registered under Chapter 10 of Title 31 may be amended in accordance with regulations adopted by the department to protect the integrity and accuracy of vital records. Such regulations shall specify the minimum evidence required for a change in any certificate or report. Amendments to birth certificates, death certificates, and application supplement-marriage reports shall be completed by the department and a copy mailed to the proper local custodian, if any.\(^\text{13}\)

A certificate or report that is amended under Code Section 31-10-23 shall be marked "amended," except as otherwise provided in the Code section. The date of amendment and a summary description of the evidence submitted in support of the amendment shall be endorsed on or made a part of the record. The department shall prescribe by regulation the conditions under which additions or minor corrections may be made to certificates or records within one year after the date of the event (birth, death, marriage) without the certificate or record being marked "amended."\(^\text{14}\)

Upon receipt of a certified copy of an order to legitimate a child, or an affidavit signed by the natural parents whose marriage had legitimated a child, the director\(^\text{15}\) shall register a new birth certificate if paternity was not shown on the original certificate. Such certificate shall not be marked "amended."\(^\text{16}\) If paternity was shown on the original certificate, the record can be changed only by an order from a court of competent jurisdiction or the Office of State Administrative Hearings to remove the name of the person shown on the certificate as the father and to add the name of the natural father and to show the child as the legitimate child of the person so named. The order must specify the name to be removed and the name to be added.\(^\text{17}\)

Upon receipt of a certified copy of a court order indicating the sex of an individual born in this state has been changed by surgical procedure and that such individual's name has been changed, the certificate of birth of such individual shall be amended as prescribed by

\(^{13}\) O.C.G.A. §31-10-23(a).
\(^{14}\) O.C.G.A. §31-10-23(b).
\(^{15}\) Presumably, this reference is intended to be to the State Registrar.
\(^{16}\) O.C.G.A. §31-10-23(c)(1).
\(^{17}\) O.C.G.A. §31-10-23(c)(2).
regulation.\textsuperscript{18}

When a certificate or report is amended under this Code section, the State Registrar shall report the amendment to the proper local custodian and their record shall be amended accordingly.\textsuperscript{19}

When an applicant does not submit the minimum documentation required in the regulations for amending a vital record or when the State Registrar has reasonable cause to question the validity or adequacy of the applicant's sworn statements or the documentary evidence and if the deficiencies are not corrected, the State Registrar shall not amend the vital record and shall advise the applicant of the reason for this action and shall further advise the applicant of the right of judicial appeal.\textsuperscript{20}

\section*{3.2 Amendments to Marriage Licenses by Probate Court}

Amendments to applications for a marriage license or the license shall be completed by the judge of the probate court of the county in which the license was issued.\textsuperscript{21}

\section*{3.3 Amendments to Birth Certificates by Probate Court}

Upon receipt of a certified copy of an order from a probate court (or a superior court or other court of competent jurisdiction) changing the name of a person born in this state and upon request of such person or such person's parents, guardian, temporary guardian, or legal representative, the State Registrar shall amend the certificate of birth to show the new name. When the names of the parent or parents and the child are changed, the State Registrar may register a new certificate if requested by the parents, guardian, temporary guardian, or legal representative. Such new certificate shall be marked "amended."\textsuperscript{22}

An order from a probate court (or a superior court) shall be required to change the year of birth shown on the original birth certificate by more than one year, to correct any item on a delayed birth certificate, or to remove the name of a father from a birth certificate on file. The person seeking such change, correction, or removal shall institute the proceeding by

\begin{itemize}
\item \textsuperscript{18} O.C.G.A. §31-10-23(e).
\item \textsuperscript{19} O.C.G.A. §31-10-23(h).
\item \textsuperscript{20} O.C.G.A. §31-10-23(g).
\item \textsuperscript{21} Id. Note that amendments to divorce reports are completed by the clerk of the court which granted the divorce.
\item \textsuperscript{22} O.C.G.A. §31-10-23(d).
\end{itemize}
filing a petition with the appropriate court in the county of residence for an order changing the year of birth, correcting a delayed birth certificate, or removing the name of the father from a birth certificate on file. Such petition shall set forth the reasons therefor and shall be accompanied by all available documentary evidence. The court shall set a date for hearing the petition and shall give the State Registrar at least ten days' notice of said hearing. The State Registrar or an authorized representative thereof may appear and testify in the proceeding. If the court finds from the evidence presented that such change, correction, or removal should be made, the judge shall issue an order setting out the change to be made and the date of the court's action. The clerk of such court shall forward the petition and order to the State Registrar not later than the tenth day of the calendar month following the month in which said order was entered. Such order shall be registered by the State Registrar and the change so ordered shall be made.  

PART II. Marriage Licenses

4.0 ISUANACE OF LICENSES: Time and Place

4.1 By Whom, When and Where Issued

The law provides that marriage licenses shall be issued only by the judge of the probate court or a clerk at the county courthouse between the hours of 8:00 A.M. and 6:00 P.M., Monday through Saturday. If any judge of the probate court or clerk issues a marriage license in violation of this provision (presumably during the hours of 6:01 P.M. and 7:59 A.M. or on Sunday), the judge or clerk, as the case may be, shall be guilty of a misdemeanor. This provision might cause a judge of the probate court some consternation if a citizen of the county has already planned a wedding with invited guests, etc., but has forgotten to secure the marriage license and calls the judge at 6:30 PM on a Saturday night in a panic. A question might also arise if a judge of the probate court is asked to come or send a clerk to, or mail the application to, one or more of the applicants who is/are unable to come

23 Presumably, this means a certified copy of the petition and order.
24 O.C.G.A. §31-10-23(f)
25 O.C.G.A. §19-3-30(a).
26 O.C.G.A. §19-3-32.
to the courthouse (or, perhaps for publicity reasons would prefer not to come to the courthouse) for purposes of taking the application. The Code Sections concerning the applications do not state that the application must be made at the courthouse. In fact, Code Section 19-3-34 states that the application “shall be filed in the office of the judge of the probate court before a marriage license is issued,” which seems to contemplate that an application might be completed at some place other than the courthouse. See Section 6.0 below. The author has found no reported cases or opinions of the Attorney General which clarify what constitutes the act of “issuance.” However, it is the author’s opinion that “issuance” is the act of preparing, signing, and delivering to the parties the actual Marriage License itself, the document which authorizes the marriage in Georgia. A plain reading of the statute would seem to support the contention that the application may be completed other than at the courthouse, so long as is it filed before the actual marriage licensed is issued at the courthouse. The author is not certain of the genesis of this provision or its underlying purpose but finds the criminalization of a constituent service otherwise in compliance with the law (to proper parties, etc.) extraordinary.

4.2 Permitted Issuance other than at Courthouse

The above provisions notwithstanding, the judge of the probate court of any county which has within its boundaries a municipality that has a population according to the United States decennial census of 1950 or any future such census greater than that of the county seat of the county is authorized to appoint a clerk for the purpose of granting marriage licenses in the municipality at an office designated by the judge. The licenses shall be issued only between the hours prescribed in Section 4.1 above.\(^2\)

Furthermore, in all counties having a population in excess of 400,000 according to the United States decennial census of 1990 or any future such census or in counties where the county site is located in an unincorporated portion of the county, the judge of the probate court or his/her clerk shall be authorized to issue the marriage licenses and to take and perform any and all other actions concerning the issuance of marriage licenses either at the courthouse located at the county site or at any permanent satellite courthouse within the county which has been established and constructed by the governing authority of the county

\(^2\) O.C.G.A. §19-3-30(f).
and has been designated by the governing authority of the county as a courthouse annex or by similar designation has been established as an additional courthouse to the courthouse located at the county site.\textsuperscript{28}

4.3 **Issuance to Same-Sex Applicants Prohibited**  
Georgia law specifically prohibits the issuance of a marriage license to persons of the same sex.\textsuperscript{29} Furthermore, it is the declared public policy of this state to recognize the union only of man and woman. No marriages between persons of the same sex shall be recognized in this state as being entitled to the benefits of marriage. Any marriage entered into by persons of the same sex in another state or foreign country shall be considered void in Georgia. Any contractual rights granted by virtue of such marriage or the license issued for same shall be unenforceable in the courts of this state, which shall have no jurisdiction under any circumstances to grant a divorce or separate maintenance with respect to such marriage or otherwise to consider or rule on any of the rights of the respective parties arising as a result of or in connection with such marriage.\textsuperscript{30}

4.4 **Residence Requirements for Issuance**  
If one of the persons to be married is a resident of this state, the license may be issued in any county of this state. If neither the male nor the female to be married is a resident of this state, the license shall be issued in the county in which the ceremony is to be performed.\textsuperscript{31}

4.5 **Immediate Issuance**  
When both applicants for a marriage license are eligible to receive that license and that license is otherwise authorized to be issued pursuant to the provisions of Chapter 3 of Title 19, the license may be issued immediately and without any waiting period.\textsuperscript{32}

\textsuperscript{28} O.C.G.A. §19-3-31.  
\textsuperscript{29} O.C.G.A. §19-3-30(b)(1).  
\textsuperscript{30} O.C.G.A. §19-3-3.1.  
\textsuperscript{31} O.C.G.A. §19-3-30(b)(2).  
\textsuperscript{32} O.C.G.A. §19-3-35.
5.0 ELIGIBILITY

5.1 Prerequisites

In order to receive a marriage license in Georgia, the applicants must each and both be eligible to marry under state law. Preliminarily, the parties must be able to contract, there must be an actual contract, and there must be, subsequently, “consummation according to law.” This last requirement, consummation, is often thought to require that the couple have engaged in sexual intercourse. However, sexual intercourse is not essential to consummation of the marriage, although cohabitation is essential to consummation.

Most of the confusion about this concept of “consummation” has arisen in the area of common-law marriages, now prohibited in Georgia. When there has been a ceremonial marriage after the issuance of a proper license, followed by cohabitation, there is a presumption that the parties had capacity to contract and that all elements of a valid marriage exist, which presumption continues until the contrary is otherwise proved.

The Attorney General has issued an opinion that a judge may not refuse to perform a marriage ceremony because the parties are not of the same race. That opinion and federal and state laws against discrimination based on race or color would prohibit a refusal to issue a marriage license because the parties are of different racial or ethnic backgrounds.

5.2 Capacity and Proof of Age

To be able to contract marriage, that is to enter into a valid marriage, a person must be of sound mind, be at least 18 years of age (or be at least 16 years of age with parental consent), have no living spouse of a previous undissolved marriage, and not be related to the prospective spouse by blood or marriage with the prohibited degrees. If either applicant is 16 or 17 (has not reached the applicant’s 18th birthday), parental consent as described below shall be required.

The dissolution of a previous marriage cannot be presumed and must be affirmatively established. For proof of the death of a former spouse, the judge of the probate court should

33 O.C.G.A. §19-3-1
35 See Section 10.0 below.
38 O.C.G.A. §19-3-2.
require a certified copy of a death certificate for the former spouse. For proof of dissolution by divorce, the judge of the probate court should require a certified copy of the decree of divorce.\textsuperscript{39} Divorce decrees from other states may contain a prohibition against remarriage for some period of time. Since Georgia is required to give full faith and credit to the lawful judgments of the courts of other states,\textsuperscript{40} a license should not be issued during the period of prohibition, since the party’s capacity to contract marriage has been restricted for a period of time.

The judge of the probate court must be satisfied that both parties applying for a marriage license meet the age requirement. If the judge does not have personal knowledge of the age of the applicant, he/she must require the applicant to furnish documentary evidence of proof of age in the form of a birth certificate, driver's license, baptismal certificate, certificate of birth registration, selective service card, court record, passport, immigration papers, alien papers, citizenship papers, armed forces identification card or discharge papers, or hospital admission card showing full name and date of birth. If the applicant possesses none of the foregoing documents but appears to the judge of the probate court to be at least 25 years of age, the applicant may give an affidavit stating the applicant's age. If both applicants have satisfactorily proved that they have reached the age of majority and all other requirements are met, they may be issued a marriage license immediately.\textsuperscript{41} The age restrictions above also apply to any minor who has been emancipated under Article 6 of Chapter 11 of Title 15.\textsuperscript{42}

5.3 Parental Consent, When Required

NOTE: The prior provision permitting marriages by pregnant females without parental consent has been repealed and no longer applies.

If either applicant is 16 or 17 years old, the parents or guardians of each underage applicant must appear in person before the judge and consent to the proposed marriage. However, if such physical presence is impossible because of illness or infirmity, an affidavit by the incapacitated parent or guardian is acceptable, provided there is also attached to such

\textsuperscript{39} See O.C.G.A. §19-3-2(a)(3).
\textsuperscript{40} U.S. Const., Art. IV, §1; Smith v. AirTouch Cellular of Georgia, Inc., 244 Ga. App. 71 (2000).
\textsuperscript{41} O.C.G.A. §19-3-36.
\textsuperscript{42} O.C.G.A. §15-11-208(c).
affidavit an affidavit signed by a licensed attending physician stating that such parent or guardian is physically incapable of being present.\(^\text{43}\)

The Code provides alternative methods for obtaining parental consent:

1. When the parents or guardians of any underage applicants requiring parental consent reside in a county of this state other than the county where the marriage license is to be issued, the parents or guardians may appear in person before the judge of the probate court of the county in which they reside and consent.

2. Where the parents or guardians of any underage applicants requiring parental consent reside outside this state, the parents or guardians may appear in person before the judicial authority of their county who is authorized to issue marriage licenses and consent to the proposed marriage. If the parents or guardians are physically incapable of being present because of illness or infirmity, the illness or infirmity may be attested to by an attending physician licensed in that state in the same manner as applicable to residents of this state.

Where the above alternative provisions for parental consent are utilized, the parents or guardians must obtain a certificate from the judge of the probate court or the proper judicial officer before whom they have appeared with the seal and title of the official appearing on the certificate. The certificate must state that the parents or guardians appeared before the judge or judicial officer and consented to the proposed marriage.\(^\text{44}\) The certificate should be filed with the judge who issues the license.

For purposes of consent to the marriage of underage applicants, the following definitions apply:

"Parent" means:

1. Both parents if the parents are living together;

2. The parent who has legal custody if the parents are divorced, separated or widowed; or

\(^\text{43}\) O.C.G.A. §19-3-37(b). The attending physician must be licensed under Chapter 34 of Title 43 or the corresponding requirements pertaining to licensed attending physicians in sister states.

\(^\text{44}\) O.C.G.A. §19-3-37(c).
3. Either parent if the parents are living together but one parent is unavailable because of illness or infirmity or because he/she is not within the boundaries of this state or physical presence is impossible.

"Guardian" means:

1. Any person at least five years older than the applicant standing in loco parentis\(^{45}\) to the applicant for at least two years;
2. Any person at least five years older than the applicant with whom the applicant has lived for at least two years and who has or would be allowed to claim the applicant as a dependent for the purposes of a federal dependent income tax deduction;
3. Any relative by blood or marriage at least five years older than the applicant and with whom the applicant has lived at least two years, when the whereabouts of the applicant's parents are unknown; or
4. A court appointed guardian.

"Guardian" includes the same relationships between spouses as described above in connection with "parent."\(^{46}\)

5.4 Prohibited Degrees of Relationship

Marriages between persons related either by blood or by marriage to each other within the following relationships are prohibited and are void from their inception:

1. Father and daughter or stepdaughter;
2. Mother and son or stepson;
3. Brother and sister of the whole blood or half blood;
4. Grandparent and grandchild;
5. Aunt and nephew; and
6. Uncle and niece.

Any person who knowingly marries another person within these degrees commits a crime punishable by imprisonment for not less than one year nor more than three years.


\(^{46}\) O.C.G.A. §19-3-37(a).
Former Code references to “Levitical degrees” of consanguinity\(^\text{47}\) have been removed from the Code. Marriage between first cousins is legal in Georgia.\(^\text{48}\)

### 6.0 ISSUANCE OF LICENSES: Application and License

#### 6.1 Application and Supplement Report

The application for a marriage license must be in writing, must state that there is no legal impediment to the marriage, and must give the full present names of the proposed husband and the proposed wife, with their dates of birth, present addresses, and names of the father and mother of each if known, and if unknown, must so state. The application shall state whether or not the couple have completed premarital education in accordance with Code Section 19-3-30.1.\(^\text{49}\) The application must be verified by the oath of the applicants.

An application supplement-marriage report must be prepared in connection with each marriage license. Except for the date and county of the marriage ceremony, the application supplement-marriage report must be completed as a part of the application. The application supplement-marriage report must state the following at a minimum:

1. The full name, date of birth, and social security number for each applicant;
2. The number this marriage will be for each applicant; and
3. After the ceremonial marriage has been performed, the date of the marriage ceremony and the county where the ceremony occurred.\(^\text{50}\)

Thus, the judge of the probate court should require both parties to sign the verification on the application form after completion of the application form and the application supplement-marriage report (except for the date and county in which the ceremony was performed, which must be filled in by the court after the license has been returned).

The form and content of the application and the marriage license-certificate used in each county must conform substantially to the forms approved by the Georgia Council of Probate Court Judges authority in Code Section 31-10-3.

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\(^{47}\) See Leviticus 18:1-18.


\(^{49}\) See Section 6.4 below.

\(^{50}\) O.C.G.A. §19-3-33.
As noted in Section 4.1 above, there is no apparent requirement that the application be completed at the courthouse. If the application is mailed out to any applicant, or if one applicant is permitted to take the application to the other applicant, the judge of the probate court must assure that the AIDS/HIV and sickle cell disease brochures\(^{51}\) are sent with the application to the party or parties who are not completing the application before the court.

The application must be filed in the probate court which is to issue the Marriage License, where it shall remain a part of the permanent records of the court. The application may be used as evidence in any court of law under the appropriate rules of evidence. The application marriage-supplement report form must be transmitted to the State Registrar pursuant to Code Section 31-10-21. While in the temporary possession of the court, the marriage-supplement report is neither available for public inspection (i.e., it is not subject to the Georgia Open Records Act) nor admissible in any court of law. The court is not required to keep a copy of the report, and, given the preceding sentence, perhaps no copy should be kept after transmittal to and receipt by the State Registrar has occurred.\(^{52}\)

### 6.2 Designations of Surnames

As a part of the application, the applicants must designate the surnames which will be used as their legal surnames after the marriage is consummated. Each spouse may use as a legal surname his or her:

1. Given surname or, in the event the given surname has been legally changed, the surname so changed;
2. Surname from a previous marriage;
3. Spouse's surname; or
4. Surname under (1) or (2) above in conjunction with the surname of the other spouse.

### 6.3 Mandatory Information to be given to Applicants

Prior to the issuance of the license, the judge of the probate court must provide to both applicants a brochure prepared and distributed by the DCH describing AIDS and HIV

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\(^{51}\) See Section 6.3 below.  
\(^{52}\) O.C.G.A. §19-3-34.
and the dangers, populations at risk, risk behaviors, and prevention measure related thereto, together with a listing of sites at which confidential and anonymous HIV tests are provided without charge. The applicants must each acknowledge in writing the receipt of the brochure and listing, and the application contains such an acknowledgement.\(^{53}\)

Prior to the issuance of the license, the judge of the probate court must also provide to both applicants a brochure prepared and distributed by the DCH describing the importance of obtaining a blood test for sickle cell disease and explaining the causes and effects of the disease. The information must also be published on DCH’s website.\(^{54}\)

The law also requires DCH to prepare a “marriage manual” to be given to applicants for marriage licenses. The manual is supposed to provide material on family planning.\(^{55}\)

However, at the time of the writing of this Handbook, DCH has, for many years, stopped producing and distributing such a manual. Therefore, unless a probate court has retained a copy of the last such manual produced for reproduction, the court cannot comply with this requirement.

### 6.4 Premarital Education

In applying for a marriage license, a man and woman who certify on the application for a marriage license that they have successfully completed a qualifying premarital education program will not be charged a fee for a marriage license. The premarital education must include at least six hours of instruction involving marital issues, which may include but not be limited to conflict management, communication skills, financial responsibilities, child and parenting responsibilities, and extended family roles. The premarital education must be completed within 12 months prior to the application, the couple must undergo the premarital education together, and the premarital education must be performed by:

1. A professional counselor, social worker, or marriage and family therapist who is licensed pursuant to Chapter 10A of Title 43;
2. A psychiatrist who is licensed as a physician pursuant to Chapter 34 of Title 43;
3. A psychologist who is licensed pursuant to Chapter 39 of Title 43; or

\(^{53}\) O.C.G.A. §19-3-35.1.  
\(^{54}\) O.C.G.A. §19-3-40.  
\(^{55}\) O.C.G.A. §19-3-41.
(4) An active member of the clergy when in the course of his/her service as clergy or his/her designee, including retired clergy, provided that a designee is trained and skilled in premarital education.

Each premarital education provider must furnish each participant who completes the premarital education described above a certificate of completion. Such a certificate should state clearly compliance with the above requirements: at least six hours of premarital education, involving both the bride and groom together, completion within 12 months prior to the application date, and performance by an authorized person. There is no standard form for such a certificate. See Appendix A13-1 for a sample certificate form.

6.5 Objections to Issuance of License

There is no specific provision under Georgia law for the interposition of an objection to the issuance of a marriage license. Given that most licenses are issued immediately after the application is filed, there may be little likelihood of an opportunity to object. It is certainly possible that someone might convey to the court or staff information which might show that the applicants are not eligible for a license (such as an allegation that one party has an undissolved prior marriage). Any such informal information should be covered with the parties, but an unsubstantiated allegation should not be accepted over the sworn application.

However, it remains possible that someone having an interest in the matter might wish to file a formal objection to the issuance of a license. Any formal objection should be made in writing, should state sufficient grounds for the objection (i.e., allege some fact or circumstance which, if proved, would make one or both applicants ineligible, and should state the relationship or interest of the objector). The objection should be served upon both applicants who should be given an opportunity to respond. Before denying a license on a formal objection, the judge of the probate court should set a hearing after notice to the applicants and the objector and hear evidence in support or opposition to the issuance.

6.6 License and Return

The license shall be directed to any judge, including judges of state and federal courts of record in this state, city recorder, magistrate, minister, or other person of any religious society or sect authorized by the rules of such society to perform the marriage ceremony;
such license shall authorize the marriage of the persons therein named and require the judge, city recorder, magistrate, minister, or other authorized person to return the license to the judge of the probate court with the certificate thereon as to the fact and date of marriage within 30 days after the date of the marriage. The license with the return thereon shall be recorded by the judge in a book kept by such judge for that purpose.\textsuperscript{56} The issuance of blank licenses is prohibited.\textsuperscript{57}

In the event that any marriage license is not returned for recording, either party to a ceremonial marriage may establish the marriage by submitting to the judge of the probate court the affidavits of two witnesses to the marriage ceremony setting forth the date, the place, and the name of the official or minister performing the ceremony. The judge shall thereupon reissue the marriage license and enter thereon the certificate of marriage and all dates and names in accordance with the evidence submitted and shall record and cross-index same in the proper chronological order in the book kept for that purpose.\textsuperscript{58}

The fact of issue of any unrecorded marriage license may also be established by affidavit of either party to a ceremonial marriage, which affidavit shall set forth the date, the place, and the name and title of the official issuing the license.\textsuperscript{59}

Under a statute which is still included in the Code but appears to be obsolete, the judge of the probate court is required to return to the parties all marriage licenses issued subsequent to March 25, 1958, after they have been recorded as required by law.\textsuperscript{60} Under the same statute, the judge of the probate court is authorized, but not required, to return licenses issued before that date upon the request of either of the parties. A different statute, which appears to be more recent, requires that the original of the application and license must be kept in the permanent files in the judge of the probate court's office, from which certified copies may be issued.\textsuperscript{61}

\textsuperscript{56} O.C.G.A. §19-3-30(c).
\textsuperscript{57} Brewer v. Kingsbury, 69 Ga. 754 (1882).
\textsuperscript{58} O.C.G.A. §19-3-30(e).
\textsuperscript{59} O.C.G.A. §19-3-30(d).
\textsuperscript{60} O.C.G.A. §19-3-44.
\textsuperscript{61} O.C.G.A. §31-10-21(e). See also O.C.G.A. §19-3-34(a).
6.6.1 Amendments to Applications and Licenses

Requests to amend an application for a marriage license or a marriage certificate must be made to the judge of the probate court of the county in which the license was issued.\textsuperscript{62} DCH has no rules dealing specifically with the evidence required to support an amendment to a marriage application or certificate. Instead, determination of the sufficiency of evidence to support the requested change is left to the judge, unless some other DCH rule is relevant. For example, if the request is to change the year of birth shown on a marriage application, the DCH rules concerning changing the year of birth on a birth certificate might be applied. When one party to a marriage requests an amendment to the application or license, the other party should be given notice and an opportunity to respond.

6.6.2 Geographical Limit on Authority under License

As a state-issued license, a Georgia marriage license only grants authority to perform the marriage of the parties in the state of Georgia. However, the Attorney General has issued an opinion that, if a marriage is valid where performed, it is valid in Georgia, regardless of the fact that the license was not valid in the state where the ceremony was performed or that there was no license at all, so long as the couple acted in good faith and did not attempt to avoid age or other requirements of this state, and the marriage does not offend the morals, general policy or conscience of Georgia.\textsuperscript{63} Although the State Registrar is only required to record documents relating to marriages performed in this state,\textsuperscript{64} the current policy is to record marriage licenses and certificates when the license was issued in Georgia and the ceremony was performed in another state if it appears that the marriage is valid in the other state and therefore is valid in Georgia.

\textbf{NOTE: }This statement was contained in the prior Handbook, and its current accuracy has not been confirmed by the author. Since only the supplement-marriage report is now recorded by the State Registrar (or the data is entered therefrom as the record of the marriage), it is unclear to the author how the State Registrar would ascertain the validity of the marriage in the foreign state.

\textsuperscript{62} O.C.G.A. §31-10-23(a).
\textsuperscript{64} O.C.G.A. §31-10-21(a).
7.0  PUBLICATION OF BANNS

It is still possible under Georgia law to enter into a ceremonial marriage without the necessity of procuring a license. This can be accomplished through the publication of banns prior to the marriage, although the statute gives no details as to the form of publication.\(^{65}\) This procedure is rarely if ever used currently. "Banns of matrimony" is the "public notice or proclamation of a matrimonial contract, and the intended celebration of the marriage of the parties in pursuance of such contract."\(^{66}\) Whenever a judge, city recorder, magistrate, minister or other authorized person joins in marriage persons whose banns have been published, a certificate of that fact must be filed with the judge of the probate court of the county of publication, and the judge of the probate court is required to **record the certificate** in the same book with marriage licenses.\(^{67}\) This statute does not require the judge of the probate court to issue a marriage license. Should such a certificate be filed with the court, a certified copy of the recorded certificate and a copy of Code Section 19-3-39 should suffice to prove the marriage. Some modification of the marriage license could also be done to show the receipt of the certificate as proof of the marriage.

8.0  PROXY MARRIAGE

A proxy marriage is a ceremonial marriage in which one or both of the parties is/are physically absent at the time the ceremony is performed. The absent party is represented at the ceremony by an agent or stand-in who is authorized to act on behalf of the absent party. The Attorney General has given his opinion that an otherwise valid marriage is not invalid due to the fact that it was a marriage by proxy.\(^{68}\) Any couple who wishes to be married by proxy must otherwise comply with all of the requirements of the Code, such as the license requirements.

The better practice, particularly with current technology, would be for the “absent” party to “appear” via telephone or live video over the internet. When the “absent” party is

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\(^{65}\) O.C.G.A. §19-3-39.


\(^{67}\) O.C.G.A. §19-3-39.

clearly identified by the officiant and then participates in the ceremony, in some sense at least, the party is not truly “absent,” even if a proxy is also standing in.

9.0 MISCELLANEOUS PROVISIONS AND PENALTIES

9.1 Validity of Marriages in Other States

All marriages solemnized in another state by parties intending at the time to reside in this state shall have the same legal consequences and effect as if solemnized in this state. Parties residing in this state may not evade any of the laws of this state as to marriage by going into another state for the solemnization of the marriage ceremony.\(^6^9\)

9.2 Effect on Marriage of Want of Authority of Officiant

A marriage which is valid in other respects and supposed by the parties to be valid shall not be affected by want of authority in the minister, judge, city recorder, magistrate, or other person to solemnize the same; nor shall such objection be heard from one party who has fraudulently induced the other to believe that the marriage was legal.\(^7^0\)

9.3 Penalty for Falsification of Application

Any person who willfully furnishes false information in connection with the application and issuance of any marriage license, either in the application for the license or in furnishing proof of age shall be guilty of a misdemeanor.

9.4 Forfeiture for Improper Issuance of License

As stated in Section 4.1 above, any judge of the probate court or clerk who issues a license other than at the courthouse (or satellite courthouse) and during the hours of 8:00 A.M. and 6:00 P.M., Monday through Saturday, commits a misdemeanor.\(^7^1\)

Any judge of the probate court who knowingly grants a license without the required parental consent or without proper proof of age or whose clerk issues such a license shall forfeit the sum of $500.00 for every such act, to be recovered at the action of the father or

\(^6^9\) O.C.G.A. §19-3-43.
\(^7^0\) O.C.G.A. §19-3-42.
\(^7^1\) O.C.G.A. §19-3-32.
mother, if living, and, if not, at the action of the guardian or legal representative of either of such contracting parties. Under no circumstances shall more than one action be maintained by the father or mother, guardian, or legal representative of either of such contracting parties in connection with any one marriage. No such action shall be brought prior to the expiration of 60 days from the date that the marriage becomes public and nor after the expiration of 12 months from the date the marriage becomes public. A recovery shall be had against the offending judge and the surety on the judge’s official bond. From the recovery a reasonable attorney's fee, to be fixed by the presiding judge trying the case, shall be paid to the attorney representing the person bringing the action. After the payment of court costs, one-third of the remainder of the recovery shall be paid to the person bringing the action, and the remaining two-thirds shall be paid to the county educational fund of the county of the judge's residence.

9.5 Forfeiture for Officiating at a Marriage Without License or Banns

Any judge, city recorder, magistrate, minister, or other person authorized to perform the marriage ceremony who joins in marriage any couple without a license or the publication of banns shall forfeit the sum of $500.00, to be recovered and appropriated as set forth in Section 9.4 above.

9.6 Penalty for Officiating at Illegal Marriage Ceremony

If any judge, city recorder, magistrate, minister, or other person authorized to perform the marriage ceremony joins together in matrimony any man and woman without a license or the publication of banns or if the person performing the marriage ceremony knows of any disability of either of the parties which would render a contract of marriage improper and illegal, that person shall be guilty of a misdemeanor.

9.7 Acceptance of Tips, Consideration or Gratuities by Judges

In addition to any compensation otherwise provided by law, any judge who performs a marriage ceremony at any time, except normal office hours, may receive and retain as personal income any tip, consideration, or gratuity voluntarily given to such judge for

72 O.C.G.A. §19-3-45.
performing such marriage ceremony. This means that it shall be unlawful and/or unethical for any judge to accept any tip, consideration, or gratuity voluntarily given for performing a marriage ceremony during normal office hours and probably means that any fee charged to the couple for the performance of the ceremony must be remitted in the same manner as all other fees and costs.

10.0 COMMON LAW MARRIAGES

No common-law marriage may be entered into in this state on or after January 1, 1997. Otherwise valid common-law marriages entered into prior to January 1, 1997, are not affected by this prohibition and continue to be recognized in this state. In addition to the date restriction set forth above, three requirements must be met during one period of time in order to have a common law marriage:

1. Parties who are able to contract;
2. An actual contract of marriage; and
3. Consummation by cohabitation in this state.

These are essentially the same three requirements as for a valid ceremonial marriage, except that the actual contract and consummation are established differently as there is no license and ceremony.

The contract on which the common law marriage is based must express a mutual intent to be married at the present time, not a present intent to be married in the future. If the relationship began as an illicit arrangement, the party asserting the validity of the marriage has the burden of showing that the illicit relationship ended and the parties actually entered into a marriage contract.

If an issue arises wherein the judge of the probate court is called upon to rule upon the validity of an alleged common law marriage, reference should be made to the Georgia Probate Judges’ Benchbook.

73 O.C.G.A. §19-3-1.1.
PART III. Firearms Licenses

NOTE: In 2009, a bill was introduced in the General Assembly\textsuperscript{77} which would remove the licensing authority for firearms licenses from the probate court. This Bill will automatically carry over to the 2010 Session. For that reason, no extensive changes have been made in this Revised Handbook at this time, pending the outcome of such legislation. Unless and until the law is changed, judges of the probate courts should continue to accept applications and issue or deny licenses pursuant to these provisions. In the event the licensing authority is left with the judges of the probate courts, this Part of this Chapter will be revised and re-written in accordance with the provisions of the law. The following has been copied from the current Handbook and has been modified only as necessary to take into account any changes in the law since 2006.

11.0 FIREARMS VIOLATIONS

11.1 Carrying a Concealed Weapon

A person commits the offense of carrying a concealed weapon when such person knowingly has or carries about his/her person, unless in an open manner and fully exposed to view, any bludgeon, metal knuckles, firearm, knife designed for the purpose of offense and defense, or any other dangerous or deadly weapon or instrument of similar character outside of his/her home or place of business, except as explained in this paragraph.\textsuperscript{78} The law does not permit the concealed carrying of a pistol, revolver, or concealable firearm outside of the person’s home, motor vehicle, or place of business, unless that person has on his/her person a valid firearms license; and then the pistol, revolver, or firearm may only be carried in a shoulder holster, waist belt holster, any other holster, hipgrip, or any other similar device, in which event the weapon may be concealed by the person’s clothing, or a handbag, purse.

\textsuperscript{77} HB 615. \\
\textsuperscript{78} O.C.G.A. §16-11-126. A first offense is treated as a misdemeanor; second and subsequent offenses are treated as felonies.
attaché case, briefcase, or other closed container. Additionally, any person so licensed is permitted, subject to the limitations of the law concerning how the weapon is carried, to carry a weapon in all parks, historic sites, or recreational areas as defined by Code Section 12-3-10 and in all wildlife management areas. Carrying a weapon on the person in a concealed manner other than as provided above is not permitted and constitutes the offense of carrying a concealed weapon.  

    Unless a person is ineligible for a license under federal law or state law, the law does not forbid the transportation of any firearm, provided the firearm is enclosed in a case, unloaded, and separated from its ammunition. Unless a person is ineligible for a license, the law does not forbid any person from transporting a loaded firearm in any private passenger motor vehicle.

    A person licensed to carry a handgun in any state whose laws give effect within such state to a Georgia firearms license is authorized to carry a handgun in this state, but only while the person is not a resident of this state and carries the handgun in compliance with the laws of this state. As of January 15, 2008, twenty-three states afford such reciprocity: Alabama, Alaska, Arkansas, Arizona, Colorado, Florida, Idaho, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, New Hampshire, North Carolina, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, and Wyoming.

11.2 Carrying Deadly Weapons at Public Gatherings

    Unless exempt (see Section 13.0 below), a person is guilty of a misdemeanor if he/she carries to, or possesses while at, a public gathering any explosive compound, firearm, or knife designed for the purpose of offense and defense. For this purpose, "public gathering" includes, but is not limited to, athletic or sporting events, churches or church functions, political rallies or functions, publicly owned or operated buildings, or establishments at which alcoholic beverages are sold for consumption on the premises and which derive less than 50% of their total annual gross food and beverage sales from the sale of prepared meals.

79 O.C.G.A. §16-11-126(c).
80 O.C.G.A. §16-11-126(d).
81 O.C.G.A. §16-11-126(e).
83 O.C.G.A. §16-11-127(a).
or food.\textsuperscript{84} This law does not otherwise prohibit the carrying of a firearm in any other public place by a person licensed or permitted to carry such firearm under Chapter 11 of Title 16.\textsuperscript{85} A person licensed or permitted to carry a firearm under such laws is forbidden from consuming alcoholic beverages while in a restaurant or other eating establishment while carrying a firearm.\textsuperscript{86} A person licensed or permitted to carry a firearm under such laws may legally carry a pistol or revolver at a shopping mall without violating this law.\textsuperscript{87}

This law does not apply to competitors participating in organized sport shooting events. Furthermore, law enforcement officers, peace officers retired from state or federal law enforcement agencies, judges, magistrates, constables, solicitors-general, and district attorneys may carry pistols in publicly owned or operated buildings; provided, however, that a courthouse security plan in accordance with Code Section 15-16-10(a)(10) may prohibit the carrying of a pistol.\textsuperscript{88} It is an affirmative defense to a violation of this law if a person notifies a law enforcement officer or other person employed to provide security for the public gathering of the presence of such item as soon as possible after learning of its presence and surrenders or secures such item as directed by such law enforcement officer or other person employed to provide security.\textsuperscript{89}

A person licensed or permitted under such laws may carry a firearm, subject to the limitations of the law concerning how the weapon is carried, in all parks, historic sites, and recreational areas and in wildlife management areas, notwithstanding Code Sections 12-3-10, 27-3-1,1, and 27-3-6, and in public transportation, notwithstanding Code Sections 16-12-122 through 16-12-127; provided, however, that a person shall no carry a firearm into a place prohibited by federal law.\textsuperscript{90}

\subsection{Carrying Weapons in School Zones, Etc.}

It is a felony offense to possess a weapon or explosive compound within a “school

\begin{footnotes}
\item[84] O.C.G.A. §16-11-127(b).
\item[85] Id.
\item[86] O.C.G.A. §16-11-127(f).
\item[88] O.C.G.A. §16-11-127(c).
\item[89] O.C.G.A. §16-11-127(d).
\item[90] O.C.G.A. §16-11-127(e).
\end{footnotes}
safety zone” or at a school function or on school property, including a school bus or other transportation furnished by the school. The term "weapon" is defined to include any pistol, revolver, weapon designed to propel a missile of any kind, dirk, bowie knife, switchblade knife, ballistic knife, or other knife having a blade of two or more inches, straight-edge razor, razor blade, spring stick, knuckles (whether made from metal, thermoplastic, wood, or other similar material), blackjack, bat, club, or other bludgeon-type weapon, any “flailing instrument,” and any stun gun or taser, as defined in Code section 16-11-106. There are certain exemptions for law enforcement officers, persons authorized by the school to possession of a weapon for teaching purposes, and for both licensed and unlicensed persons when picking up students, within limitations, employees of certain agencies of government, state and federal trial judges, and others. There are also limited exemptions for persons who reside or work in a business within the “school safety zone” and their guests.

11.4 Carrying Weapons at Nuclear Power Facility

It is unlawful for any person to carry, possess, or have under such person’s control while on the premises of a nuclear power facility a firearm or weapon. A violation of this provision is a misdemeanor, unless the violator intends to do bodily harm, in which case the violation is a felony. There is an exemption for security officers employed at such facility and for certain other law enforcement personnel.

11.5 Carrying a Pistol without a License

Unless exempt (see Section 13.0 below), a person commits the offense of carrying a pistol without a license when such person has or carries on or about his/her person, outside of his/her home, motor vehicle, or place of business, any pistol or revolver without having on

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91 Defined as “in, on, or within 1,000 feet of any real property owned by or leased to any public or private elementary school, secondary school, or school board and used for elementary or secondary education and in, on, or within 1,000 feet of the campus of any public or private technical school, vocational school, college, university, or institution of postsecondary education. O.C.G.A. §16-11-127.1(a)(1).
92 Defined as consisting of two or more rigid parts, connected in such a manner as to allow them to swing freely, which may be known as nun cha, nun chuck, nunchaku, shuriken, or fighting chain, or any disc, of whatever configuration, having at least two points or pointed blades which is designed to be thrown or propelled and which may be known as a throwing star or oriental dart, or any weapon of like kind. O.C.G.A. §16-11-127.1(a)(2).
93 O.C.G.A. §16-11-127.1
94 O.C.G.A. §16-11-127.2.
his/her person a valid license issued by the judge of the probate court of the county in which he/she resides. However, no permit is required for persons with a valid hunting or fishing license on their person or for persons not required by law to have hunting licenses who are engaged in legal hunting, fishing, or sport shooting when the persons have the permission of the owner of the land on which the activities are being conducted, provided that the pistol or revolver, whenever loaded, must be carried only in an open and fully exposed manner.\(^\text{95}\) A person licensed to carry a handgun in any state whose laws give effect within such state to a Georgia firearms license is authorized to carry a handgun in this state, but only while such person is not a resident of this state and carries the handgun in compliance with the laws of this state.\(^\text{96}\) A first violation of this provision is treated as a misdemeanor, and second and subsequent violations are treated as felonies.\(^\text{97}\)

The carrying of a concealed weapon under Code Section 16-11-126 and the carrying of a pistol without a license under this provision are separate offenses growing out the same transaction.\(^\text{98}\) Taken together, then, it would be a violation for any unlicensed person to carry on his/her person and/or have under his/her control any firearm, even if fully exposed to view, outside his/her home or place of business.

**12.0 FIREARMS LICENSING**

**12.1 Authority and Application**

The judge of the probate court of each county may, on application under oath and on payment of a fee of $15.00, issue a license or renewal license, valid for a period of five years, to any person whose domicile is in that county or who is on active duty with the United States armed forces and who is not a domiciliary of this state but who either resides in that county or on a military reservation located in whole or in part in that county, authorizing the person to carry any pistol or revolver in any county in this state notwithstanding any change in that person’s county of residence or state of domicile.\(^\text{99}\) Although such active duty military personnel may apply for a firearms license if they desire and if they meet the requirements,

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\(^{95}\) O.C.G.A. §16-11-128(a).

\(^{96}\) O.C.G.A. §16-11-128(c). [See Section 11.1](#) for a list of the states.

\(^{97}\) O.C.G.A. §16-11-129(b).


\(^{99}\) O.C.G.A. §16-11-129(a).
they are exempt from the requirement to have a license under Code Sections 16-11-126 through 16-11-128. See Section 13.0 below.

Applicants must submit the application on forms furnished free of charge by the Department of Public Safety. An applicant who is not a United States citizen must provide sufficient personal identifying data, including without limitation his or her place of birth and United States issued alien or admission number, as the Georgia Bureau of Investigation may prescribe by rule or regulation. An applicant who is in nonimmigrant status must provide proof of his or her qualifications for an exception to the federal firearm prohibition pursuant to 18 U.S.C. Section 922(y). The forms must be designed to elicit information from the applicant pertinent to his eligibility, including citizenship, but may not require irrelevant data such as serial numbers or other identification capable of being used as a de facto registration of firearms owned by the applicant.100

The judge is required to deny a license or renewal license to anyone prohibited from possessing a firearm under federal, state.101 The effect of these provisions is to require the judge to apply whichever law is most strict. Georgia can be described as a “do not issue” state in that our provisions are written in a manner which described who is not eligible. Federal law prohibits certain persons from possessing any firearm or ammunition “in or affecting commerce,” and from shipping, transporting or receiving any firearm or ammunition through interstate or foreign commerce.102 Set forth below are first, ineligibility provisions under Georgia law, then federal ineligibility provisions, followed by a discussion of where they overlap and how they may be construed together.

12.2 Georgia Prohibitors

No license may be granted to:

1. Any person under 21 years of age;

2. Any person who is a fugitive from justice or against whom charges are pending for any felony, forcible misdemeanor or carrying a concealed

100 Id.
weapon, carrying deadly weapons at public gatherings, or carrying a pistol without a license, until such time as the charges are adjudicated;

3. Any person who has been convicted of a felony\textsuperscript{103} (unless he has received a pardon) or who has been convicted of a forcible misdemeanor and has not been free of all restraint or supervision in connection therewith for at least five years, or any person who has been convicted of a violation of Code Sections 16-11-126, 16-11-127, or 16-11-128 and has not been free of all restraint or supervision in connection therewith for at least three years, immediately preceding the date of the application;

4. Any person who has been hospitalized as an inpatient in any mental hospital or alcohol or drug treatment center within five years of the date of application. The judge of the probate court may require any applicant to sign a waiver authorizing any mental hospital or treatment center to inform the judge whether or not the applicant has been an inpatient in any such facility in the last five years and authorizing the superintendent of such facility to make a recommendation to the judge regarding whether a license to carry a pistol or revolver should be issued. When such a waiver is required by the probate judge, the applicant must pay a fee of $3.00 to the judge for reimbursement of the cost of making such a report by the mental health hospital, alcohol or drug treatment center, or DBHDD,\textsuperscript{104} which the judge must remit to the hospital, center, or department.\textsuperscript{105} The judge must keep any such hospitalization or treatment information confidential. The judge of the probate court must consider the circumstances surrounding the hospitalization and the recommendation of the superintendent and determine in his discretion whether or not to issue the license or renewal license;

\textsuperscript{103} O.C.G.A. §16-11-129(b)(3). If this statute is read narrowly, it would not be sufficient for this purpose to obtain relief from disabilities as discussed in Section 12.11 and pardon would be required. However, a broad reading of the word “pardon” to include relief from disabilities seems to fulfill the legislative intent. This point will be moot if the Federal Bureau of Alcohol, Tobacco and Firearms continues not to process applications for relief from disabilities.

\textsuperscript{104} Department of Behavioral Health and Developmental Disabilities, formerly the Mental Health, Mental Retardation, and Substance Abuse division of the Department of Human Resources.

\textsuperscript{105} O.C.G.A. §16-11-129(b)(4).
5. Any person who has been convicted of an offense arising out of the unlawful manufacture, distribution, possession, or use of a controlled substance or other dangerous drug, regardless of the time free of supervision. For these purposes,
   a. "Controlled substance" means any drug, substance, or immediate precursor included in the definition of controlled substances in Code Section 16-13-21(4).
   b. "Convicted" means a plea of guilty, a finding of guilt by a court of competent jurisdiction, the acceptance of a plea of nolo contendere, or the affording of first offender treatment by a court of competent jurisdiction irrespective of the pendency or availability of an appeal or an application for collateral relief.
   c. "Dangerous drug" means any drug defined as such in Code Section 16-13-71; or

6. Any person not lawfully present in the United States.\(^\text{106}\)

[This paragraph does not apply to drug offenses specified in item 5 immediately above.] Otherwise, an applicant for a license to carry a pistol who has successfully completed, or who has been released prior to termination of, the probationary period under the First Offender Act\(^\text{107}\) does not have to be free from all restraint or supervision for a specified period of years before applying for a pistol permit, since successful completion of the period of probation has resulted in there being no adjudication of guilt and therefore no conviction.\(^\text{108}\) In Georgia a plea of nolo contendere is not deemed to be a plea of guilty so as to prevent an individual from qualifying for a license to carry a pistol; however, the judge might be able to deny a permit under such circumstances in view of his/her discretion under subsection (a) of Code Section 16-11-129\(^\text{109}\) and might be required to deny a permit under federal law if under the law of the state where the nolo plea was entered such a plea is deemed to be a conviction.

\(^{106}\) O.C.G.A. §16-11-129(b).
\(^{107}\) O.C.G.A. §§42-8-60 through 42-8-65.
12.3 **Federal Prohibitors**

In accordance with 18 U.S.C. § 922 (g) and (n), no license may be granted to any person:

(g)

1. Who has been convicted in any court of a crime *punishable* by imprisonment for a term exceeding one year;

2. Who is a fugitive from justice;

3. Who is an unlawful user of or addicted to any controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802);

4. Who has been adjudicated as a mental defective or who has been committed to a mental institution;

5. Who, being an alien--
   
   (A) is illegally or unlawfully in the United States; or
   
   (B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa, as that term is defined in section 101(a)(26) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(26);

6. Who has been discharged from the Armed Forces under dishonorable conditions;

7. Who is subject to a court order that --
   
   (A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;
   
   (B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and
   
   (C)(i) includes a finding that such person represents a credible threat to the physical safety of such intimate partner or child; or
   
   (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury; or

9. Who has been convicted in any court of a misdemeanor crime of domestic violence; or
(n) Who is under indictment for a crime punishable by imprisonment for a term exceeding one year.

The prohibitions of (g)(1)-(8) and (n) do not apply to firearms issued for the use of the United States, any department or agency thereof, any State or any department, agency or political subdivision thereof; or issued by the Army or the Armed Forces, or to clubs composed solely of such members and recognized by the Department of Defense or determined by the Attorney General to be particularly suitable for sporting purposes and intended for the personal use of such member or club, or authorized by the Department of Defense to be classified as a war souvenir and intended for personal use by the member. The prohibitions of (g)(9) do apply to government-issued or sanctioned firearms unless a relief from disabilities is granted by the Attorney General under § 925(c), or (on appeal of the Attorney General’s decision) by the United States District Court in the district in which the applicant resides.\(^\text{110}\)

The following bulleted statements provide a brief overview of how state and federal provisions may be read together. For a more complete treatment, please refer to the [Firearms Permit Guidelines for Application Review](#)\(^\text{111}\) distributed by the Georgia Council of Probate Court Judges.

- As to drug offenses involving any controlled substance as defined by state or federal law, the state statute is more strict. It requires that the judge deny the license, even if a nolo contendere plea or first offender treatment was allowed and regardless of when or where the offense occurred.\(^\text{112}\) This also applies to misdemeanor marijuana charges.\(^\text{113}\) While the Georgia statute is not clear as to what effect a pardon may have, a 2005 Opinion of the Attorney General holds that even if the pardon expressly reinstates the person’s right to bear arms, O.C.G.A. §16-11-129(b)(5)(A) renders them ineligible for a firearms license.\(^\text{114}\)

- Federal law does, however, contain a prohibition against addicts or current unlawful users of controlled substances, so pending charges, probation violations, or arrests may indicate enough of a problem to allow the judge to draw an inference of

\(^{110}\) 18 U.S.C. § 925 (a).

\(^{111}\) See Appendix A13-2.


addiction or current use, thereby justifying denial of a license. Such inferences may be drawn from either “recent use” or “patterns of use.” [Note: This prohibitor does not include alcohol but may include DUI-drug charges.]\textsuperscript{115} As to certain forcible misdemeanors, federal law demands a higher standard than Georgia law in that if the offense was a misdemeanor crime of domestic violence (see next paragraph), the applicant is permanently ineligible for a license, even if the applicant is a law enforcement officer, unless pardoned or relieved from this disability.\textsuperscript{116} However, if due process protections were not afforded the defendant, this disability does not attach. If domestic violence was not involved, then the 5-year state law waiting period applies, after which the applicant is eligible.

- A misdemeanor crime of domestic violence means an offense that:
  a. is a misdemeanor under federal or state law; and
  b. has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.\textsuperscript{117}

Simple battery and assault and battery, and sometimes other forcible misdemeanors, come within the above definition provided the crime was committed against the type of victim listed above. A plea of nolo contendere to a misdemeanor crime of domestic violence in Georgia does not result in the imposition of a civil disability so as to prohibit the right to ship, transport, possess, or receive firearms.\textsuperscript{118}

**Note:** As to criminal offenses which are federal prohibitors, whether a nolo contendere plea is considered a conviction is governed by the law of the state in which the criminal proceedings occurred.\textsuperscript{119}

\textsuperscript{115} FBI Handouts: “Prohibited Persons: Firearms” and “Persons Prohibited from Receiving Firearms - NICS Section - Dec. 2003.”
\textsuperscript{116} 18 U.S.C. §925(a).
\textsuperscript{117} Gun Control Act of 1968, 18 U.S.C. §921 et seq
\textsuperscript{119} FBI Handouts: “Prohibited Persons: Firearms” and “Persons Prohibited from Receiving Firearms - NICS Section - Dec. 2003.”
Conviction of a felony under state and federal law, or court-martial offense punishable by possible imprisonment in excess of one year under federal law, renders a person ineligible. The federal exception for felony anti-trust restraint of trade or unfair trade types of offenses would not seem to render the person eligible under state law, which makes no exceptions for felons other than those who have received a pardon or had their rights otherwise restored. A separate federal exception provides that any crime classified by the state of occurrence as a misdemeanor which is punishable by two years or less would render the person eligible. Expungement or pardon will relieve this disability.  

Pending charges: State prohibitions include any pending felony, forcible misdemeanor or weapons charges. Federal prohibitors for pending charges are only triggered if the charge is punishable by imprisonment for over one year and a formal indictment or accusation has issued following arrest. It is also good practice to delay issuance of a permit until disposition if there are pending drug charges as any disposition other than acquittal would prohibit issuance.

Recent charges involving possible illegal drug use, drug or alcohol abuse, or mental illness, even if they have been dismissed, may, upon closer examination, lead to a determination that the applicant is ineligible either under the “addict or unlawful user of any controlled substance” category of federal prohibitors or under the “committed to treatment to a mental institution” category if the applicant has been ordered to receive treatment as a condition of dismissal.

Adjudication that a person is “mentally defective,” whether in a civil, criminal or administrative proceeding, is a permanent prohibitor under federal law, as is mandated treatment, civil or criminal, for mental illness or substance abuse. Georgia just prohibits someone who has received inpatient treatment within the last five years, although it also applies to voluntary treatment. The state prohibition only applies to inpatient treatment, whereas the federal one applies to any and all types of involuntary or mandatory treatment for reasons such as mental defectiveness, mental illness, drug abuse, or alcohol abuse in any mental health facility, hospital, sanitarium

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120 Id.
or other facility that provides diagnosis by licensed professionals.¹²¹

- Neither state nor federal law renders a person ineligible merely by virtue of having been delivered to a mental institution in connection with an order to be evaluated.
- Subsequent state action restoring competency or firearms rights is not sufficient to remove the federal prohibition; however, a relief from disabilities under 18 U.S.C. § 925(c) by the Bureau of Alcohol, Tobacco, Firearms and Explosives will remove the federal prohibition.¹²²

### 12.4 Special Problems with Mental Health Records

Under O.C.G.A. § 16-11-172(b), the Georgia Crime Information Center must forward to the Federal Bureau of Investigation information concerning persons who have been involuntarily hospitalized for the purpose of completing an NICS check. Involuntary hospitalization is a permanent prohibitor under federal law, absent a relief from disabilities by the ATF. The prohibitions of 18 U.S.C. § 922(g)(4) continue to apply even if the person is later released or found to be competent, i.e. the prohibition is a “lifetime prohibition” which is not affected by the subsequent mental health status of the individual.¹²³ According to FBI/NICS instructions, despite state statutory provisions to the contrary, no subsequent state action, whether to restore competency or to restore firearms rights restricted by a state due to mental defectiveness or mental illness, etc., will affect the federal Gun Control Act’s application.¹²⁴

For this purpose, "involuntarily hospitalized" means hospitalized as an inpatient in any mental health facility pursuant to Code Section 37-3-81 or hospitalized as an inpatient in any mental health facility as a result of being adjudicated mentally incompetent to stand trial or being adjudicated not guilty by reason of insanity at the time of the crime.¹²⁵ Note that Code Section 37-3-81 only applies to mental illness (not to alcohol or drugs), only applies to treatment (not examination or evaluation), and only applies to involuntary (not voluntary)

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¹²¹ FBI Handout: “18 U.S.C. 922(g)(4) Adjudicated Mental Defective or Commitment to a Mental Institution Federal Firearms Prohibition - FBI NICS (03-27-03)”; “Mental Health Prohibition Frequently Asked Questions - February 2003” (Q.’s #3,5,6,7 & 8).

¹²² Id.

¹²³ United States v. Waters, 23 F.3d 29 (2nd Cir. 1994); United States v. Buffalo, 449 F.2nd 779 (4th Cir. 1971); Redford v. Dept. of Treasury, 691 F.2nd 47 (10th Cir. 1982).

¹²⁴ “Mental Health Prohibition Frequently Asked Questions - February 2003”(Q.#2).

treatment. Therefore, the only probate courts which will be "committing" courts required to report such commitment to the GCIC are in counties in which evaluation facilities are located, since that is where a petition for involuntary treatment must be filed (see Section 19.2.9). If the Georgia Crime Information Center has deemed an applicant to be ineligible due to the applicant’s having been involuntarily hospitalized within the immediately preceding five years, GCIC must upon request provide the record of involuntary hospitalization and also inform the applicant of his or her right to an eligibility hearing before the committing court.\footnote{O.C.G.A. §35-3-37(f).} However, this may not restore federal eligibility under NICS. The GCIC must be provided with information as to whether a person has been involuntarily hospitalized and no other mental health information from the records of the probate courts concerning persons involuntarily hospitalized after March 22, 1995 in a manner agreed upon by the Probate Judges Training Council and the GBI.\footnote{O.C.G.A. §35-3-34(e)(2).} Normally, it will be the committing court (see above) which will make this report to GCIC, since that court is where the treatment order is entered. After five years have elapsed from the date that a person's involuntary hospitalization information was received by GCIC, it must be purged from the GCIC records within 30 days. The information will only be available on the NICS database thereafter.

\section*{12.5 Fingerprinting and Records Checks}

Following completion of the application for a license or renewal license, the judge of the probate court requires the applicant to proceed to an appropriate law enforcement agency in the county with the completed application to capture the applicant’s fingerprints and place the applicant’s right index fingerprint on the appropriate form. The law enforcement agency is entitled to a fee of $5.00 for these services.\footnote{O.C.G.A. §16-11-129(c).}

For both license applications and requests for license renewals, the judge of the probate court must \textit{within two business days following receipt of the application or request} direct the law enforcement agency to request a fingerprint based criminal history records check from the GCIC and FBI for purposes of determining the suitability of the applicant and

\footnotesize{\begin{itemize}
\item \footnotemark\footnotetext{126} O.C.G.A. §35-3-37(f).
\item \footnotemark\footnotetext{127} O.C.G.A. §35-3-34(e)(2).
\item \footnotemark\footnotetext{128} O.C.G.A. §16-11-129(c).
\end{itemize}}
return an appropriate report to the judge. Fingerprints must be in such form and of such quality as prescribed by the GCIC and under standards adopted by the FBI. The GBI may charge such fee as is necessary to cover the cost of the records search.¹²⁹ For both license applications and requests for license renewals, the judge of the probate court must within two business days following receipt of the application of request also direct the law enforcement agency to conduct a background check using the FBI National Instant Criminal Background Check System and return an appropriate report to the probate judge.¹³⁰

When a person who is not a United States citizen applies for a license or renewal of a license under this Code section, the judge of the probate court must direct the law enforcement agency to conduct a search of the records maintained by the United States Bureau of Immigration and Customs Enforcement. As a condition to the issuance of a license or the renewal of a license, an applicant who is in nonimmigrant status must provide proof of his or her qualifications for an exception to the federal firearm prohibition pursuant to 18 U.S.C. Section 922(y).¹³¹

¹²⁹ O.C.G.A. §16-11-129(d)(1).
¹³⁰ O.C.G.A. §16-11-129(d)(20).
¹³¹ O.C.G.A. §16-11-129(d)(3).
¹³² O.C.G.A. §16-11-129(d)(4).

12.6 Return of Records, License Issuance, Temporary Permit

The law enforcement agency must notify the judge of the probate court within 30 days, by telephone and in writing, of any findings relating to the applicant which bear on his/her eligibility for a license or renewal license. If no relevant derogatory information is found concerning the applicant, a report is not required but is advisable to document the findings. The law enforcement agency returns the application and the blank license form with the fingerprint thereon directly to the judge of the probate court within such time period. The statute provides that not later than 10 days after receipt of the report, the judge of the probate court must issue the applicant a license or renewal license to carry any pistol or revolver if no facts establishing ineligibility have been reported and if the judge determines the applicant has met all the qualifications and is of good moral character.¹³² However, the Attorney General has ruled that the judge may not issue the firearms license until he receives
the law enforcement report even if this takes longer than 60 days. The Brady law now requires that the Court wait until the NICS check and IAQ query, if applicable, are completed prior to issuance.

Any person who holds a license to carry a pistol or revolver may, at the time he applies for a renewal of the license, also apply for a temporary renewal license if less than 90 days remain before expiration of the license he/she then holds or if his/her previous license has expired within the last 30 days. Although Georgia law provides that unless the judge of the probate court knows or is made aware of any fact which would make the applicant ineligible for a five-year renewal license, the judge must at the time of application issue a temporary renewal license to the applicant, it would appear that this provision has been superseded by federal law, given that a NICS check must now be performed on all renewal applications as well as on the initial application, and the results of these checks are not always available within the time frames set forth in this statute. It might be good practice to check the applicant’s records with the FBI or the GCIC prior to issuing any temporary renewal license. Such a temporary renewal license must be in the form of a paper receipt indicating the date on which the court received the renewal application and must show the name, address, sex, age, and race of the applicant and that the temporary renewal license expires 90 days from the date of issue. During its period of validity, the temporary renewal permit, if carried on or about the holder's person together with the holder's previous license, is valid in the same manner and for the same purposes as a five-year license. A $1.00 fee is charged by the probate court for issuance of a temporary renewal license. A temporary renewal license may be revoked in the same manner as a five-year license.

Georgia law now provides that if an applicant does not receive the license, renewal license, or temporary permit within the time periods set forth above, and the application has been properly filed, the applicant may bring an action in mandamus or other legal proceeding in order to obtain a license, temporary permit, or renewal license, and such applicant shall be entitled to recover his/her costs in such action, including reasonable attorney’s fees.

134 O.C.G.A. §16-11-129(i).
135 O.C.G.A. §16-11-129(j).
This onerous provision permits no defense if the requisite time has expired and is the only state statute known to the author which purports to award costs and fees irrespective of success in the action. In the author’s opinion, the provision is unconstitutional. Whether or not it is, it remains uncertain what effect this statute may have on the opinion of the Attorney General referenced in footnote 133 above or the decision in Moore v. Cranford.\footnote{Moore v. Cranford, 285 Ga. App. 666 (2007).}

12.7 Revocation and Replacement

If at any time during the period for which the license was issued, the judge of the probate court of the county in which the license was issued has reasonable grounds to believe the licensee is not eligible to retain the license, the judge may, after notice and hearing, revoke the license upon adjudication of falsification of the application, mental incompetency, chronic alcohol or narcotic usage, conviction of any felony or forcible misdemeanor, or violation of Code Sections 16-11-126, 16-11-127, or 16-11-128.\footnote{O.C.G.A. §16-11-129(e).} According to FBI instructions, if after notice and hearing the judge finds that the licensee has fallen into prohibited status under state or federal law, the judge must revoke the license. Possession of a revoked license is a misdemeanor offense.\footnote{Id.}

It is required that any license holder have in his/her possession a valid license whenever carrying a pistol or revolver, and a failure to do so is prima facie evidence of a violation of Code Section 16-11-128. Loss or damage to a license in any manner which renders it illegible must be reported to the judge of the probate court of the county in which it was issued within 48 hours of the time the loss or damage becomes known to the license holder. The judge of the probate court must then issue a replacement license and take custody of and destroy the damaged license. If the license has been lost, the judge must issue a cancellation order and notify by telephone and in writing each of the law enforcement agencies whose records were checked before issuance of the original license. The fee specified in Code Section 15-9-60(k) is charged by the judge for these services in connection with a replacement license.\footnote{Id.}
12.8 License Specifications; Records of Applications and Licenses

Licenses must be printed on durable but lightweight card stock, and the completed card must be laminated in plastic to improve its wearing qualities and to inhibit alterations. Measurements are 3¼ inches long and 2¼ inches wide. Each license must be serially numbered within the county of issuance, and must bear the full name, residential address, birthdate, weight, height, color of eyes, sex, and a clear print of the right index finger of the licensee. If the right index fingerprint cannot be secured for any reason, the print of another finger may be used, but it must be marked to identify the finger. The license must show the date of issuance, the expiration date, the probate court in which issued, and must be signed by the licensee and bear the original or facsimile signature of the judge. The seal of the court must be placed on the face of the license before it is laminated. On the reverse side of the license, Code Section 16-11-127 must be imprinted in its entirety.\(^\text{140}\)

The judge is not required to record any portion of the application to carry a handgun;\(^\text{141}\) however, doing so might be a good practice to assure protection of the records. The court is required to keep a record of the name of the licensee and the date of issuance for each license granted.\(^\text{142}\) All permanent records, including information obtained pursuant to the criminal history background check, maintained concerning firearms licenses are exempt from the Open Records Act, except that such records are available to law enforcement agencies.\(^\text{143}\)

12.9 Licenses for Former Law Enforcement Officers

Any person who has served as a law enforcement officer for at least ten of the 12 years immediately preceding the retirement of such person as a law enforcement officer is entitled to be issued a firearms license by the probate court without the payment of any of the fees. Such person must comply with all the other provisions relating to the issuance of such licenses. As used in this context, the term "law enforcement officer" means any peace officer who is employed by the United States government or by the State of Georgia or any political

\(^{140}\) O.C.G.A. §16-11-129(f).
\(^{143}\) O.C.G.A. §50-18-72(d).
subdivision thereof and who is required by the terms of his employment, whether by election or appointment, to give his/her full time to the preservation of public order or the protection of life and property or the prevention of crime. Such term includes conservation rangers.  

12.10 Checking Court’s Record

Especially in large counties, where the applicants for licenses to carry pistols are not personally known to the judge of the probate court, the issuance of these licenses imposes a great responsibility upon the judge of the probate court. Due to the requirement to determine that “no available information” indicates ineligibility, it seems incumbent upon the judge of the probate court to determine from his/her own records whether the applicant for a pistol license has ever been adjudicated to be an incapacitated adult or has ever been involuntarily committed to treatment for mental illness or substance abuse.

In counties where there is an easy capability to do so, it is also a good idea to check the records of the other courts, as well as outstanding warrants which might be held by law enforcement from other counties or agencies.

12.11 Pardons and Relief from Disabilities

Under both federal and state law, persons who have been convicted of felonies are prohibited from receiving, possessing or transporting a firearm; this applies also to any person on probation as a first offender for a felony charge. Hence, any such person is also prohibited from receiving a Georgia firearms license.

With one exception, for both federal and state law purposes, a person is not considered “convicted” of a felony offense if the person has received a pardon or has had his/her civil rights restored or if the conviction has been set aside or expunged, unless the pardon, expungement or restoration expressly prohibits the transportation, possession or receipt of firearms.

However, the Attorney General of Georgia has issued an opinion that even a pardon will not restore a person’s eligibility for a firearms license when the offense for which the

144 O.C.G.A. §16-11-129(h).
146 18 U.S.C. §§921(a)(20) and 921(a)(33); O.C.G.A. §16-11-1331(d).
person was “convicted” [as defined in Code Section 16-11-129(b)(5)] was for manufacture, distribution, possession or use of a controlled substance or dangerous drugs.  

13.0 EXEMPTIONS

Code Sections 16-11-126 through 16-11-128 do not apply to any of the following persons (that is, they are not required to have a firearms license in order to possess and carry a firearm) if they are employed in the offices listed below or when authorized by federal or state law, regulations, or order:

(1) Peace officers, as such term is defined in paragraph (11) of Code Section 16-1-3, and retired peace officers so long as they remain certified whether employed by the state or a political subdivision of the state or another state or a political subdivision of another state but only if such other state provides a similar privilege for the peace officers of this state;

(2) Wardens, superintendents, and keepers of correctional institutions, jails, or other institutions for the detention of persons accused or convicted of an offense;

(3) Persons in the military service of the state or of the United States;

(4) Persons employed in fulfilling defense contracts with the government of the United States or agencies thereof when possession of the weapon is necessary for manufacture, transport, installation, and testing under the requirements of such contract;

(5) District attorneys, investigators employed by and assigned to a district attorney's office, assistant district attorneys, attorneys or investigators employed by the Prosecuting Attorneys' Council of the State of Georgia, and any retired district attorney, assistant district attorney, district attorneys’ investigator, or attorney or investigator retired from the Prosecuting Attorneys' Council of the State of Georgia, if such employee is retired in good standing and is receiving benefits under Title 47 or is retired in good standing and receiving benefits from a county or municipal retirement system;

(6) State court solicitors-general; investigators employed by and assigned to a state court solicitor-general's office; assistant state court solicitors-general; the corresponding personnel of any city court expressly continued in existence as a city court pursuant to

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148 But see O.C.G.A. §16-11-127.1(c) for the special exemptions for “school safety zones.”
Article VI, Section X, Paragraph I, subparagraph (5) of the Constitution; and the corresponding personnel of any civil court expressly continued as a civil court pursuant to said provision of the Constitution;

(7) Those employees of the State Board of Pardons and Paroles when specifically designated and authorized in writing by the members of the State Board of Pardons and Paroles to carry a weapon;

(8) The Attorney General and those members of his or her staff whom he or she specifically authorizes in writing to carry a weapon;

(9) Chief probation officers, probation officers, intensive probation officers, and surveillance officers employed by and under the authority of the Department of Corrections pursuant to Article 2 of Chapter 8 of Title 42, known as the "State-wide Probation Act," when specifically designated and authorized in writing by the director of Division of Probation;

(10) Public safety directors of municipal corporations;

(11) Explosive ordnance disposal technicians, as such term is defined by Code Section 16-7-80, and persons certified as provided in Code Section 35-8-13 to handle animals trained to detect explosives, while in the performance of their duties;

(12) State and federal trial\textsuperscript{149} judges, full-time and permanent part-time judges of municipal and city courts, and former state trial and appellate judges retired from their respective offices under state retirement;

(13) United States Attorneys and Assistant United States Attorneys;

(14) County medical examiners and coroners and their sworn officers employed by county government;

(15) Clerks of the superior courts;

(16) Persons who at the time of their retirement from service with the Department of Corrections were chief probation officers, probation officers, intensive probation officers, or surveillance officers, when specifically designated and authorized in writing by the director of Division of Probation;

\textsuperscript{149} “Trial judge” is not defined in Georgia law. However, the probate courts are courts of record and issues of fact and law may be tried in the probate courts. \textit{Johnson v. Hamilton}, 211 Ga. App. 268 (1993); \textit{Bryan v. Granade}, 180 Ga. App. 296 (1986). Therefore, it is the opinion of the author that probate judges are “trial judges” as that term is used in this Code Section.
(17) Any sheriff, retired sheriff, deputy sheriff, or retired deputy sheriff if such retired deputy sheriff is receiving benefits under the Peace Officers' Annuity and Benefit Fund provided under Chapter 17 of Title 47;

(18) Any member of the Georgia State Patrol or agent of the Georgia Bureau of Investigation or retired member of the Georgia State Patrol or agent of the Georgia Bureau of Investigation if such retired member or agent is receiving benefits under the Employees' Retirement System;

(19) Any full-time law enforcement chief executive engaging in the management of a county, municipal, state, state authority, or federal law enforcement agency in the State of Georgia, including any college or university law enforcement chief executive that is registered or certified by the Georgia Peace Officer Standards and Training Council; or retired law enforcement chief executive that formerly managed a county, municipal, state, state authority, or federal law enforcement agency in the State of Georgia, including any college or university law enforcement chief executive that was registered or certified at the time of his or her retirement by the Georgia Peace Officer Standards and Training Council, if such retired law enforcement chief executive is receiving benefits under the Peace Officers' Annuity and Benefit Fund provided under Chapter 17 of Title 47 or is retired in good standing and receiving benefits from a county, municipal, State of Georgia, state authority, or federal retirement system; or

(20) Any police officer of any county, municipal, state, state authority, or federal law enforcement agency in the State of Georgia, including any college or university police officer that is registered or certified by the Georgia Peace Officer Standards and Training Council, or retired police officer of any county, municipal, state, state authority, or federal law enforcement agency in the State of Georgia, including any college or university police officer that was registered or certified at the time of his or her retirement by the Georgia Peace Officer Standards and Training Council, if such retired employee is receiving benefits under the Peace Officers' Annuity and Benefit Fund provided under Chapter 17 of Title 47 or is retired in good standing and receiving benefits from a county, municipal, State of Georgia, state authority, or federal retirement system.

In addition, any such sheriff, retired sheriff, deputy sheriff, retired deputy sheriff, active or retired law enforcement chief executive, or other law enforcement officer referred
to in this subsection shall be authorized to carry a pistol or revolver on or off duty anywhere within the state and the provisions of Code Sections 16-11-126 through 16-11-128 shall not apply to the carrying of such firearms.

A prosecution based upon a violation of Code Section 16-11-126, 16-11-127, or 16-11-128 need not negative any exemptions.\(^\text{150}\)

Federal exemptions are set out with other federal provisions in Section 11.6.3. Note, however, that no one is exempt from the misdemeanor domestic violence conviction prohibitor.

PART IV. Veterans’ Licenses

[NOTE: No changes were made to the section from the former Handbook for this Section. Ed.]

14.0 EXEMPTIONS FROM BUSINESS LICENSE FEES FOR CERTAIN VETERANS AND BLIND PERSONS

Certain persons are entitled to peddle, conduct business, or practice professions or semi-professions without the payment of an occupation tax, administrative fee, or regulatory fee to any city, municipal, or county authority, provided they secure a certificate of exemption issued by the state commissioner of veterans service. These persons include:

1. Any disabled war veteran of any armed conflict in which any branch of the armed forces of the United States engaged whether under United States command or not.

2. Any blind person.

3. Any veteran of peace-time service who has a physical disability incurred during service.\(^\text{151}\)

Any person falling into one of these classifications must first make application to the judge of the probate court of the county in which he/she resides for a certificate of eligibility. Each applicant must:

1. Furnish an affidavit that he/she is not subject to payment of any income taxes to

\(^{150}\) O.C.G.A. §16-11-130.

\(^{151}\) O.C.G.A. §43-12-1.
the State of Georgia.\textsuperscript{152}

2. Establish that he/she is a resident of Georgia.

3. If blind, furnish satisfactory proof of blindness.

4. If a war veteran, furnish satisfactory proof of at least ten percent disability. This must be established by the certificate of two physicians, or a certificate from the United States Department of Veterans Affairs or from the branch of service in which he served. The disability need not be due to military service. The veteran must also show that his discharge from the service was under conditions other than dishonorable, and that his service was during one of the war periods set forth in the statute.

5. If a veteran of peace-time service, furnish satisfactory proof of at least 25 percent disability incurred in the line of duty. He/she must also show that his/her discharge from the service was under conditions other than dishonorable. The disability must be established by a certificate from the United States Department of Veterans Affairs or by written evidence from the branch of service in which he served. The certification by two physicians will not be acceptable.\textsuperscript{153}

A certificate of eligibility issued by the judge of the probate court is prima-facie evidence of the right of the holder to receive the certificate of exemption from the commissioner of veterans’ service, but the commissioner may require additional proof.\textsuperscript{154}

The application to the commissioner of veterans service must state the kind of business to be operated and the location of such business. The exemption from license fees applies only to the business shown on the application, and the applicant cannot operate any other business in his name.\textsuperscript{155} Such a certificate of exemption cannot be issued for the sale of intoxicating drinks, for the operation of a pool or billiard table, for carrying on the business of pawnbroker or auctioneer, or to deal in futures.\textsuperscript{156}

The judge of the probate court should remember that the granting of the certificate of exemption to conduct business without payment of an occupation tax, administrative fee, or

\textsuperscript{152} O.C.G.A. §43-12-3.
\textsuperscript{153} O.C.G.A. §43-12-2.
\textsuperscript{154} O.C.G.A. §43-12-5.
\textsuperscript{155} O.C.G.A. §43-12-4.
\textsuperscript{156} O.C.G.A. §43-12-8.
regulatory fee is the function and responsibility of the commissioner of veterans’ service.\textsuperscript{157} The responsibility of the judge of the probate court is the issuance of a certificate that the applicant has furnished the proof required by law to entitle him to the exemption certificate.

Once the applicant has been issued the certificate by the judge of the probate court, the applicant must make application to the commissioner of veterans’ service for the certificate of exemption. Municipal authorities can secure from the commissioner of veterans service information as to payment of income taxes by any applicant for an exemption.\textsuperscript{158} Therefore, the judge of the probate court should require strict compliance by all applicants, since many of the municipal authorities check with the commissioner of veterans’ service. The judge should require a new affidavit each year as to payment of income tax, but proof of the other conditions which have been established is not required each year.

In this particular area, the judge of the probate court has a responsibility to the commissioner of veterans’ service, the county and municipal licensing authorities, and the veteran.

\textbf{PART IV. Peddlers’ Licenses and Registration of Junk Dealers}

[\textit{NOTE: No changes were made to the section from the former Handbook for this Section. Ed.}]

\textbf{15.1 LICENSES FOR PEDDLERS AND ITINERANT TRADERS}

Every peddler or itinerant trader must apply to the judge of the probate court of each county where he desires to trade for a license, which is granted to him on such terms as the judge of the probate court may impose. Such license extends only to the limits of the county, and the judge of the probate court may charge a fee to be used for county purposes.\textsuperscript{159} There must be a separate license for every vehicle used in vending.\textsuperscript{160} These licensing requirements do not apply to the sale of agricultural products or implements, or jugs and flower pots.\textsuperscript{161}

The applicant must furnish evidence of good character and subscribe to the required

\textsuperscript{157} O.C.G.A. §43-12-1.
\textsuperscript{158} O.C.G.A. §43-12-7.
\textsuperscript{159} O.C.G.A. §43-32-1.
\textsuperscript{160} O.C.G.A. §43-32-4.
\textsuperscript{161} O.C.G.A. §43-32-6.
A license to peddle cannot be issued to an alien unless he has declared and sworn to his intention to become a citizen of the United States. Judges of the probate courts are authorized to grant licenses to peddle to indigent or infirm persons upon such terms as the judges in their discretion may impose. Each applicant should be cautioned that there may be additional county or city licensing requirements.

15.2 REGISTRATION OF JUNK DEALERS

Junk dealers are required to register with the judge of the probate court of the county in which they intend to engage in business. The judge is to record these registrations in a book to be known as the “junk Dealers” book. For this purpose, “junk” means any used article of commerce which is composed principally of metal and is commonly bought for the purpose of resale, refabrication, or both. Code Section 43-22-3 sets the fee for this registration at $1.00. However, the probate courts fee schedule, which is a later enactment by the General Assembly, sets the fee at $10.00.

PART V. Fireworks Permits

16.0 PERMITS FOR FIREWORKS DISPLAYS

16.1 Definitions

As used in this Part, the term:

(1) "Fireworks" means any combustible or explosive composition or any substance or combination of substances or article prepared for the purpose of producing a visible or audible effect by combustion, explosion, deflagration, or detonation, including blank cartridges, balloons requiring fire underneath to propel them, firecrackers, torpedoes, skyrockets, Roman candles, bombs, sparklers, and other combustibles and explosives of like construction, as well as articles containing any explosive or flammable compound and tablets and other devices containing an explosive substance.

(2) "Proximate audience" means an audience closer to pyrotechnic devices than

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164 O.C.G.A. §43-32-5.
165 O.C.G.A. §43-22-2
166 O.C.G.A. §43-22-1
167 O.C.G.A. §15-9-60(k)(18)]
permitted by the National Fire Protection Association Standard 1123, Code for Fireworks Display, as adopted by the Safety Fire Commissioner.

(3) "Pyrotechnics" means fireworks.

As used in this Part, the term "fireworks" shall not include:

1. Model rockets and model rocket engines designed, sold, and used for the purpose of propelling recoverable aero models, toy pistol paper caps in which the explosive content averages 0.25 grains or less of explosive mixture per paper cap or toy pistols, toy cannons, toy canes, toy guns, or other devices using such paper caps; nor shall the term "fireworks" include ammunition consumed by weapons used for sporting and hunting purposes; and

2. Wire or wood sparklers of 100 grams or less of mixture per item; other sparkling items which are non-explosive and non-aerial and contain 75 grams or less of chemical compound per tube or a total of 200 grams or less for multiple tubes; snake and glow worms; trick noise makers which include paper streamers, party poppers, string poppers, snappers, and drop pops each consisting of 0.25 grains or less of explosive mixture.168

168 O.C.G.A. §25-10-1.

16.2 Application [GPCSF 31]

16.2.1 General Audience

Any person, firm, corporation, association, or partnership desiring to conduct a public exhibition or display of fireworks not before a proximate audience shall first obtain a permit from the judge of the probate court of the county in which the public exhibition or display is to be held. Application for a permit must be made in writing and filed with the judge not less than ten days prior to the date of the proposed public exhibition or display of fireworks. Fireworks distributors located outside this state shall obtain display permit application forms and provide the same to applicants upon request.

The judge may grant a permit for the display on the following conditions:

1. That the display be conducted by a competent operator approved by the judge;

2. That the display shall be of such character as in the opinion of the judge will not be hazardous to persons or property;

3. That the local fire official responsible for the area in question certifies in writing that the site for the display meets his or her approval and is in compliance with all applicable
codes; and

(4) That the application be accompanied by a bond in the principal sum of $10,000.00, payable to the county in which the display is being held and conditioned for the payment of damages which may be caused either to persons or to property by reason of the display or, alternatively, that the application be accompanied by evidence that the applicant carries proper liability insurance for bodily injury in the amount of not less than $25,000.00 for each person and $50,000.00 for each accident and for property damage in the amount of not less than $25,000.00 for each accident and $50,000.00 aggregate, with an insurance company duly licensed by the Commissioner of Insurance.\textsuperscript{169}

16.2.2 Proximate Audience

Any person, firm, corporation, association, or partnership desiring to conduct a public exhibition or display of fireworks before a proximate audience shall first obtain a permit from the judge of the probate court of the county in which the public exhibition or display is to be held. Application for a permit must be made in writing and filed with the judge not less than ten days prior to the date of the proposed public exhibition or display of fireworks. Such application must contain the license number issued by the Safety Fire Commissioner for the person, firm, corporation, association, or partnership that will cause the combustion, explosion, deflagration, or detonation of pyrotechnics at the public exhibition or display. Fireworks distributors located outside this state shall obtain display permit application forms and provide the same to applicants upon request.

The judge may grant a permit for the display on the following conditions:

(1) That the display be conducted by a competent operator approved by the judge;

(2) That the display shall be of such character as in the opinion of the judge will not be hazardous to persons or property;

(3) That the local fire official responsible for the area in question certifies in writing that the site for the display meets his or her approval and is in compliance with all applicable codes; and

(4) That the application be accompanied by a bond in the principal sum of $10,000.00, payable to the county in which the display is being held and conditioned for the payment of damages which may be caused either to persons or to property by reason of the display or, alternatively, that the application be accompanied by evidence that the applicant carries proper liability insurance for bodily injury in the amount of not less than $25,000.00 for each person and $50,000.00 for each accident and for property damage in the amount of not less than $25,000.00 for each accident and $50,000.00 aggregate, with an insurance company duly licensed by the Commissioner of Insurance.\textsuperscript{169}

\textsuperscript{169} O.C.G.A. §25-10-4(a).
payment of damages that may be caused either to persons or to property by reason of the display or, alternatively, that the application be accompanied by evidence that the applicant carries property liability insurance for bodily injury in the amount of not less than $25,000.00 for each person and $50,000.00 for each accident and for property damage in the amount of not less than $25,000.00 for each accident and $50,000.00 aggregate, with an insurance company duly licensed by the Commissioner of Insurance.\textsuperscript{170}

16.3 Permit, Expiration, and Fees

No such permit shall be granted unless the applicant has met all the requirements of and is in full compliance with the rules and regulations promulgated by the Safety Fire Commissioner pursuant to Chapter 10 of Title 25.\textsuperscript{171}

Such permit shall be limited to the time specified therein, such time not to exceed a two-week period. The permit shall not be transferable. In the event any fireworks bought and possessed under such Chapter are not used by the licensee or in the event that there is a surplus or excess after the two-week period expires, it shall be the duty of the licensee to return such fireworks to a facility approved in accordance with Code Section 25-10-3.1 and the rules and regulations promulgated by the Safety Fire Commissioner. Fireworks stored in accordance with Code Section 25-10-3.1 and regulations shall not be deemed contraband and shall not be subject to seizure.\textsuperscript{172}

The judge of the probate court shall receive $10.00 for his or her services in granting or refusing the original permit and $1.00 for each copy issued, to be paid by the applicant. The judge of the probate court shall provide the Safety Fire Commissioner a copy of each permit granted prior to the proposed date of the public exhibition or display.\textsuperscript{173} NOTE: This provision conflicts with the fee schedule\textsuperscript{174}, which sets the application fee as $25.00 and which was last revised at a later date than the fee set forth in Chapter 10 of Title 25.

\textsuperscript{170} O.C.G.A. §25-10-4(b).
\textsuperscript{171} O.C.G.A. §25-10-4(c).
\textsuperscript{172} O.C.G.A. §24-10-4(d).
\textsuperscript{173} O.C.G.A. §25-10-4(e).
\textsuperscript{174} O.C.G.A. §15-9-60(k)(10).
PART VI. Certificates of Residence

17.0 CERTIFICATES OF RESIDENCE

No retail dealer's license or tax stamps for distilled spirits may be sold to any person unless an application is filed with the state revenue commissioner, accompanied by a certificate by the judge of the probate court of the county of the applicant's residence certifying that the applicant has been a bona fide resident of the county or municipality for at least 12 months immediately preceding the application and is a resident of the county or municipality where distilled spirits may be legally sold. The intention of this requirement is to prevent the sale of distilled spirits in any county or municipality other than those where distilled spirits may be legally sold.\textsuperscript{175}

Various municipalities have forms concerning alcoholic beverage licenses which require the applicant to obtain a certificate of residency from the judge of the probate court. While this is not a statutory duty of the judge, good public relations and constituent service suggest that the judge handle these matters.

While not designated by a specific statute, the judge of the probate court, or the clerk of the superior court, may be called upon to certify to residence of a person seeking to enroll in a facility which is a part of the University System of Georgia. This places at least some responsibility upon the judge of the probate court in that the judge’s certification will be relied upon by the institution requiring the certificate.

There may be other instances where the judge of the probate court is asked to certify that a person is a resident of the county and/or state. Again, signing such certificates is more a matter of constituent service. The fee schedule indicates that there is to be no fee for this service.\textsuperscript{176}

\textsuperscript{175} O.C.G.A. §3-4-23.
\textsuperscript{176} O.C.G.A. §15-9-60(k)(17).
APPENDIX TO CHAPTER 13
VITAL RECORDS, LICENSES, PERMITS,
AND CERTIFICATES OF RESIDENCE

A3-1. Sample Premarital Education Certificate……………………………………13-54
A3-2. Firearms Permits Guidelines………………………………………………13-55

Important Notice

Several sample orders and forms have been included in this Appendix. These sample orders and forms have not been officially sanctioned by the Georgia Council of Probate Court Judges. They have, unless otherwise noted, been prepared by the author. They are provided solely as samples. They should be modified or adapted to the specific court for the specific purpose, with any unnecessary material being deleted and any additional material being added.

William J. Self, II
Appendix A13-1

CERTIFICATION OF COMPLETION OF QUALIFYING PREMARITAL EDUCATION

This will certify that ______________________ and ______________________ have completed a course of premarital education conducted by the undersigned on ______________ [Date] and that such course qualifies under Section 19-3-30.1 of the Official Code of Georgia Annotated in that it included at least six hours of instruction involving marital issues (which may include but not be limited to conflict management, communication skills, financial responsibilities, child and parenting responsibilities, and extended family roles) and the couple underwent the course together.

I further certify that I am

___ A professional counselor, social worker, or marriage and family therapist who is licensed pursuant to Chapter 10A of Title 43 of the Official Code of Georgia Annotated;

___ A psychiatrist who is licensed as a physician pursuant to Chapter 34 of Title 43 of the Official Code of Georgia Annotated;

___ A psychologist who is licensed pursuant to Chapter 39 of Title 43 of the Official Code of Georgia Annotated;

___ An active member of the clergy who:
   ___ performed such education in the course of my service as clergy; OR
   ___ designated ______________________ to perform such education, and I certify that my designee is trained and skilled in premarital education and has certified to me the completion of the course by the couple.

Sworn to and certified before me ______________________.

Signature

on ______________________.

Notary Public ______________________.

Printed Name ______________________.

Address ______________________.

City, State, ZIP ______________________.

[Notarization not required if certificate is reproduced on official letterhead of certifier.]
Appendix A13-1

FIREARMS PERMITS 03/08/08
GUIDELINES FOR APPLICATION REVIEW
(For Assistance of Court Personnel)

Question 1: Are you currently a United States Citizen?
___ If you have ever renounced your U.S. citizenship, attach a copy of the reversal of such renunciation.
___ If you are not a U.S. Citizen, you must show proof of name, address, date of birth, INS number with a photo ID, identify all countries of citizenship and attach: (a) documentation of your lawful presence in the United States, and (b) proof of residency in the State of Georgia for at least 90 days.

Review of Response:
A "Yes" answer does not require further inquiry. This is the only question for which a "Yes" answer does not call for further inquiry. With the remaining questions a "No" answer is the response generally not requiring further review.

An alien (non-citizen) who is in the United States illegally is automatically DISQUALIFIED.

You must check the specified identifying information on everyone who is not a U.S. citizen, and keep a copy of their visa, green card, or other proof of immigrant status in addition to proof that the person has resided in Georgia for 90 days or more. (Note: All such documents must be government-issued in order to document lawful entry into the U.S.)

Question 2: Are you a non-immigrant or non-resident alien?
___ If yes, attach proof that you fall within a valid exemption establishing your eligibility.

Review of Response:

a. Non-immigrant/non-resident aliens are Disqualified from receiving a permit unless they fall into a specific exemption. All non-immigrant/non-resident aliens must provide proof of their claimed exemption. Valid exemptions are:
b. Applicant is an official representative of a foreign government, accredited to the United States or an international organization with headquarters in the U.S.
c. Applicant has a waiver issued by the Attorney General of the U.S.
d. Applicant is a foreign law enforcement officer of a friendly foreign government in the United States on official law enforcement business.
e. Applicant has a valid hunting license or permit lawfully issued in the United States.
Question 3: Have you ever been convicted of, pled guilty or nolo contendere to, or received first offender treatment for, any offense arising out of the unlawful manufacture, distribution, possession or use of a dangerous drug or other controlled substance?

**Review of Response:**

For purposes of this question only, a plea of nolo contendere and first offender treatment are each deemed to be a conviction, no matter what state the proceedings took place in, even if the defendant has been successfully discharged by the court which afforded first offender treatment. (Note 1: See Foss v. Probate Court of Chatham County, 232 Ga.App. 612, 502 S.E.2d 278 (1998).)

Anyone convicted of any violation of the Georgia Controlled Substances Act or any offense in any court in any country arising out of the unlawful manufacture, distribution, possession, or use of a substance defined as a dangerous drug or other controlled substance in O.C.G.A. §16-13-21 or §16-13-71 is **automatically disqualified** from obtaining a permit. According to Ga. Op. Atty. Gen. No. 05-3, 2005, even a full pardon will not enable us to issue a license to such an applicant.

Question 4: Have you ever been convicted of, pled guilty or nolo contendere to, or received first offender treatment for any crime involving domestic violence, violence toward a family member, child or significant other?

___ If discharged, pardoned or rights restored, specify date(s) and attach proof.

**Review of Response:** If yes:

First determine whether the plea constituted a conviction under the law of the state in which it occurred. (Note 1: For example, under Georgia law a nolo contendere plea is not considered a conviction, whereas in some states a nolo plea may be deemed a conviction.) If in doubt, call the legal research office at the AOC, the court in which the proceedings were held, or visit the statutory research section of the LEO website. (Note 2: An individual on first offender probation is treated as having a conviction until satisfactory completion of the probationary period and a formal discharge by the court. Successful completion of first offender treatment and subsequent discharge by the court without adjudication of guilt is not a disqualifier, but this information is requested so that the Court may have more complete information regarding any history of this type of charge.)

If so, then determine whether the type of offense and category of victim constitutes an automatic disqualification under the law, and if it does, whether the defendant was afforded certain due process protections when the plea was entered. (Note 3: The phrasing of this question is a simplified version of the technical language set forth in federal law. Even if the applicant has a conviction as described, you must look further to assess the applicant's eligibility.)

Convictions of misdemeanors involving force or the threat of force or violence
against a person unrelated to (and not involved with) the defendant generally only disqualifies an applicant from receiving a firearms license until the 5 year waiting period for forcible misdemeanors under Georgia law has run. BUT if it is a "Misdemeanor Crime of Domestic Violence," as defined in federal law, that is, an offense which “has as an element the use or attempted use of physical force or the threatened use of a deadly weapon against a victim who is a current or former spouse, child, ward, person with whom the applicant has had a child, has cohabitated with, or one similarly situated to a current or former spouse, child, ward, or someone the person has lived within an intimate relationship,” there is a federal prohibition against firearms possession. (Note 4: As to types of offenses which might be disqualifying, due to a 1997 opinion by the Department of Justice Office of Legal Counsel, we must now determine whether the statute or particular subsection of a statute the applicant was convicted of violating has this element of force or threat of force. The NICS section of the FBI has information on its handouts and also on the LEO website to enable us to make this determination more readily. It is not enough to just read the police report since this opinion came down. For example, simple battery and battery, among others, are misdemeanor crimes of domestic violence if the crime was committed against the type of victim listed, but the crime of assault, may or may not include an element of force or threat of force, depending on state law where the crime occurred. In many states whether or not an assault conviction is a disqualifying event will depend on what subsection the applicant has been convicted of violating. As to finding the requisite relationships, bond conditions often reveal the name of the victim and a requirement that the defendant have no contact with him or her. You may have to obtain a copy of the bond order or the police report to determine their relationship to each other, if any. Who qualifies as a person "similarly situated" to a spouse, child, ward or guardian is to be determined on a case-by-case basis. For example, such a crime against a sibling, grandchild, or even roommate would probably not qualify as a misdemeanor crime of domestic violence unless the sibling had custody, the grandparent was raising the grandchild or the “roommate” was or had been involved in an intimate relationship with the defendant. It would include stepparents and foster parents or children Provided however, federal law does not prohibit the person from receiving a license unless the person was either represented by counsel or waived the right to counsel, and unless, if a right to trial by jury attached, the person knowingly waived the right to a jury trial.

Except as noted in the preceding subparagraphs, persons convicted of Domestic Violence are Disqualified from obtaining a license unless they have a sufficient expungement or pardon, i.e. one which expressly restores the right to bear firearms. The pardon, expungement, restoration of rights, or discharge without adjudication of guilt must be attached. (Note 5: The federal prohibitor is permanent if a person convicted of such a crime has not received a discharge, pardon, expungement or restoration of civil rights.)

Question 5: Have you ever been convicted of, pled guilty or nolo contendere to, or received first offender treatment for any felony offense or any offense punishable by a term of imprisonment/probation over one year, or to a felony or court-martial charge
punishable by imprisonment over one year?

Review of Response: If yes:

First determine whether the plea constituted a conviction under the law of the state in which it occurred. (Note 1: For example, under Georgia law a nolo contendere plea is not considered a conviction, whereas in some states a nolo plea is deemed a conviction.) If in doubt, call the legal research office at the AOC or the court in which the proceedings were held, or visit the statutory research section of the NICS area of the LEO website. (Note 2: An individual on first offender probation is treated as having a conviction until satisfactory completion of the probationary period and a formal discharge by the court. Also, although successful completion of first offender treatment and subsequent discharge by the court without adjudication of guilt is not an automatic disqualifier as are convictions in this category of offenses, this information is requested so that the Court may have more complete information regarding any history of this type of charge).

If so, then determine whether any criminal offense was a felony or misdemeanor under the law of the state where it occurred, and whether any felony, misdemeanor or court-martial was of a type that disqualifies the applicant. (Note 3: The phrasing of this question is a simplified/expanded version of the technical language set forth in federal law. Even if the applicant has a conviction as described, you must look further to assess the applicant's eligibility.)

For purposes of this question, a conviction of: (a) an offense pertaining to antitrust violations, unfair trade practices, restraints of trade, or a similar offense relating to the regulation of business (even if a felony), or (b) any crime classified by the state of occurrence as a misdemeanor which is punishable by imprisonment for 2 years or less (unless it is a crime of domestic violence) does not disqualify a person from receiving a firearms license, although it may delay eligibility to receive a permit (if a forcible misdemeanor or a weapons charge).

Except as noted in the preceding review comments, convicted felons, persons convicted of crimes defined as misdemeanors in the state where the crime occurred but which was punishable by imprisonment or probation for over two years, and persons convicted in a court-martial of charges punishable by imprisonment for over one year are Disqualified from obtaining a license unless they have a sufficient expungement or pardon, i.e one which expressly restores the right to bear firearms. The pardon, expungement, restoration of rights, or discharge without adjudication of guilt must be attached as proof. (Note 4: The federal prohibitor is permanent if a person convicted of such a crime has not received a pardon, expungement or restoration of civil rights.)

(Note 5: Although rarely done, a convicted felon may also apply to the Georgia Board of Public Safety for relief from disabilities imposed by O.C.G.A. § 16-11-131. Under Georgia law, if such relief is granted and the individual has been free from
supervision for 10 years (if a forcible felony) or 5 years (if a non-forcible felony), then the DPS Board’s grant of relief may be treated as a pardon, permitting the applicant to obtain a permit. It is believed that this could constitute a “restoration of civil rights” allowable under federal law unless the right to possess a firearm is specifically prohibited in the relief from disabilities.)

Question 6: Have you ever been convicted of, pled guilty or nolo contendere to, or received first offender treatment for a forcible misdemeanor?
___ If yes, has it been at least five years since your release from jail and/or probation?

Review of Response: If yes:

First determine whether the plea constituted a conviction under the law of the state in which it occurred. (Note 1: For example, under Georgia law a nolo contendere plea is not considered a conviction, whereas in Florida a nolo plea is deemed a conviction.) If in doubt, call the legal research office at the AOC or the court in which the proceedings were held. (Note 2: An individual on first offender probation is treated as having a conviction until satisfactory completion of the probationary period and a formal discharge by the court. Also, although successful completion of first offender treatment and subsequent discharge by the court without adjudication of guilt is not an automatic disqualifier as are convictions in this category of offenses, this information is requested so that the Court may have more complete information regarding any history of this type of charge.)

If so, then determine whether the offense was a forcible misdemeanor, and if it was, whether the waiting period required by state law has expired. (Note 3: Generally, a forcible misdemeanor is any misdemeanor offense involving the use or threat, or reasonably perceived use or threat, of force, violence or a deadly weapon towards any individual. See O.C.G.A. §16-1-3(7).)

If the record establishes a forcible misdemeanor conviction and the offense does not involve domestic violence, the person is Disqualified from obtaining a permit until the applicant has been free from all supervision (including probation) in connection with the offense for the past five years. (State definitions follow.)
(O.C.G.A. § 16-1-3 Definitions:
“Forcible misdemeanor” means any misdemeanor which involves the use or threat of physical force or violence against any person.
“Misdemeanor” and “misdemeanor of a high and aggravated nature” mean any crime other than a felony.)

Question 7: Have you ever been convicted of, or pled guilty or nolo contendere to, or received first offender treatment for carrying a concealed weapon, having a deadly weapon at a public gathering, or carrying a pistol without a license?
___ If yes, has it been at least three years since your release from jail and/or probation?

Review of Response: If yes:
You must first determine whether the plea constituted a conviction under O.C.G.A. Sections 16-11-126, 16-11-127 or 16-11-128. (Note 1: Technically, Georgia law does not prohibit the issuance of a firearms license to persons convicted of similar offenses in another state; however, because federal law requires that we apply whichever law is most restrictive, state or federal, it would be within the Court's discretion to interpret federal law to require that such a waiting period be imposed on persons convicted of this type of offense in another state, thus, denying the application if the waiting period has not expired.) If so, you must then determine whether the waiting period has run. The beginning date of the waiting period is the first day the defendant was free of all restraint (imprisonment/probation—including unsupervised). (Note 2: An individual on first offender probation is treated as having a conviction until satisfactory completion of the probationary period and a formal discharge by the court. Also, although successful completion of first offender treatment and subsequent discharge by the court without adjudication of guilt is not an automatic disqualifier as are convictions in this category of offenses, this information is requested so that the Court may have more complete information regarding any history of this type of charge.)

A person convicted of one of the foregoing offenses is Disqualified from obtaining a permit until the applicant has been free from all restraint (including unsupervised probation) in connection with the offense for the past three years.

Question 8: Are you subject to pending charges (including matters under indictment or accusation, on appeal, or uncompleted first offender treatment) or other court order? ___ If yes, do the pending charges involve or arise out of any felony, any crime that is possibly punishable by imprisonment for over one year, any misdemeanor involving force or violence, any offense or conduct involving a weapon, or any offense involving a controlled substance or other dangerous drug?

Review of Response: If yes:

If the pending charges include formal indictment or accusation following arrest, and are offenses which are punishable by imprisonment for a term exceeding one year, the applicant is Disqualified under federal law from obtaining a permit at least until the adjudication of any such pending charge and under state law as to the other categories of offenses listed, except for any pending drug charges. (Note 1: Although pending drug charges are not an automatic disqualifier pending satisfactory disposition of the charge, the Court might wish to delay issuance of the license on these as well, given the fact that any disposition other than dismissal or acquittal would disqualify the applicant. Whether to withhold issuance of a license until disposition of other pending charges not listed would also be in the court’s discretion, even though they do not automatically disqualify the applicant, unless the charges are pending in another state or country, in which case the applicant may be considered a “fugitive from justice,” a federal prohibitor examined in Question 9.). The disposition of such charge(s) will determine subsequent action on the application. The length of time, if any, to hold the
application open for consideration would be in the Court's discretion. (Note 2: Arrest alone is not sufficient to meet the “under indictment” prohibitor.)

**Question 9:** Have you left any state, or any foreign state, to avoid criminal prosecution, to avoid giving testimony in any criminal proceeding, or knowing that charges are pending against you?

**Review of Response:** If yes:

As a fugitive from justice, the applicant is Disqualified from obtaining a permit. State law disqualification exists until adjudication of the charge. (Note 1: A person is not a "fugitive from justice" merely because he or she has an outstanding civil traffic citation.)

**Question 10:** Have you been the subject of any proceedings (including arrests, matters on appeal, under indictment or accusation, or cases which were nolle prossed) within the past five years for any offense arising out of the unlawful possession or use of a controlled substance or other dangerous drug, or found through a drug test to have used such a substance or drug unlawfully within the past year?

**Review of Response:** If yes:

All of the listed circumstances are used as examples of the types of incidents which might disqualify a person, according to various interpretations of a person "who is an unlawful user of or addicted to any controlled substance" as defined in §102 of the federal Controlled Substances Act (21 U.S.C. §802). In essence, the Court could find on the basis of such information that the person falls within a prohibited category. The Court has the right to inquire into illicit drug use whether or not the applicant has been convicted. The extent of such abuse or illegal conduct must be evaluated by the Court on a case-by-case basis. Inquiry should be made as to whether the individual has a recent history of use or a pattern of use. “Controlled substance” includes, but is not limited to: marijuana, depressants, stimulants, and narcotic drugs—but not alcohol or tobacco.

For further information regarding inferences of “recent use” or “pattern of use” which may be drawn from the applicant's history, see FBI NICS handouts on prohibited persons.

**Question 11:** Do you use any controlled substance or illegal drug other than as prescribed by a licensed physician, or have you done so within the past year, or had a pattern of using within the past five years?

**Review of Response:** If yes to question 10 or 11:

All of the listed circumstances are used as examples of the types of incidents which might disqualify a person, according to various interpretations of a person "who is an
unlawful user of or addicted to any controlled substance” as defined in §102 of the federal Controlled Substances Act (21 U.S.C. §802). In essence, the Court could find on the basis of such information that the person falls within a prohibited category. The Court has the right to inquire into illicit drug use whether or not an applicant has been convicted. The extent of such abuse or illegal conduct must be evaluated by the Court on a case-by-case basis. Inquiry should be made as to whether the individual has a recent history of use or a pattern of use. “Controlled substance” under federal law includes, but is not limited to: marijuana, depressants, stimulants, and narcotic drugs—but not alcohol or tobacco.

For further information regarding inferences of “recent use” or “pattern of use” which may be drawn from the applicant's history, see the most recent FBI NICS handout describing categories of prohibited persons.

Question 12: Are you addicted to or have you lost the power of self-control over any controlled substance or drug?

Review of Response: If yes:

The applicant is automatically DISQUALIFIED from receiving a firearms license. “Controlled substance” under federal law includes, but is not limited to: marijuana, depressants, stimulants, and narcotic drugs—but not alcohol or tobacco.

Question 13: Are you, or have you ever been, subject to any order (including but not limited to restraining orders, protective orders, peace bonds & good behavior bonds) restraining you from harassing, stalking, threatening, engaging in communication with, or refraining in any manner from contact with or coming in proximity to any person, individual, spouse, parent, child or former or current intimate partner or their property, residence or other location frequented by such person?

___ If yes, attach a copy of the order and any order terminating the same.

Review of Response: If yes:

(Note 1: The phrasing of this question is a simplified version of the technical language set forth in federal law. Even if the applicant is subject to a protective order as described in the question, you must look further to assess the applicant's eligibility.)

Any individual subject to an order prohibiting the person from harassing, stalking, threatening or engaging in any conduct that would reasonably cause fear of bodily injury to a current or former intimate partner, partner’s child, or the subject's child or parent; or prohibiting the use, attempted use or threatened use of physical force that would reasonably be expected to cause bodily injury to such a person is DISQUALIFIED from obtaining a permit, provided that the order was entered following a hearing after actual notice to the subject and an opportunity to participate, and the order either (a) includes a finding that the individual represents a credible
threat to the safety of the intimate or formerly intimate partner thereof, or to such a person's child or the individual's child or parent; or (b) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such current or former partner, child or parent that would reasonably be expected to cause bodily injury. (Note 2: The reason for asking if a person has ever been subject to such an order is that the applicant may not realize the order has remained in effect. This approach also enables the court to discover possible prohibitors which might not be on the protective order registry yet. In any case, a copy should be obtained so that the court can judge whether the order is in fact a disqualifier, which depends on whether all the required elements are present. Also, although criminal background checks now include a check of the Protective Order Registry in Georgia, the registry only goes back a few years.) This prohibitor does not apply to persons subject to a protective order involving an intimate partner who the person is dating or has dated but with whom the person has not cohabitated or had a child in common, nor family members other than those specified; for example, a protective order aimed at protecting a grandchild, grandparent or sibling would not necessarily prohibit issuance of a license, but would have to be examined on a case-by-case basis.

For further information, see the ATF "Protection Orders and Federal Firearms Prohibition" card.

Question 14: Have you ever been dishonorably discharged from the U.S. Armed Forces, or separated from the U.S. Armed Forces under a dismissal adjudicated by a general court-martial?

Review of Response: If yes:

The applicant is DISQUALIFIED from obtaining a license.

Question 15: Have you ever been found by a civil or criminal court, board, commission or other lawful authority, as a result of subnormal intelligence, incompetency, mental illness, condition or disease, to be a danger to yourself or others, to lack the mental capacity to manage your own affairs, or to be incompetent to stand trial, insane, guilty but mentally ill, or not guilty for lack of mental responsibility?

Review of Response: If yes:

Questions 14 and 15 apply to any criminal proceedings in which charges were dropped or treatment was ordered as either (a) a condition of release, probation, or parole, (b) the basis of the entry of a “nolle prosequi” order due to the receipt of a psychiatric or psychological evaluation, or (c) the result of a finding of insanity, not guilty by reason of lack of mental responsibility, guilty but insane, or a finding that the applicant was incompetent to stand trial. In such event, the person is DISQUALIFIED from receiving a permit. You may require the applicant to submit a copy of the order or decision if he or she is in doubt as to the answer. The foregoing circumstances are all examples of persons deemed to be "adjudicated as a mental
defective," a federal prohibitor against issuance, whenever or wherever it occurred, even though the person's rights or capacity may have later been restored. If so adjudged at any time, the person is permanently DISQUALIFIED from receiving a permit. (Note 1: For example, if a veteran has received benefits on the basis of post-traumatic stress syndrome, such applicant is DISQUALIFIED.)

(Note 2: Also, see notes following Question 16.) Federal instructions regarding this “mental defective” prohibitor is being significantly reworked.

**Question 16:** Have you ever been ordered to receive inpatient or outpatient treatment at any treatment facility, mental health center, hospital, sanitarium, clinic or program for a mental condition, drug abuse, or alcohol abuse, by any court, board, or other authority in any civil, criminal or administrative proceeding? 
___ If yes, attach a copy of the order.

**Review of Response:** If yes:

Originally this disqualifier was interpreted to apply to any order to undergo treatment in civil commitment proceedings, whether inpatient or outpatient, according to ATF's first set of FAQ's. The questions and answers (on ATF's current website FAQ’s section) respecting the effect of mandated outpatient treatment have since been deleted. The latest verbal instruction from ATF is that only inpatient treatment is an automatic disqualifier and that outpatient treatment is not an automatic disqualifier. However, FBI and the ATF counsel are currently reviewing this issue respecting whether or not outpatient commitment renders a person ineligible for a license. Judges are advised to use their own discretion. (Note 1: For example, if a person is ordered to complete alcohol or drug or mental health treatment as a condition of probation, if coupled with an adjudication that the person suffers from a mental illness or addictive disease, they could be DISQUALIFIED.) (Note 2: An order to be evaluated or observed only, as opposed to an order to receive or to comply with treatment, does not disqualify a person from obtaining a license.) (Note 3: The DHR database only includes treatment in state-funded hospitals or other facilities in Georgia, and includes voluntary as well as involuntary admissions. A person is not disqualified by a voluntary admission.)

(This form is an investigative tool retained for the purpose of maintaining and preserving public order. Therefore, this document is not subject to public disclosure.)
Chapter 14

MISCELLANEOUS DUTIES OF THE JUDGE OF THE PROBATE COURT;
PROBATE COURT DOCKETS, BOOKS, MINUTES AND RECORDS

The Revised
HANDBOOK FOR PROBATE JUDGES OF GEORGIA
2010
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CHAPTER 14

PART I.
MISCELLANEOUS DUTIES OF
THE JUDGE OF THE PROBATE COURT

1.0  IN GENERAL

As explained in Chapter 1, the judge of the probate court has many additional duties and responsibilities, both judicial and ministerial. Those subjects which require detailed information have been covered in the preceding Chapters of this Handbook. This Chapter covers those responsibilities and duties which may be equally as important as those covered in other Chapters but require less explanation. Some of these functions fall upon the judge of the probate court as vestiges of the broad authority previously held by Ordinaries over county administrative matters, while others come in a clearer judicial or quasi-judicial capacity.

Jurisdiction over some matters discussed in this Chapter may have been placed with the boards of county commissioners or other agencies and/or officers of the counties. Reference should be made the local laws relating to a particular county to determine the authority of the judge of the probate court in that county to act in any of the matters discussed in this Chapter.

2.0  APPOINTMENT OF PROCESSIONERS

The judge of the probate court is required to appoint three processioners in each militia district of the county every second year. Vacancies may be filled at any time, or processioners may be appointed upon the application of any landowner.\(^1\) If the judge cannot find three persons resident in a militia district to serve as processioners, he/she may appoint persons residing in another militia district.\(^2\) The authority to appoint processioners was expressly removed from the board of county commissioners of any county.\(^3\)

Any landowner who desires to have the lines around his entire tract resurveyed and

\(^1\) O.C.G.A. §44-4-1.
\(^2\) Id.
\(^3\) Id.
re-marked may make application to the processioners of the district to set a date when a majority of them, along with the county surveyor, will trace and mark the lines. The application to the processioners must be in writing. However, if, upon a trial of a protest to the return of the processioners, it is shown that no written application was filed, it is sufficient that the return of the processioners acknowledges that the “application was made.” It is then the responsibility of the processioners to give ten days' written notice of the time for running and marking the lines to all resident owners of adjoining land. Before proceeding, the processioners must have satisfactory evidence of the service of the notice. If there is no county surveyor, the processioners may engage any competent citizen of the county provided he/she is properly sworn, or they may use the county surveyor of an adjoining county. The processioners, however, cannot establish a new line; their power extends only to running and marking anew the already established lines. A landowner is entitled to the services of the processioners in marking out a single dividing line between him/her and an adjacent owner. In cases of disputed lines, the Code provides certain guidelines which the processioners must follow.

It should be noted that the application for marking out lines is not made to the judge of the probate court but to the processioners directly. The records of the probate court should show who the processioners are for each district of the county.

It is the duty of the county surveyor and the processioners to establish the true lines and to plainly mark them. The surveyor then makes out a plat, properly certifies it, and delivers a copy to the applicant. Such plat is prima facie evidence between adjoining landowners of the true line, though it is not conclusive.

When the processioners have acted on an application, their report is filed with the judge of the probate court within 30 days along with the plat of the surveyor. The written

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4 O.C.G.A. §44-4-2.
6 Id.
7 O.C.G.A. §44-4-2.
8 Id.
12 O.C.G.A. §§44-4-5, 44-4-6, 44-4-7, and 44-4-8; Elder v. Merritt, 204 Ga. App. 163 (1992).
13 O.C.G.A. §44-4-3.
14 O.C.G.A. §44-4-4.
application of the landowner to the processioners should be filed along with the report and the plat, but failure to file the application does not invalidate the proceedings.\textsuperscript{15} It is not necessary for the judge to take any action in connection with the report of the processioners other than to file it and make an appropriate entry on the minutes. No order of approval is necessary.

Any owner of adjoining lands who is dissatisfied with the lines run by the processioners may file a protest with the judge of the probate court at any time within 30 days after the report is filed.\textsuperscript{16} The judge then delivers all of the papers, including the plat, to the clerk of the superior court of the county or counties where the disputed land lies. The clerk enters the protest on the issue docket, and the matter is tried in the same manner as other cases in superior court.\textsuperscript{17}

Remaindermen are necessary parties to a protest proceeding and must be joined either as applicants or as defendants in order to be bound by any judgment.\textsuperscript{18}

It is not mandatory that an adjoining landowner file a protest, and when none is filed the processioning acquires no res judicata effect.\textsuperscript{19}

\section*{3.0 BONDS AND OATHS OF CERTAIN ELECTED AND APPOINTED OFFICIALS AND JURY COMMISSIONERS}

The judges of the probate courts approve the official bonds of clerks of superior court, chief magistrates, magistrates, sheriffs, coroners, county surveyors, county treasurers, county tax receivers, county tax collectors, and generally, in practice, all other county officers and court officials, and maintains the bonds on file in the office after they have been recorded.\textsuperscript{20}

All county officials are required to have their bonds signed by some surety or guaranty company authorized to do business in this state, and the county fiscal authorities are required to pay the premiums.\textsuperscript{21} Counties, and certain other entities, are authorized to

\begin{thebibliography}{9}
\bibitem{16} O.C.G.A. §44-4-9.
\bibitem{17} Id.
\bibitem{18} Oliver v. Irvin, 105 Ga. App. 844 (1962).
\bibitem{19} Sacks v. Jordan, Id at FN 15.
\bibitem{20} O.C.G.A. §45-4-13.
\bibitem{21} O.C.G.A. §45-4-7.
\end{thebibliography}
purchase blanket bonds in lieu of individual bonds. Blanket bonds may cover any two or more officers and must meet certain statutory requirements. A blanket bond must be signed by the judge of the probate court of the county and filed and recorded in his/her office.\textsuperscript{22}

The Governor grants commissions to county elected public officials and has the discretion to issue a dedimus potestatem.\textsuperscript{23} Usually, the judge of the probate court receives from the Governor, the Executive Department, or the Secretary of State a dedimus potestatem authorizing the judge to administer the oath and to take and approve the bond of various county officials. Accompanying the dedimus are the commission and forms of the oaths to be administered and of the bond to be executed. The instructions as to procedure are usually specific, stating where the papers are to be filed and recorded, when the commission is to be delivered, and what is to be returned to the Secretary of State or to any other office.

The judge of the probate court sends a certificate to the Governor that the respective county officials have taken their oaths of office and have given the bonds sent from the Executive Department, and that the commissions have been delivered to the officials.\textsuperscript{24} The law specifically authorizes the judge to approve all official bonds which are required by law to be approved by him/her and which are sent to the judge by the Governor with the dedimus to qualify such officers and to deliver their commissions to them.\textsuperscript{25}

The oaths are filed in the Governor's office when taken by officers whose duties are not confined to one county,\textsuperscript{26} or, if taken by an officer whose duties are confined to one county, in the office of the judge of the probate court or clerk of superior court depending on the particular county office.\textsuperscript{27}

All magistrates, constables, and clerks of magistrate courts must take the required oath before the judge of the probate court before entering upon the duties of their offices.\textsuperscript{28}

Jury commissioners appointed by the chief judge of the superior court are required to take the official qualifying oath before the judge of the probate court, who is required to enter

\textsuperscript{22} O.C.G.A. §45-4-11.
\textsuperscript{23} O.C.G.A. §45-12-20.
\textsuperscript{24} O.C.G.A. §45-4-17.
\textsuperscript{25} O.C.G.A. §15-9-30.
\textsuperscript{26} O.C.G.A. §45-3-4.
\textsuperscript{27} O.C.G.A. §45-3-5.
\textsuperscript{28} O.C.G.A. §15-10-3(a).
the oath of such commissioners upon the minutes of the probate court. The clerk of the superior court is usually designated as the clerk of the board of jury commissioners and must also qualify as such by taking the oath before the judge, who likewise is required to record it on the minutes of the probate court. The requirements of taking an oath before the judge and the recording of the oath in the minutes of the court are merely directory and will not support a challenge to the jury list. There seems to be no specific requirement for jury commissioners to take the loyalty oath but, since the jury commissioners draw per diem compensation, it would seem to be required (as to the part which is constitutional) and certainly would be the best practice.

4.0 BONDS OF ITINERANT ENTERTAINMENT

All carnivals, road shows, tent shows, and all other types of itinerant entertainment not presented within any regularly licensed theater, auditorium, or other building are required to file with the judge of the probate court of the county in which they are to be held, or with the judge and the Secretary of State, a copy of a public liability bond or insurance policy with a limit of not less than $50,000.00 for personal injury, death or property damage sustained by one person and not less than $100,000.00 for injury, death or property damage sustained by two or more persons as a result of any one accident or event, or an indemnity bond subject to a limit of $100,000.00.

All such itinerant shows are also required to designate an agent for service of process and to file such designation with the judge of the probate court of each county in which the show is to appear. If no designation is filed, the Secretary of State becomes the agent for service of process.

There is no specific provision for any fee for filing these documents, but it is recommended that the bond or policy declarations page be recorded. It is the opinion of the author that this would be an equivalent service to that of recording the oaths and bonds of

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29 O.C.G.A. §15-12-22.
30 O.C.G.A. §15-12-23.
32 O.C.G.A. §45-3-11.
35 Id.
officials, plus recording. The duty of the judge would seem to be to inform the proper law enforcement officers of the failure to file the bond or insurance policy or to designate an agent for service. Such information places the law enforcement officers in a position to prevent operation of the show or equipment until the requirements of the law have been satisfied. Violations of the provisions of this Code section are misdemeanor crimes.

5.0 CERTIFYING PUBLICATION OF APPLICATION FOR INSURANCE COMPANY CHARTER

The application for a charter for mutual stock and mutual insurers must be filed with the office of the Secretary of State. The applicant then publishes a copy of the application, certified by the Secretary of State, once a week for four weeks in the legal newspaper for the county where the principal office of the company is to be located. When the application and any and all exhibits attached to it have been so published, the applicant may apply to the judge of the probate court of such county for a certification of the publication. Such certificate is then filed by the applicants in the office of the Secretary of State.

6.0 CONDEMNATION PROCEEDINGS

Under various forms of condemnation proceedings, either those instituted by governmental authority or those instituted by certain corporations which have the power of condemnation, the judge of the probate court may have certain responsibilities.

Under general condemnation proceedings, if there is a minor or incompetent party at interest who has no legal representative, the proceedings are served personally upon the minor or incompetent and upon the judge of the probate court of the county where the land is located, who in turn appoints a guardian-ad-litem for such person(s). Further, if the address of any interested party is not known, the judge appoints a guardian-ad-litem to represent the interests of such party. Likewise, if the owners are unknown, the judge appoints a

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36 O.C.G.A. §15-9-60(26).
37 O.C.G.A. §43-1-15(b).
38 O.C.G.A. §§33-14-1, 33-14-5(b).
40 O.C.G.A. §22-2-23.
guardian-ad-litem to represent the interests of unknown owners. 41

If the judge of the probate court is disqualified by reason of interest or any other cause from making the appointment of guardians-ad-litem, the Clerk of Superior Court makes the appointments. The order of appointment should be recorded in the minutes.

If the person seeking condemnation notifies the judge of the probate court that the owner or interested persons have failed to select an assessor, or have failed to agree upon an assessor, or that the owner is unknown, or the owner or any person interested is a minor or otherwise under disability with no legally appointed guardian, the judge of the county where the land is located is required to appoint an assessor. 42

After the value of the property has been determined by the assessors, or by a superior court judgment if the award of the assessors is appealed, and the money is ready for distribution, if a person to whom the money belongs is under a disability and is without a legal representative, the money is paid to the judge of the probate court, who appoints a guardian (conservator) or other proper representative for the investment of the funds. 43

Under condemnation proceedings before a special master, the judge of the probate court is required to accept service for minors or incompetents who have no legally appointed guardians/conservators and for unknown owners or unborn remaindermen who are likely to have any interest in the property or proceeds, and the judge is either to represent such persons or appoint a guardian-ad-litem to represent such persons. 44 It certainly seems to be the better practice to immediately appoint a guardian-ad-litem who can make an appropriate investigation, file an answer, and request compensation for services from the condemnor if no award is made to the parties the guardian-ad-litem represents.

When there is a condemnation proceeding for public road or other transportation purposes, the petition and declaration of taking are served on the judge of the probate court if the guardian of a minor or incompetent is a nonresident or if there is no guardian. The judge appoints a guardian-ad-litem to represent the minor or person under disability. If the minor or incompetent is a resident of this state and has no guardian, service is also made upon the

41 Id.
42 O.C.G.A. §22-2-41. If the judge of the probate court is disqualified, the Clerk of Superior Court makes the appointment.
43 O.C.G.A. §22-2-86.
44 O.C.G.A. §22-2-107(e), (f).
minor or incompetent personally.\textsuperscript{45}

7.0 CONDEMNED GASOLINE PUMPS

All gasoline pumps must be inspected for compliance with regulations of the Commissioner of Agriculture.\textsuperscript{46} If an operator fails or refuses to make any required adjustments to the measuring device on a pump, the pump must be condemned and rendered inoperable.\textsuperscript{47} When any pump is condemned under the Code by any inspector, it is the duty of the inspector immediately to make affidavit before the judge of the probate court of the county in which the pump is located that the pump is being operated contrary to law by the person named in the affidavit. Thereupon the judge must issue an order to the person named in the affidavit to show cause before the judge on the day set forth in the order, not more than ten days nor less than three days from the issuance of the order, why the pump should not be confiscated and dismantled. On the day set forth in the order, it is the duty of the judge to hear the respective parties and to determine whether or not the pump has been operated contrary to the provisions of the Code. If the judge finds that the pump has been so operated, he/she issues an order adjudging the pump to be forfeited and confiscated to the state and directing the sheriff of the county to dismantle the pump and take it into his/her possession, and, after ten days' notice by posting or publication, as the court may direct, to sell the pump to the highest bidder for cash. The proceeds of sale, or as much thereof as may be necessary, will be used by the sheriff, first, to pay the costs, which are the same as in cases of attachment, and the sheriff must thereupon pay over and deliver the residue, if any, to the person from whose possession the pump has been taken.\textsuperscript{48}

8.0 COUNTY BOUNDARY LINE CHANGES

Whenever one or more citizens of any county desire(s) to have the boundary line of the county changed, the person(s) must file in the offices of the judges of the probate courts of the counties to be affected a written petition setting forth certain information specified in the statute. The applicant must also give notice at least 30 days immediately preceding the

\textsuperscript{45} O.C.G.A. §32-3-8.
\textsuperscript{46} O.C.G.A. §10-1-159(b).
\textsuperscript{47} O.C.G.A. §10-1-159(c).
\textsuperscript{48} O.C.G.A. §10-1-159(d).
next term of the superior court or courts to be held in the affected counties after the filing of the petition with the judges of the probate courts. The notice must be published in a public newspaper having general circulation in each of the affected counties and posted at the door of the courthouse in each of the counties and at three public places in every militia district adjacent to the line to be changed.\textsuperscript{49}

On the first day of the next term of the superior courts after the publication of the notice and the filing of the petition as described above, the judges of the probate courts of the affected counties must submit the original petition to the grand juries of their respective counties, together with all related maps, plats, and other papers that have been filed. If such grand juries, by a two-thirds' vote of their respective bodies, approve the change, they so declare in their general presentments. This action of the grand juries must be certified at once by the clerks of the superior courts to the county governing authority in the affected counties, who must, within 30 days from the date of the certification, approve or disapprove the application and certify their action to the judges of the probate courts of their respective counties. When the judges of the probate courts have satisfactory evidence of the concurrent approval of the grand juries and of the county governing authority in the affected counties, they cause an official notice of concurrent approval and a description of the approved line to be published for at least 30 days in a public newspaper having general circulation in their respective counties.\textsuperscript{50}

After all the above proceedings have taken place and have been recorded by the judges of the probate courts on the minutes of their respective courts, the new line or lines are held to have been established.\textsuperscript{51} Three copies of the survey and plat evidencing the change and a copy of the resolution from the governing authority of each county must be filed jointly by the judge of the probate court of each county with the Secretary of State, who then certifies the survey and plat and sends a certified copy to the clerk of the superior court of each affected county. The clerks of the superior court record the survey and plat in the same book in which other plats of the county are recorded. The Secretary of State retains the other copy of the survey and plat.\textsuperscript{52}

\textsuperscript{49} O.C.G.A. §36-3-1.
\textsuperscript{50} O.C.G.A. §36-3-2.
\textsuperscript{51} O.C.G.A. §36-3-3.
\textsuperscript{52} O.C.G.A. §39-3-5.
All advertising and court costs are paid by the applicant.53

9.0 COUNTY LAW LIBRARIES

There has been created in each county a board known as the Board of Trustees of the County Law Library. The board consists of the chief judge of the superior court of the circuit in which the county is located, the judge of the probate court, the senior judge of the state court, if any, the solicitor-general of the state court, if any, the clerk of the superior court, and two practicing attorneys of the county. The practicing attorneys are selected by the other trustees and serve at their pleasure. All of the trustees serve without pay. The chief judge of the superior court is chairperson of the board. A majority of the members of the board constitute a quorum.54

A secretary-treasurer must be selected and appointed by the board and serves at the pleasure of the board. The board may appoint one of its own members as secretary-treasurer or, in its discretion, may designate some other person to so act. The secretary-treasurer performs the duties provided for the treasurer. The board of trustees may designate the judge of the probate court or a deputy clerk of the superior court of each county to act as librarian. Any such official may not receive any additional compensation for the performance of such duties. However, the board in its discretion may designate some other person to act as librarian and fix the compensation for such person.55 A librarian designated and compensated under this section may not serve in the dual capacity as librarian-secretary.56

The board of trustees is given the following powers and duties:

1. To provide for the collection of all money provided for in Code Sections 36-15-6 and 36-15-9;
2. To select the books, reports, texts, and periodicals;
3. To make all necessary rules and regulations governing the use of the library;
4. To keep records of all its meetings and proceedings;
5. To exercise all other powers necessary for the proper administration of Chapter 15 of Title 36 of the Code;

53 O.C.G.A. §39-3-4.
6. To enter into agreements with the boards of trustees of other county law libraries within the same judicial circuit for the purpose of pooling funds to purchase books and periodicals and to purchase or lease computer-related research equipment and programs, and to provide for the location and joint use of such resources within the judicial circuit.\textsuperscript{57}

The board is to have control of the funds provided for by law discussed below. All funds received must be deposited in a special account to be known as the county law library fund. The board has authority to expend the funds in accordance with Code Section 36-15-7 and to invest any of the funds so received in any investments which are legal investments for fiduciaries in this state.\textsuperscript{58}

For the purpose of providing funds for county law library uses, a sum not to exceed $5.00, in addition to all other legal costs, may be charged and collected in each action or case, either civil or criminal, including, without limiting the generality of the foregoing, all adoptions, certiorari, applications by personal representatives for leave to sell or reinvest, trade name registrations, applications for change of name, and all other proceedings of civil or criminal or quasi-criminal nature, filed in the superior, state, probate, and any other courts of record, except county recorders’ courts and certain municipal courts.\textsuperscript{59} The amount of such additional costs to be charged and collected, if any, in each such case is to be fixed by the chief judge of the superior court of the circuit in which such county is located. Such additional costs may not be charged and collected unless the chief judge first determines that a need exists for a law library in the county. The clerk of each and every such court must collect such fees and remit the same to the treasurer on the first day of each month. When the costs in criminal cases are not collected, the law library fee must be paid from the fines and forfeitures fund of the court in which the case is filed, before any other disbursement or distribution of such funds or forfeitures is made. For these purposes, a "case" is any matter which is docketed upon the official dockets of the enumerated courts and to which a number is assigned, whether such matter is contested or not.\textsuperscript{60}

In counties where a law library has not been established, upon request of the county

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\textsuperscript{57} O.C.G.A. §36-15-4.
\textsuperscript{58} O.C.G.A. §36-15-5.
\textsuperscript{60} Id.
governing authority, the chief judge of the circuit must direct that the fees be charged and collected for the purpose of the establishment and maintenance of the codification of county ordinances. The clerk of each court in which such costs are collected must remit the same to the county governing authority on the first day of each month.\textsuperscript{61}

With respect to suits, note that the fee only applies to a filing to "initiate" a suit, action or case. No additional fee is charged for amendments, objections, caveats, answers, interrogatories, depositions or other documents filed subsequent to the original petition or motion. No additional fee is charged for appointing a guardian-ad-litem, issuing a commission to take oath or testimony, a subpoena, or a report of sale, as these relate to the original petitions. This statute is not very clear as to what matters are subject to a law library fee. To some extent, each county must interpret the statute for itself.

\textbf{10.0 DRAWING GRAND JURY PANEL}

Whenever, from any cause, the judge of the superior court fails to draw a grand jury, the judge of the probate court of the county in which such failure occurred is required to meet with the jury commissioners and the clerk of the superior court at the courthouse at least 20 days prior to the next term of court and draw grand jurors to serve at the next term, all of which is to be entered on the superior court minutes and signed by the judge of the probate court.\textsuperscript{62}

This provision is merely a safeguard to insure that there will be a grand jury even when, for whatever cause, the judge of the superior court fails to draw a panel. It would seem incumbent upon the clerk of the superior court to notify the judge of the probate court when a judge of the superior court is not available to draw the grand jury panel, thereby necessitating that it be done by the judge of the probate court.

\textbf{11.0 ESTABLISHING LOST EVIDENCE OF INDEBTEDNESS}

As explained below, the Code provides a method for a copy of a lost document which evidences indebtedness to be established by the judge of the probate court as having the same effect as the original. However, this probate court procedure does not apply to any document

\textsuperscript{61} O.C.G.A. §36-15-9(g).
\textsuperscript{62} O.C.G.A. §15-12-64.
to which Title 11 of the Code (the Uniform Commercial Code) applies.\textsuperscript{63} Title 11 applies to lost, destroyed or stolen negotiable instruments including certificates of deposit,\textsuperscript{64} lost securities,\textsuperscript{65} and lost commercial documents such as warehouse receipts.\textsuperscript{66} Therefore, few if any documents are left for the probate court procedure to cover.

Subject to the above, the owner, his/her agent, or his/her legal representative, of any evidence of a bond, bill, note, draft, check, or other evidence of indebtedness which has been lost or destroyed, may establish by the following procedure that the item has been lost or destroyed:

1. File a verified petition with the judge of the probate court of the county of the residence of the maker or debtor.
2. Give a full and accurate description of the lost document.
4. Declare the petitioner's inability to find the document, and explain the reasons why.
5. Pray for the establishment of a copy, setting forth the copy desired to be established.\textsuperscript{67}

The judge of the probate court issues a citation to the alleged debtor or maker requiring him/her to appear within ten days and show cause why a copy should not be established in lieu of the lost original. The citation is personally served by the sheriff, or by a person specially appointed by the judge for that purpose, at least five days before the hearing.\textsuperscript{68}

If no successful defense is presented at the hearing, the judge proceeds to establish, by an order entered on the petition, the copy so prayed to be established, which then has all of the effect of the original. The petition, notice, and order are entered in a record book maintained for that purpose.\textsuperscript{69}

If an objection is filed and the debtor under oath denies that such original ever

\textsuperscript{63} O.C.G.A. §24-8-21(f).
\textsuperscript{64} O.C.G.A. §11-3-804.
\textsuperscript{65} O.C.G.A. §11-8-405.
\textsuperscript{66} O.C.G.A. §11-7-601.
\textsuperscript{67} O.C.G.A. §24-8-21(a).
\textsuperscript{68} O.C.G.A. §24-8-21(b).
\textsuperscript{69} O.C.G.A. §24-8-21(c).
existed, the judge of the probate court must allow the parties up to 20 days to prepare and then hold a hearing. At the hearing, the judge enters an order based on his/her findings. Either party may appeal to the superior court except as otherwise provided in Article 6 of Chapter 9 of Title 15.

If the person alleged to be the debtor or maker of the lost or destroyed paper is a nonresident of this state, service is made by publication twice a month for two months in a newspaper selected by the judge. If the nonresident's address is known, due process would also require mailing of a copy of the notice to him.

This summary method of establishing lost papers in the probate court is very limited in its scope. It is applicable only to bonds, bills, notes, drafts, checks, or other evidences of indebtedness, and even then only where Title 11 is not applicable. It cannot be used to establish a lost will, for which there are other specific requirements, or for lost stock certificates.

12.0 ESTABLISHING MUTILATED, DESTROYED, OR LOST PUBLIC RECORDS

The judge of the probate court may bring a petition in superior court to establish mutilated, lost, or destroyed public records, which petition may be heard and determined at the first term after or during which it is filed. The superior court is required to give precedence to the case and proceed with it as quickly as possible. Upon hearing the matter, it is discretionary with the superior court judge to order the whole or any part of such records established. If established, the “new” records are as effective as evidence as were the original records. The copies so established must, as nearly as possible, specify and conform to the original book and pages of the records in which they originally existed.

The petition must set out:

1. The fact that some portion of the records has been lost, mutilated, stolen, or destroyed.

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70 O.C.G.A. §24-8-21(d).
71 O.C.G.A. §24-8-21(e).
72 O.C.G.A. §24-8-22.
73 O.C.G.A. §24-8-2.
74 O.C.G.A. §24-8-1.
75 O.C.G.A. §24-8-6.
2. The title of the books or parts of books in which such records existed.

3. A prayer for their establishment. 76

The superior court may appoint an auditor to hear evidence, summon witnesses and compel the production of books and papers. 77 After the auditor's report is filed, any person who is adversely interested may file an objection within 30 days. Any such objection would then be heard by the superior court judge. 78

The interest of the judge of the probate court in this situation is the preservation of public records in as complete and accurate condition as possible. In filing petitions of this type, the judge's concern should be the accuracy of the material sought to be established. In any cases of doubt the evidence should be sufficiently strong to warrant the establishment of the material as a public record.

13.0 EXEMPTIONS FROM LEVY AND SALE

13.1 In General

Georgia law protects certain property from being seized and sold to pay the debts of a person who has not or cannot pay them. Georgia provides both a constitutional exemption and a statutory exemption at the election of the debtor as described below.

13.2 Constitutional Exemption

Property, both real and personal, of a debtor in the amount of $5,000.00 is exempt from levy and sale with certain exceptions. 79 This exemption was previously commonly referred to as a homestead exemption. In 1983, the Georgia legislature made numerous changes to Chapter 13 of Title 44, including deletion of the term "homestead." The exemption is now referred to as a "constitutional exemption" because it is authorized by the Constitution. 80 Such property is exempt from levy and sale when set apart in accordance with the Code except for:

1. Taxes;

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76 O.C.G.A. §24-8-3.
77 O.C.G.A. §24-8-4.
78 O.C.G.A. §24-8-6.
79 O.C.G.A. §44-13-1.
81 Ga. Const. art. I, §1, para. XXVI.
2. The purchase money of the property;
3. Labor done on, or materials furnished for, the property; or
4. Removal of encumbrances thereon.\textsuperscript{82}

Under Georgia law both real and personal property may be set apart; however, if cash
is set aside, it must be invested in personal property selected by the applicant under the
direction of the judge of the probate court and a schedule of the property must be filed with
the judge.\textsuperscript{83} The exemption is general in scope, and any property may become the subject of
a constitutional exemption; the limitation is as to the overall value of the property set apart.

The person seeking the benefit of the exemptions provided in the Constitution must
apply to the judge of the probate court of the county of his/her residence by petition stating:
1. The debtor for whom the exemption is claimed.
2. The names and ages of the minor children and dependents of the debtor.
3. Out of what and whose property exemptions are claimed.

The petition must comply with all laws for setting apart and valuation of exemptions.\textsuperscript{84}

The petition must be accompanied by a schedule containing a detailed and accurate
description of all real and personal property belonging to the person from whose estate the
exemption is to be made, so that interested persons may know exactly what is exempted and
what is not.

The petition may, if the debtor refuses to do so, be filed by the spouse, anyone on
behalf of the minor children, or anyone on behalf of any other dependents of the debtor.\textsuperscript{85}

A list of the person's creditors and their post office addresses, if known, must also be
attached and must be sworn to by the applicant or his/her agent.\textsuperscript{86}

Failure to comply with these requirements in the original petition or any amendments
will result in dismissal by the judge of the probate court.\textsuperscript{87}

The applicant applies to the judge of the probate court for an order to the surveyor of
the county to lay off any real property owned by the applicant and to make a plat. The judge

\textsuperscript{82} O.C.G.A. §44-13-1.
\textsuperscript{83} O.C.G.A. §44-13-15.
\textsuperscript{84} O.C.G.A. §44-13-4(a).
\textsuperscript{85} O.C.G.A. §44-13-2.
\textsuperscript{86} O.C.G.A. §44-13-4(b).
\textsuperscript{87} O.C.G.A. §44-13-4(c).
is required to issue such an order immediately and give it to the applicant.\textsuperscript{88}

If the applicant does not own sufficient land in the county of the application, but does have land in other counties, he/she may include such land in the application and the judge of the county of the application must cause the survey, valuation, and plat of the lands in the other counties to be done.\textsuperscript{89}

The person claiming the benefit of the exemption is obligated to act in good faith. Any willful fraud in the concealment of assets on the part of the debtor voids the judgment allowing the exemption. Such property is subject to all just debts owed at the time the fraud was committed.\textsuperscript{90}

If the debtor applying for an exemption fails to make a complete showing of all of the property, the judgment allowing the exemption is void. A creditor objecting that the schedule of property is incomplete has the right of appeal to the superior court from the judgment of the judge of the probate court,\textsuperscript{91} who is exercising a judicial function.\textsuperscript{92}

When the applications and schedules have been filed, the judge publishes notice of the time and place of the hearing not more than twice in the official county newspaper.\textsuperscript{93} While the specific form of the citation is provided in the law, there is no specific direction as to the intervals at which the publication is to be made. Based upon other publication requirements of the law, it would probably constitute compliance with the statute to publish once a week for two consecutive weeks. The time of hearing fixed by the notice is not less than 20 nor more than 30 days from the date of the order of the judge of the probate court to the surveyor.\textsuperscript{94} The judge should carefully check the published notice, because a misnomer renders a judgment void.\textsuperscript{95}

In addition, the applicant is required to give notice, in writing, of the filing of the application and the day set for the hearing to each of his/her creditors residing in the county at least five days before the hearing. Service is to be personal, or by leaving a copy at the residence or place of business of the creditor, and the fact of such notice must be verified by

\begin{footnotes}
\item[88] O.C.G.A. §44-13-4(d).
\item[89] O.C.G.A. §44-13-5.
\item[90] O.C.G.A. §44-13-6.
\item[92] Cook v. Hendricks, 146 Ga. 63 (1916).
\item[93] O.C.G.A. §44-13-7.
\item[94] Roberts v. Atlanta Cemetery Ass'n, 146 Ga. 490 (1917).
\end{footnotes}
the oath of the applicant or his/her agent. The applicant is required also to prepare the same type of notices, with envelopes addressed and stamped for nonresident creditors, and to deliver them to the judge of the probate court, who is to mail them at least 15 days before the day set for the hearing.\footnote{O.C.G.A. §44-13-8.}

The surveyor is required to return the plat to the judge of the probate court with a certificate of correctness and value at least five days before the day set for the hearing. The surveyor can be punished for contempt of court for failure to comply with the reporting requirement.\footnote{O.C.G.A. §44-13-10.}

If no objections are made at or before the time set for the hearing, the judge endorses an approval on the schedule. If the schedule includes real property, the judge must deliver a copy of the plat to the clerk of the superior court in each county in which real property is located. The clerk of the superior court must record the exempted real property in a book kept for such purpose.\footnote{O.C.G.A. §44-13-11.}

Objections by creditors of the applicant are to be made in writing, stating the grounds and must be filed at or before the time and place set for the hearing.\footnote{O.C.G.A. §44-13-12.}

When objections are made, the judge of the probate court must appoint three disinterested appraisers to examine the property about which there has been objection and to value it. Based upon their return, the judge can make changes in the schedule and plat to bring it within the constitutional limits, and then approve it, and give it to the clerk of the superior court. Either party, if dissatisfied, has a right of appeal under the same rules as provided by law in cases of appeals from the probate court.\footnote{O.C.G.A. §44-13-13.}

When property located in town is involved and exceeds the amount of the exemption and cannot be divided, the judge may pass an order that, should the property be sold under judgment or decree, a certain amount to make up the exemption must be paid to the judge to be invested by some person named by the judge in property selected by the applicant.\footnote{O.C.G.A. §44-13-14.} If the judge does not appoint a person to make the investment and turn over the funds, he/she is

\footnotesize{96 O.C.G.A. §44-13-8.  
97 O.C.G.A. §44-13-10.  
101 O.C.G.A. §44-13-14.}
liable for the funds, plus 20 percent interest.\textsuperscript{102}

When the surveyor's return shows that the applicant is the owner of more real estate than is allowed him as a homestead, it is the duty of the judge of the probate court to appoint a receiver to take charge of the excess and sell it for the benefit of creditors.\textsuperscript{103} The same rule applies to personal property.\textsuperscript{104}

The receiver advertises a sale of real estate in the official county newspaper once a week for four weeks and sells on the first Tuesday of the following month at public sale. Proceeds of the sale are delivered to the judge of the probate court for distribution to creditors.\textsuperscript{105} Sale of personalty is the same except that the notice is given by posting in three of the most public places of the county for 30 days instead of by publication.\textsuperscript{106} The judge must require the receiver to give bond.\textsuperscript{107}

The duty of the judge after approval of the exemption is to hand the entire record to the clerk of the superior court who is required to record it. The papers are office papers until every duty required by law of a public officer has been discharged. After they have been recorded by the clerk, they become the private papers of those interested in the homestead estate.\textsuperscript{108}

Every debtor, even if he/she has given a waiver of homestead, is entitled to $300.00 worth of household and kitchen furniture.\textsuperscript{109} To claim this benefit, he/she makes out a schedule of the items and their value and files it with the judge of the probate court of the county of residence. No application for such exemption or publication is required. The judge records the schedule in a book kept for that purpose.\textsuperscript{110}

\section*{13.3 Statutory Exemptions}

\textbf{In lieu of the constitutional exemption}, any debtor who is a natural person may exempt, for purposes of bankruptcy, the specific items and amounts of property listed in the

\begin{itemize}
  \item Id.
  \item O.C.G.A. §44-13-80.
  \item O.C.G.A. §44-13-81.
  \item O.C.G.A. §44-13-82.
  \item O.C.G.A. §44-13-83.
  \item O.C.G.A. §44-13-86.
  \item Paschal v. Hutchinson, 119 Ga. 243 (1903).
  \item O.C.G.A. §44-13-41.
  \item O.C.G.A. §44-13-42.
\end{itemize}
so-called statutory exemptions. A debtor may not claim the benefits of both the constitutional and the statutory exemptions but must elect which type of exemption he/she wishes to claim. The statutory exemptions may also be claimed by intestate insolvent estates if there is a living widow or child of the intestate.

The debtor, or his/her spouse or next friend if the debtor refuses, makes out a schedule of the property claimed to be exempt and files it with the judge of the probate court. No application or publication is required. The judge records the schedule. The list of items which may be exempted includes the debtor's interest in real and personal property used as a residence up to an aggregate value of $5,000.00; social security, veteran's and unemployment benefits; motor vehicles, up to a total of $1,000.00 in value; household goods, appliances, animals, crops, books and clothes up to $200.00 per item and $3,500.00 in total value; certain wrongful death and personal injury proceeds up to specified limits; and undistributed funds or property held on behalf of the debtor under certain retirement or pension plans, including individual retirement accounts subject to limitations.

The judge of the probate court in receiving and recording the schedule is performing merely a ministerial act and the validity of the exemption may be collaterally attacked. The schedule must be of particular property contained in the classes provided by the statute or it is void.

When land is to be set apart, the debtor makes application to the county surveyor, who marks off the land and files a plat with the judge of the probate court within 15 days after the application is made and the judge records it. If any creditor objects, such creditor may apply to the judge for the appointment of appraisers; after notice to the debtor, the judge may appoint three appraisers. Upon their return the judge may direct the surveyor to alter the plat so as to make it conform to law. Property set apart pursuant to this statutory provision is exempt from levy and sale except for purchase money security interests and

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111 O.C.G.A. §44-13-100.  
113 O.C.G.A. §44-13-100(c).  
115 O.C.G.A. §44-13-100(a).  
120 Id.
state, county or municipal taxes.\textsuperscript{121}

14.0 \textbf{GOLD PURCHASES REPORTS}

Every person who purchases "native gold, gold bullion, gold dust, gold nuggets or gold amalgam" within Georgia is to keep a record of the purchase in a book, showing the date of purchase, amount purchased, name of seller, and lands from which the gold was obtained, and file with the judge of the probate court in the county of his/her residence a copy of this register on the first day of January, April, July and October of each year, showing the transactions for the previous quarter.\textsuperscript{122} Each judge with whom a register has been filed makes an annual report of these transactions for the preceding year by certified copy to the state geologist by January 15 of each year.\textsuperscript{123}

15.0 \textbf{GUARDS FOR CONVICTS UNDER DEATH SENTENCE}

Upon a judgment of death made by a judge, if the trial judge is not available, the judge of the probate court of the county in which the prisoner was sentenced to death approves the number of guards determined by the sheriff who are to convey the convicted person to the appropriate state correctional institution. Such transportation is to be effected not more than 20 days nor less than two days prior to the date set for the execution.\textsuperscript{124}

16.0 \textbf{INSPECTION AND INVESTIGATION BY GRAND JURY}

There are two Code sections concerning inspection and examination by the grand jury of the office of the judge of the probate court. One requires the grand jury, at least once every three calendar years, to inspect and examine the offices and operations of the probate court.\textsuperscript{125} The grand jury may appoint a committee to make more frequent inspections.\textsuperscript{126} Any grand jury also may, upon vote of not less than eight members, investigate any county office or building, the office of any county officer, court, or court official, or the Board of

\begin{footnotesize}
122 O.C.G.A. §12-4-120.
123 O.C.G.A. §12-4-121.
124 O.C.G.A. §17-10-33.
125 O.C.G.A. §15-12-71(b)(1).
126 O.C.G.A. §15-12-71(c).
\end{footnotesize}
Education and/or the Superintendent of schools. The grand jury may prepare reports or presentments based on its investigations or inspections, which may be published pursuant to Code Section 15-12-80.

This meeting with Grand Jurors is, and should be used as, an excellent opportunity to address issues of concern to the judge of the probate court. Prepare yourself for this meeting; look at it as an opportunity, not a burden. Report to the grand jurors if you do not have sufficient space, equipment, and/or staffing to properly do your job. Remember that most grand jurors will not have a realistic idea of what probate judges and courts do. Take this opportunity to educate them; in most cases, they will be both surprised and amazed. If you handle criminal matters, have figures ready to give them showing your court’s financial contribution to the cost of government through fines, etc., reducing the burden on ad valorem taxpayers. Tell them if you are unable to fulfill your statutory duty to audit the returns of personal representatives, guardians, and conservators because of insufficient staff. Tell them that this situation leaves vulnerable adults, minor children, and heirs and beneficiaries at risk that there is wrongdoing which the court may not discover with just a cursory look at the returns filed. If you also serve as chief magistrate, give an explanation of what that court does and what you must do as judge. Remind them that you are a judge, whether or not you are an attorney, deciding important matters daily. On the other hand, do not exaggerate the work of your court. If your caseload is minimal, and you do not have to work fulltime to handle the affairs of the court, don’t make assertions which might backfire on you.

A second statute puts the burden on certain officers, including the judge of the probate court, to report under oath to the grand jury on the first day of each term of superior court, the amount of county funds received, the source and all expenditures, accompanied by proper vouchers. As to terms of superior court, circuits vary around the state, and the Code sets forth the times new terms begin in each county. This statute provides that if the officer fails to file the required report, the foreman of the grand jury must immediately notify the presiding judge, who issues an order requiring that the report be made or the officer will be

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127 O.C.G.A. §15-12-71(b)(2).
129 O.C.G.A. §15-6-3.
held in contempt. This statute is not limited to fines and forfeitures. There is little reason for financial supervision by the grand jury if there is an annual audit by an independent certified public accounting firm of all county financial matters, including all probate court matters.

Most counties require reports from county departments, including the probate court, together with funds collected, to be submitted to the finance department or county treasurer at least monthly. Even when not required, it is good policy for the judge of the probate court to make periodic reports to these officers or the county commissioners. Periodic reports will keep the appropriate officers advised as to the volume of work in the office and also will facilitate future requests as to personnel and equipment.

17.0 INVOLUNTARY STERILIZATION PROCEEDINGS

This proceeding is authorized if a person, because of developmental disability, brain damage, or both, is irreversibly and incurably mentally incompetent to the degree that such person, with or without economic aid (charitable or otherwise), could not provide care and support for any children procreated by that person in such a way that such children could reasonably be expected to survive to the age of 18 years without sustaining serious mental or physical harm, when the required finding that the condition of such person is irreversible and incurable has been made as explained below.

"Sterilization procedure" means any procedure which is designed or intended to prevent conception and which is not designed to unsex the patient by removing the ovaries or testicles. An involuntary sterilization procedure may be performed by a physician only after satisfaction of all of the following conditions precedent.

The person alleged to be subject to this type of proceeding has the right to counsel at all stages of the proceedings.

A petition may be filed by one or more of the parents, a legal guardian, or next of kin of the person alleged to be subject to this type of proceeding, stating the reasons why such

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130 O.C.G.A. §36-1-7.
131 O.C.G.A. §31-20-3(b).
132 O.C.G.A. §31-20-1(3).
133 O.C.G.A. §31-20-3(c).
134 O.C.G.A. §31-20-3(c)(7).
person is alleged to be an appropriate subject. The written consent of the parent or parents not filing the petition, if such parents are living, can be found after reasonable efforts, and are mentally competent must be included. If no such parent or parents survive or can be found after reasonable efforts, or if such parent or parents are mentally incompetent, the petition must contain the written consent of a guardian-ad-litem appointed by the judge of the probate court who must make an investigation and report to the court before the hearing. The guardian-ad-litem must be an attorney. The written consent of a parent is not required if that parent has not provided any support or maintenance to the person within six months and does not reside within the same household as the subject.  

The judge of the probate court appoints an examining team composed of two members: a psychologist or psychiatrist qualified in the area of developmental disabilities and brain damage, and a physician. This team may not include the physician who proposes to perform the sterilization procedure. The team must make an investigation and file a consolidated report to the court before the hearing. The report states that they have examined the subject, states whether or not they find such person to be subject to this type of proceeding and states whether, in their opinion, the condition of such person is irreversible and incurable. The report must include reasons and factual information. If the examining team determines that such person is subject to this type of proceeding, then the team also includes in its report any less permanent methods of preventing conception and reports on the feasibility of each method for that person. The subject person, the applicant, the parents of the person, any guardian-ad-litem, and the attorney representing the person must receive a copy of the report no later than five days prior to the hearing. Upon a timely request by any party, each author of the report is subject to cross-examination either in court or by deposition.

Prior to the hearing, evidence must be presented to the court that a sterilization procedure has been approved for the subject person by a committee of the medical staff of the accredited hospital in which the operation is to be performed. The committee must be one established and maintained in accordance with the standards promulgated by the Joint

135 O.C.G.A. §31-20-3(c)(1).
136 O.C.G.A. §31-20-3(c)(2).
Commission on the Accreditation of Healthcare Organizations. The approval must be by a majority vote of a membership of not less than three members of the hospital staff, not including the physician proposing to perform the sterilization procedure. The approval of the committee must be based upon a finding that the condition of the subject is irreversible and incurable in the opinion of the majority of the committee. No member of this committee may serve on the examining team.

If the person alleged to be subject to this type of proceeding requests that the hearing be closed to the public, the judge must close the hearing to the public unless an overriding or compelling reason can be shown as to why the hearing should not be closed. The ruling by the judge whether to open or close the hearing must be in writing. Notice of the date, time, and location of the hearing must be provided to the person alleged to be subject to this type of proceeding and the attorney for that person at least ten days prior to the hearing.

After the hearing, if the judge finds by clear and convincing evidence that the person is subject to this type of proceeding and that the condition of the person is irreversible and incurable, the judge enters an order and judgment authorizing the physician to perform the sterilization procedure. The procedure should not be performed until the 30-day appeal period has expired.

An appeal may be taken by the applicant or person alleged to be subject to this type of proceeding or by any other interested party. Except as to probate courts with expanded jurisdiction in counties over 96,000 in population, the appeal is to the superior court upon a trial de novo, and either party may demand a jury. The same rules apply concerning closing the hearing to the public. The cost of any appeal is taxed as in other civil cases. The pendency of an appeal stays the proceedings in the probate court until the appeal is finally determined.

After a judgment of the court granting the petition has become final, a sterilization procedure may be performed in an accredited hospital by a duly licensed physician upon the

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137 www.jointcommission.org.
138 O.C.G.A. §31-20-3(c)(3).
139 O.C.G.A. §31-20-3(c)(4).
140 O.C.G.A. §31-20-3(c)(5).
141 O.C.G.A. §15-9-120(2).
142 O.C.G.A. §31-20-3(c)(6).
The statute summarized above does not establish jurisdiction or venue clearly. Venue may be established in the county of residence of the subject person by relying on Article VI, Section II, Paragraph VI of the Georgia Constitution. Jurisdiction in the probate court is implied by the requirement that the probate court appoint the examining team and make a finding on the petition.

The statute does not contain any criteria for determining that the psychologist or psychiatrist on the examining team is qualified in the area of developmental disability and brain damage. The statute does not specify any particular period of training or experience.

The statute does not require the petition or order to state the specific type of sterilization procedure to be used; however, it implies that the least permanent but appropriate method which will prevent conception should be used.144

Records of sterilization proceedings should be treated as confidential as discussed in Chapter 15.

It is not required that this Chapter be complied with where medical or surgical treatment “for sound therapeutic purposes” is required for a patient and where such treatment, at the same time, may result in nullification or destruction of reproductive functions.145

18.0 LIVESTOCK BRANDS

Any person owning any livestock and desiring to register a mark, brand, or tattoo must apply to the Commissioner of Agriculture for a certificate of mark, brand, or tattoo registration.146 It is the duty of the commissioner to transmit a copy of the certificate to the judge of the probate court of the county of residence of the person to whom the certificate is issued, for recording in a book kept for that purpose.147
19.0 OFFICIAL NEWSPAPER

Any selection or change in the official organ of any county must be made upon the concurrent action of the judge of the probate court, the sheriff, and the clerk of the superior court of the county or a majority of these officers. No change in the official legal organ will be effective without the publication for four weeks of notice of the decision to make a change in the newspaper in which legal advertisements have previously been published. All changes in the official legal organ must be made effective on January 1 unless a change has to be made where there is no other qualified newspaper.\textsuperscript{148}

No newspaper published in this state may be declared as the official organ of any county for the publication of sheriff’s sales, citations of probate court judges, or any other advertising commonly known as official or legal advertising unless the newspaper meets and maintains the following qualifications:

“Newspaper” in this context means a printed product of multiple pages containing not greater than 75 percent advertising content in no more than one-half of its issues during the previous 12 months, excluding separate advertising supplements.

The newspaper must be published within the county and must have been published continuously at least weekly for a period of two years or be the direct successor of such a newspaper. Failure to publish for not more than two weeks in any calendar year does not disqualify a newspaper otherwise qualified.

For a period of two years prior to designation and thereafter, the newspaper must have and maintain at least 75 percent paid circulation as established by an independent audit. There are detailed rules as to what counts toward paid circulation.

Based on the published results of the 1990 United States decennial census or any future such census, the newspaper must have and maintain at least the following paid circulation within the county:

- 500 copies per issue in counties having a population of less than 20,000;
- 750 copies per issue in counties having a population of at least 20,000 but less than 100,000; or
- 1500 copies per issue in counties having a population of 100,000 or greater.\textsuperscript{149}

\textsuperscript{148} O.C.G.A. §9-13-142(c).
\textsuperscript{149} O.C.G.A. §9-13-142(a).
In counties where no newspaper meets the qualifications set forth above, the official organ may be designated by the judge of the probate court, the sheriff, and the clerk of the superior court, a majority of these officers governing, from among newspapers otherwise qualified to be a legal organ that meet the minimum circulation figures stated above which apply to the county, or if there is no such newspaper, then the newspaper having the greatest general paid circulation in the county.\(^{150}\)

Notwithstanding the above requirements, an official organ of any county meeting the qualifications under the statute in force at the time of its appointment and which was appointed prior to July 1, 1999 may remain the official organ of that county until a majority of the judge of the probate court, the sheriff, and the clerk of the superior court determine to appoint a new official organ for the county.\(^{151}\) The judge of the probate court must supply the Secretary of State in December of each year with the name and mailing address of the current official organ of the county and must notify the Secretary of State any time a change is made in the official organ.\(^{152}\)

### 20.0 PRESERVING HISTORICAL DATA

When two successive grand juries of the county have so recommended, the judge of the probate court becomes the custodian of historical matter in the county.\(^{153}\) Each judge should determine whether two successive grand juries have made these provisions effective in the county.

The county commissioners are required to furnish a suitable filing case or other container to be placed in the office of the judge of the probate court for the storage of historical matter.\(^{154}\) The judge is required to receive from any responsible citizen any data of an historical nature and file such data for safe preservation and historical reference. The matter must be of general interest and not of a personal nature and may include:

- Records, proceedings, or minutes of any religious body or organization.
- School records not otherwise preserved.

\(^{150}\) O.C.G.A. §9-13-142(b).
\(^{151}\) O.C.G.A. §9-13-142(d).
\(^{152}\) O.C.G.A. §9-13-142(e).
\(^{153}\) O.C.G.A. §36-16-5.
\(^{154}\) O.C.G.A. §36-16-1.
Records of civic, patriotic, or fraternal organizations.
Records of purely community affairs when of such nature as to be of general interest and not otherwise recorded by court procedure.\textsuperscript{155}

The judge and the county board of education are the sole judges of whether documents are of historical value.\textsuperscript{156} The judge is required to place in the historical container and properly index all documents in his/her office relating to records of Confederate soldiers and their widows, as well as records of soldiers and their surviving spouses of all other wars of our nation.\textsuperscript{157}

The judge is required to keep a suitable record and index of all matters placed in the historical container, with notations as to the nature of the matter on file, the name of the person filing, and the date of filing.\textsuperscript{158}

The judge is entitled to a fee of 25\c for each piece of historical matter or document filed. The county historian may submit documents without paying a fee.\textsuperscript{159}

\section*{21.0 \textsc{Removing Obstructions From Private Ways}}

If the owner of land over which a private way passes, or any other person, obstructs, closes, or renders it unfit for use, anyone injured by such obstructions or interference may file a petition to the judge of the probate court of the county where the private way has been in use to remove the obstructions.\textsuperscript{160}

Upon the filing of such a petition, the judge issues a rule nisi directed to the party or parties complained against requiring him/her/them to show cause why such obstructions should not be removed, setting a specific date and time for the hearing of the rule nisi. The rule nisi must be served by the sheriff or lawful deputy at least three days before the date set for the hearing.

At the time set, the judge hears evidence as to the obstructions or interference.\textsuperscript{161} The petitioner is required to show the following to make out a right to relief:

\begin{itemize}
  \item \textsuperscript{155} O.C.G.A. §36-16-2.
  \item \textsuperscript{156} O.C.G.A. §36-16-3.
  \item \textsuperscript{157} Id.
  \item \textsuperscript{158} O.C.G.A. §36-16-4.
  \item \textsuperscript{159} Id.
  \item \textsuperscript{160} O.C.G.A. §44-9-59.
  \item \textsuperscript{161} Id.
\end{itemize}
1. That the private way has been in continuous, uninterrupted use for seven years or more;\(^\text{162}\)
2. That no steps have been previously taken to prevent enjoyment of the same;\(^\text{163}\)
3. That the way is not more than 20 feet wide;\(^\text{164}\)
4. That the way has been kept open and in repair by the original person and successors in title;\(^\text{165}\) and
5. That the way claimed is the same as originally established or appropriated.\(^\text{166}\)

However, a minor change to the course of the way by or with the permission of the owner of the land through which the way passes will not void the easement nor begin a new period of holding.\(^\text{167}\)

The right of private way over another's land may arise from an express grant, from prescription by seven years' uninterrupted use through improved lands, by 20 years' use through wild lands, or by other methods not relevant to this type of probate court proceeding.\(^\text{168}\) A private way cannot be acquired by prescription where it is used with the owner's consent until an adverse claim has been made and actual notice has been given to the owner or the party in possession. Conversion of permissive use into adverse use, so as to ripen into a prescriptive easement, must begin with notice to the true owner that the use is being made under a claim of right and not due to the owner's permission.\(^\text{169}\) In a case in which the defendant argued that the land was wild land and that the applicable period of use was 20 years, it was held that only the seven-year period was applicable since the land did not remain in a state of nature.\(^\text{170}\)

If the right is shown, the judge of the probate court grants an order directing the removal of the obstructions. Upon failure of the respondent to remove the obstructions within 48 hours, the judge issues a warrant to the sheriff directing immediate removal.\(^\text{171}\) If either party is dissatisfied with the order of the probate court, he/she may appeal to the

\(^{162}\) O.C.G.A. §44-9-54.
\(^{163}\) Id.
\(^{166}\) Rogers v. Wilson, 171 Ga. 802 (1931).
\(^{167}\) Hunt v. Parker, above.
\(^{168}\) O.C.G.A. §44-9-1.
\(^{171}\) O.C.G.A. §44-9-59.
superior court as a matter of right except as otherwise provided in Article 6 of Chapter 9 of Title 15.\textsuperscript{172}

One particular difficulty arises in cases of this kind. If the obstruction is removed between the time of the service of the rule nisi and the date set for the hearing, there seems to be no issue to be submitted to the judge of the probate court, who cannot order the removal of the obstructions which do not exist at the time of the hearing. There is the possibility that after the proceeding is dismissed the obstruction may be replaced, and such a situation could continue to recur. This definitely presents a situation for the intervention of a court of equity which may enjoin such replacement.\textsuperscript{173}

### 22.0 REGISTERING JUNK DEALERS

Junk dealers are required to register with the judge of the probate court of the county in which they intend to engage in business. The judge is to enter the dealer's name in a book in the court known as the junk dealer's book.\textsuperscript{174} For this purpose, "junk" means any used article of commerce which is composed principally of metal and is commonly bought for the purpose of resale, refabrication or both.\textsuperscript{175} The annual registration fee is $1.00, for which the judge must issue a proper receipt.\textsuperscript{176}

### 23.0 SALES OF PROPERTY UNDER EXECUTION

When personal property has been levied upon and neither the claimant to the property nor the plaintiff in execution gives bond for the personal property, the claimant may apply to the judge of the probate court for a sale of the property. When the order has been granted, the levying officer makes the sale and holds the proceeds subject to the final disposition of the claim case.\textsuperscript{177}

Whenever an execution issued from a probate court is levied upon personal property and a claim to the property or an affidavit of illegality is interposed, it is the duty of the

\textsuperscript{172} Id. This exception means that an appeal from an Article 6 Probate Court will be to the Court of Appeals or the Supreme Court.
\textsuperscript{174} O.C.G.A. §43-22-2.
\textsuperscript{175} O.C.G.A. §43-22-1(1).
\textsuperscript{176} O.C.G.A. §43-22-3.
\textsuperscript{177} O.C.G.A. §9-13-97.
sheriff or other levying officer to return the same, together with the execution and all the other papers, to the next term of the superior court of the county from which the execution was issued. If the levy has been made upon realty, the execution, with the claim or illegality papers, must be returned by the levying officer to the next term of the superior court of the county where the land lies and the issue must be tried as is provided for the trial of claim and illegality cases.178

24.0 SALES OF REAL PROPERTY TO POLITICAL SUBDIVISION BY LOCAL OFFICER OR EMPLOYEE

Code Section 16-10-6(a) provides criminal penalties for certain sales of real or personal property by an officer or employee of a political subdivision to the employing subdivision. These penalties do not apply to sales of real property in which a disclosure has been made to the judge of the probate court of the county in which the purchasing political subdivision is included, provided that if the sale is made by the judge of the probate court, a copy of such disclosure must also be filed with any superior court judge of the superior court of the county. The disclosure must be filed at least 15 days prior to the date the contract or agreement for such sale will become final and binding on the parties thereto and must show that an employee, appointed officer, or elected officer of an employing political subdivision or agency thereof has a personal interest in such sale and give the name of such person, his/her position in the political subdivision or agency, the purchase price, and location of the property.179

25.0 UNCLAIMED PROPERTY REPORT

The Disposition of Unclaimed Property Act180 generally requires businesses and others to review their records each year to determine whether they are in the possession of any funds, securities or other property that have been unclaimed for five years181 or longer.

179 O.C.G.A. §16-10-6(b).
180 O.C.G.A. §§44-12-190 through 44-12-235.
181 O.C.G.A. §44-12-193.
after they became payable and to make an annual report of their findings. Funds held by the judge of the probate court as custodian are subject to the Act. Funds held by the judge of the probate court for a minor do not become payable until age 18, and funds held for an incapacitated adult do not become payable until restoration to competency or death. As to a missing heir, it is not clear whether the judge should assume the missing heir is sui juris. If this assumption is made, the funds would have been payable to the missing heir upon original deposit with the court. The Act provides that holders who willfully fail to comply with the law may be required to pay $100.00 each day the report is withheld but not more than $5,000.00. In addition a penalty equal to 25 percent of the amount to be reported may be imposed on all property not reported or delivered as required.

Reports and remittance (consisting of completed forms UP-1G and UP-2G) are due on November 1 of each year, and must include all property that has gone unclaimed for five or more years as of the preceding June 30. Questions regarding reporting obligations may be directed to:

Georgia Department of Revenue
Unclaimed Property Program
4245 International Parkway, Suite A
Hapeville, Georgia 30354-3918
T: (404) 968-0490
F: (404) 968-0772
E: ucpmail@dor.ga.us

26.0 WRITS OF HABEAS CORPUS

Judges of the probate courts may issue writs of habeas corpus in certain circumstances; the jurisdiction to do so is concurrent with the superior courts. However, the superior courts have exclusive jurisdiction in cases of capital felonies, when a person is held for extradition under warrant of the Governor, or when a person’s liberty is being restrained by virtue of a sentence imposed by a court of record of this state. Whenever there is concurrent jurisdiction, the court first taking jurisdiction will retain it unless good cause is

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182 O.C.G.A. §44-12-214.
183 See Chapters 10 and 11.
184 O.C.G.A. §44-12-192(14).
185 O.C.G.A. §44-12-227.
186 Forms may be completed online at https://etax.dor.ga.gov/ptd/adm/forms/ucp.aspx.
187 O.C.G.A. §44-12-193.
188 O.C.G.A. §44-12-214(d).
shown for equitable interference.\textsuperscript{189}

Habeas corpus is a writ to examine the legality of a person's detention. The only question for determination is the legality or illegality of the detention not the guilt or innocence of the accused.\textsuperscript{190} Furthermore, habeas corpus is not the proper remedy for attacking the physical conditions of confinement.\textsuperscript{191} A writ of habeas corpus may be sought by:

1. Any person restrained of liberty under any pretext whatsoever, except under sentence of a state court of record;
2. Any person alleging that another person in whom for any cause he/she is interested is kept illegally from the custody of the applicant; and
3. Any person restrained of his liberty as a result of a sentence imposed by any state court of record.\textsuperscript{192}

All applications for the writ must be in writing, verified by the applicant, and signed by the applicant or his/her attorney or agent or some other person in his/her behalf. The application is to be filed with the judge of the probate court of the county in which the alleged illegal detention exists and must state:

1. The name or description of the person whose liberty is restrained.
2. The name of the person restraining, the mode of restraint, and the place of detention, as nearly as practicable.
3. The cause or pretense of the restraint, and if the restraint is under pretext of legal process, a copy of the process must be attached if possible.
4. A distinct averment of the illegality claimed or other reason why the writ of habeas corpus is sought.
5. A prayer for issuance of the writ of habeas corpus.\textsuperscript{193}

If the application shows on its face that the restraint complained of is legal, the court may dismiss the petition and writ \textit{instanter}.\textsuperscript{194} However, the better practice is for the court to inquire into the restraint when the person is before the court and then enter an appropriate

\begin{itemize}
\item \textsuperscript{189} Breeden v. Breeden, 202 Ga. 740 (1947).
\item \textsuperscript{190} Perdue v. Smith, 228 Ga. 770 (1972).
\item \textsuperscript{191} Brown v. Caldwell, 231 Ga. 795 (1974).
\item \textsuperscript{192} O.C.G.A. §§9-14-1, 9-14-41.
\item \textsuperscript{193} O.C.G.A. §9-14-3.
\item \textsuperscript{194} Reid v. Perkerson, 207 Ga. 27 (1950).
\end{itemize}
Technical rules of pleading are not applicable in habeas corpus proceedings.

If upon examination of the petition, it appears to the judge of the probate court that the restraint of liberty is illegal or the custody is improper, the judge issues the writ, requiring the person so restraining or having custody to bring the person before the judge at a time and place specified in the writ for the purpose of an inquiry into the cause of the detention.

The writ should follow substantially the form set out in the Code. The writ is to be made returnable within 20 days of the presentation of the application in civil cases and within eight days of the presentation of the application in criminal cases. The writ may be served by any officer authorized to make a return of process or by any other citizen who can make an affidavit as to service. While personal service is contemplated, if this is not possible, a copy may be left at the house, jail or other place of detention. When there is filed along with the application an affidavit that the applicant has reason to apprehend that the person detained may be removed beyond the limits of the county or may be concealed, the judge of the probate court may issue a warrant for the arrest of the detained person, directing that such person be brought before the court for such disposition as the court may direct.

All responses to writs must be under oath, and if detention or custody is admitted, the detained person must be produced in court, except when prevented by providential causes or when prohibited by law. If detention is justified under legal process, the process must be produced at the hearing. If custody is denied, the response must show the date, if applicable, on which the respondent last had custody and to whom it was transferred.

If the response denies any material facts stated in the petition or alleges other facts upon which issue is taken, the judge may in a summary manner hear testimony as to all issues raised by the response. The judge can require the attendance of witnesses and the

197 O.C.G.A. §9-14-5.
198 O.C.G.A. §9-14-6.
199 O.C.G.A. §9-14-7.
200 O.C.G.A. §9-14-8.
201 Id.
203 O.C.G.A. §9-14-11.
205 O.C.G.A. §9-14-12.
No person may be discharged upon the hearing on a writ of habeas corpus in the following cases:

When there is imprisonment under lawful process of a court of competent jurisdiction, except where bail is allowed and proper bail is tendered.

When there is substantial compliance with legal requirements, but there is an irregularity in the warrant or commitment.

When there is no bond to prosecute.

When imprisonment is under a bench warrant regular on its face.

When there is a misnomer in the warrant or commitment, if the court is satisfied that the person in custody is the party charged with the offense.

When the party is in custody for contempt of court and the court has not exceeded its jurisdiction in the length of the sentence imposed.

In any other case in which the detention appears to be authorized by law.

In criminal cases where there is probable cause for the detention but there is a defect in the proceedings or the offense was committed in another state, there must be no discharge until the proper authorities have a reasonable time to take appropriate corrective action. In all criminal cases notice is to be given to the district attorney or the prosecutor.

When the writ is issued on account of the detention of a spouse or child, the judge of the probate court, on hearing all the facts, may exercise discretion as to who should have the custody of the spouse or child, and the judge has the authority to award the custody of a child to a third person. The writ in such a situation is effective as to a person within the jurisdiction, and such person can be compelled to produce the child even though the child is not within the jurisdiction. In such a proceeding the judge must look to the welfare of the child but has very broad discretion within legal limits. The welfare of the child is the

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206 O.C.G.A. §9-14-14.
207 O.C.G.A. §9-14-16.
208 O.C.G.A. §§9-14-17, 9-14-18.
paramount consideration in a proceeding for custody.\textsuperscript{213} If the contest in a habeas corpus proceeding is between a parent and a third party over the custody of a minor child, it must first be determined whether the parent has lost parental control.\textsuperscript{214} The wishes of a minor over the age of 14 years, while entitled to consideration, are not controlling on the question of custody. The best interest of the child is the controlling factor.\textsuperscript{215}

The juvenile court has exclusive jurisdiction over any proceeding which involves the termination of the legal parent-child relationship, except for termination through adoption proceedings, in which case the superior court has exclusive jurisdiction to terminate the legal parent-child relationship and/or the rights of any biological father who is not the legal father of a minor.\textsuperscript{216} The juvenile court has concurrent jurisdiction with the superior court to hear and determine cases involving custody controversies, except in those cases where the law places exclusive jurisdiction in the superior court, if the issue of custody and support is transferred to the juvenile court by proper order of the superior court.\textsuperscript{217}

When a habeas corpus petition is heard by the judge of the probate court, all relevant pleadings and orders are to be recorded, and the court fees are the same as the fees of clerks of the superior court in similar cases.\textsuperscript{218} Costs may be awarded against either party and an execution for unpaid costs may be issued.\textsuperscript{219}

Appeals of habeas corpus proceedings is the same as in all other matters appealed from the probate courts.\textsuperscript{220} However, it would appear that an appeal of a habeas corpus case would not fall under the provisions of Article 6 of Chapter 9 of Title 15, since there is no right to a trial by jury in a habeas corpus case,\textsuperscript{221} and a review of the holding of a probate court in a habeas corpus case must be sought by certiorari, rather than appeal.\textsuperscript{222}

\textsuperscript{213} Kilgore v. Tiller, 194 Ga. 527 (1942).
\textsuperscript{214} Morrison v. Morrison, 212 Ga. 48 (1955).
\textsuperscript{216} O.C.G.A. §15-11-5(a)(2)(C).
\textsuperscript{217} O.C.G.A. §15-11-5(c).
\textsuperscript{218} O.C.G.A. §9-14-20.
\textsuperscript{219} O.C.G.A. §9-14-21.
\textsuperscript{220} O.C.G.A. §9-14-22(a).
\textsuperscript{221} Beavers v. Williams, 199 Ga. 113 (1945)
\textsuperscript{222} Perry v. McLendon, 62 Ga. 598 (1879).
26. CLERKS OF THE PROBATE COURTS

As was discussed in Chapter 1, judges of the probate courts are, by virtue of their offices, clerks of their own courts. However, they may appoint one or more clerks, for whose conduct they are responsible, who hold their offices at the pleasure of the judge. Judges of the probate courts also have the authority to appoint one of their clerks as chief clerk unless otherwise provided by local law. The manner of appointment and authority of chief clerks, clerks, and deputy clerks is covered in Chapter 1.223

26.1 Duties of Clerks

It is the duty of the clerks of the probate court or the judges of the probate courts acting as such to:

1. Issue all citations required by law, and administer all oaths relating to the business of the court;
2. Grant temporary letters of administration;
3. Grant marriage licenses;
4. Issue all writs of fieri facias for costs on all judgments of the judge of the probate court, or other process necessary to enforce them;
5. Issue subpoenas for witnesses, and all similar process in connection with a trial;
6. Issue any paper or process by order of the judge of the probate court and bearing teste in her name;
7. Keep fair and regular minutes of each session of the court entered in a suitable book, and perform such other services as the judge of the probate court may require; provided, however, that any minutes, dockets, or other records required to be kept by any statute may be combined into one or more suitable

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223 See Chapter 1, Section 2.7.
books, but in any case they must be indexed, permanent, economical, and accessible to the public;

8. Keep in their offices a suitable book for each of the following purposes:
   a. Record of wills;
   b. Record of all letters of administration and guardianship;
   c. Record of all bonds given by administrators and guardians;
   d. Record of all appraisements, inventories, and schedules;
   e. Record of all accounts of sales;
   f. Record of all current accounts authorized to be made to the judge of the probate court, together with the vouchers accompanying the same;
   g. Record of all marriage licenses and the returns thereon;
   h. Record of all official bonds required to be recorded in the judge of the probate court's office; and
   i. Docket in which to enter all applications and other proceedings, in the order they are made, which must be called in like order at each session;

9. Procure and preserve for public inspection a complete file of all newspaper issues in which their advertisements actually appear;\(^{224}\)

10. Keep their books and papers arranged, filed, labeled, and indexed, as clerks are required to do;

11. Give transcripts as clerks are required to do, and when the judge of the probate court and the clerk are the same person, to so state in the certificates;

12. Keep and maintain facilities for the filing of wills of persons still in life; and

13. Perform any other duty required of them by law or which is indispensable to those required.\(^{225}\)

In addition to the above records required to be maintained by clerks, the judge of the probate court is required by separate statutes to maintain the following records:

1. Minutes of the proceedings in the court, including applications refused as well

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\(^{224}\) An agreement may be reached among the probate judge and the sheriff and clerk of superior, who are also required to maintain copies, such that only one copy will be maintained for the benefit of all three. O.C.G.A. §15-9-43.

\(^{225}\) O.C.G.A. §15-9-37.
as those granted.\textsuperscript{226}

2. A docket of all fiduciaries liable to file returns, with regular entries of their returns, and of those who have failed to make returns as required by law and by order of the court.\textsuperscript{227}

3. A docket of all applications and cases pending in her court which are regularly continued from term to term until final disposition thereof.\textsuperscript{228}

Another statute requires that the court's proceedings must always be kept on file, and when a final order is entered, they must be recorded in a book kept for that purpose.\textsuperscript{229}

\section*{26.2 Dockets and Minutes (Recording Proceedings)}

There is often confusion over what documents are to be recorded as part of the record and what documents need not be recorded. Taken together and applied, paragraph 7. and the last three requirement from the preceding Section mean that every official act or event which is done or occurs in the court is to be documented and memorialized.

\begin{quote}
"The dockets, minutes, and records of a court of record must be kept so as to represent the true state if its business, and from (such records) the judge (or any other person) must be able to ascertain what cases are pending and what are not pending … to speak the truth in respect to the pendency or the disposition of any case."\textsuperscript{230}
\end{quote}

\textit{"Minutes"} means a memorandum of what takes place in court, made by the authority of the court; a book kept by the clerk of court for entering memoranda of its proceedings.\textsuperscript{231}

\textit{"Record"} means a written memorial of all the acts and proceedings in a court of record; the official and authentic history of a cause, consisting of entries of each successive step in the proceedings, chronicling the various acts of the parties and the court, couched in the formal language established by usage, terminating with the judgment rendered in the

\begin{thebibliography}{99}
\bibitem{226} O.C.G.A. §15-9-41.
\bibitem{227} O.C.G.A. §15-9-42.
\bibitem{228} O.C.G.A. §15-9-39.
\bibitem{229} O.C.G.A. §15-9-40.
\bibitem{230} Smith v. Merchants’ & Farmers’ Bank, 22 Ga. App. 505 (1918).
\end{thebibliography}
cause, and intended to remain as a perpetual and unimpeachable memorial of the proceedings and judgment.\textsuperscript{232}

“Docket” means an abstract or brief entry, or the book containing such entries; a book containing an entry in brief of all the important acts done in court in the conduct of each case, from its inception to its conclusion.\textsuperscript{233}

As noted also in paragraph 7. in Section 26.1, dockets, minutes, and other records may be combined in one or more suitable books. Therefore, it is no longer necessary to have separate books for recording wills, Letters, bonds, etc. In fact, research of the records is much simpler when all pleadings, motions, orders, Letters, wills, etc. involved in a particular case are recorded together, chronologically and contiguous, in a single Minute book.

Minutes, records, and files of matters which are confidential, as discussed below, obviously must be kept separate from those which are open to public inspection.

Every petition, application, or other pleading which first addresses the court with respect to a matter must be recorded, whether ultimately granted, denied, or dismissed. Every additional pleading, motion, response, objection and/or caveat filed with the court with regard to that case or matter must also be recorded. Correspondence not requesting some disposition by the court, file notes, scheduling notes, and other memoranda which are not intended to be a part of the official record of the proceeding need (should) not be recorded.

The record of a proceeding should be so completely memorialized in the minutes that someone having no familiarity with the particular case could reconstruct all of the official actions in the case, from inception to disposition, without reference to the file or other source of information. A brief history of the actions involved in the case should be summarized in the dockets.

The best way to completely memorialize a proceeding from start to finish is to record every part of the file which contains any part of the legal process by which a matter is taken from inception to disposition. For example, a will probate involves, at a minimum, (1) the filing of a verified petition, (2) the issuance of the order for service and notice and/or the filing of acknowledgments of service, (3) the notice and evidence of service, (4) a final order granting or denying the petition, (5) qualification of the executor, (6) issuance of Letters, and

\textsuperscript{232} Id.
\textsuperscript{233} Id.
(7) the purported will (either admitted to probate or denied). If all of that is recorded in the Minutes, the case could be fully reconstructed without reference to any other source of information about the case. If the original file were completely destroyed, everything necessary to prove that the case was filed, processed, and disposed of could be recreated by copies from the Minutes. Obviously, if the matter had been contested, or if there were amendments, motions or other pleadings filed, those would also be a part of the record.

The dismissal of a case filed with the court is an official proceeding and must also be recorded. It could become just as necessary to prove that the court received and dismissed a case as it is to prove a case which was granted.

26.3 English as the Official Language for Records

English has been designated as the official language of the State of Georgia, and must be used for public records, public meetings and official acts. Documents filed or recorded with the clerk of a county must be in English or an English translation must be simultaneously filed. A person’s rights must not be denied as a result of inability to communicate in English, and government publications and documents may be printed in other languages as necessary.234

26.4 Costs of Court and Additional Charges

The main statute setting forth and itemizing the various filing fees and other costs in the probate courts is O.C.G.A. §15-9-60. Those costs are modified from time to time, and reference to the most current version of the Code Section should always be made. A schedule of the costs from that Code Section is also available on the Council of Probate Court Judges website.235

There are various other statutes which require the probate courts to collect additional fees or costs. These include but are not necessarily limited to:

Children’s Trust Fund – a $15.00 additional fee must be collected with each marriage license issued by the probate court.236

234 O.C.G.A. §50-3-100.
236 O.C.G.A. §15-9-60.1.
**Indigent Defense Fund** – a $15.00 additional fee must be collected with each “civil action” filed in the probate court. For these purposes only, “civil action” means:

1. With regard to decedents’ estates, the following proceedings: petition for letters of administration; petition to probate will in solemn form; petition for an order declaring no administration necessary; petition to probate will in solemn form and for letters of administration with will annexed; and petition for year’s support. (The fee is collected with each proceeding, even if involving the same decedent.)

2. With regard to a minor guardianship (conservatorship) matter, the proceeding by which the jurisdiction of the probate court is first invoked (i.e., the fee is charged only once in each case involving a particular minor).

3. With regard to an adult guardianship (conservatorship) matter, the proceeding by which the jurisdiction of the probate court is first invoked (i.e., the fee is charged only once in each case involving a particular proposed ward).

4. An application for writ of habeas corpus.

**Probate Judges’ Retirement Fund** – 25% of the marriage license application fee for every application filed.\(^\textit{237}\)

**Law Library Fund** - if applicable, in such amount and applied to such proceedings as set by local order of the superior court of the county.\(^\textit{238}\)

**Alternative Dispute Resolution Fund** - if applicable, in such amount and applied to such proceedings as set by local order of the superior court of the county.\(^\textit{239}\)

A monthly report, together with the remittance of the Children’s Trust Fund and Indigent Defense Fund fees collected during the preceding month, must be filed by the judge of the probate court with the Georgia Superior Court Clerks’ Cooperative Authority (“SCCCA”).\(^\textit{240}\) Additionally, the judge of the probate court must report to the SCCCA the

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\(^{237}\) O.C.G.A. §47-11-50.  
\(^{238}\) See Section 9.0 above.  
\(^{239}\) See Chapter 2, Section 9.  
\(^{240}\) O.C.G.A. §15-21A-3.
amounts collected for the Probate Judges’ Retirement Fund, the Law Library Fee (if applicable), and the Alternative Dispute Resolution Fund (if applicable).

27. RECORDS SYSTEMS

27.1 Establishing and Maintaining Records

Proper facilities and equipment for the orderly arrangement and protection of records must be maintained. It is the responsibility of the judge of the probate court to provide every possible protection for the records entrusted to the court. What may be an adequate system for one county might be completely inadequate for some other county.

27.2 Computer, Photographic and Microfilm Equipment

A clerk of the probate court or a judge of the probate court acting as such may elect to store for computer retrieval any or all records, dockets, indices, or files. A clerk or judge may also combine or consolidate any books, dockets, files, or indices required by any law. However, any automated or computerized recordkeeping method or system must provide for the systematic and safe preservation and retrieval of all books, dockets, records or indices. If the clerk or judge elects to use a computer storage and retrieval system, the same data elements used in a manual system must be used, and the same integrity and security maintained.241

Permissive authority is given to the judge of the probate court for the installation and use of photostatic or other photographic equipment for the purpose of recording any documents authorized or required to be recorded, or for recording and preserving the minutes of the court. Such method is for the same purpose and in lieu of typing or handwriting such documents, records, or minutes.242 Provision is to be made for the orderly filing and storing of the pictures or negatives.243 Records made by means of a photostatic or photographic process are valid and effective for all purposes. Copies of such records are to be received as are copies of typed or written records, except that rules of the appellate courts must be complied with in the preparation of transcripts of records.244

242 O.C.G.A. §15-9-44.
244 O.C.G.A. §15-9-46.
An excellent system of records can be developed by using a microfilm camera in the office to photograph all documents to be recorded. The film is then developed by a company engaged in this type of work. A security copy of the film is sent to the State Department of Archives and History, and quality is checked periodically. Copies of the microfilm and, usually, copies of the images on archival quality paper are sent back to the court and kept in properly-indexed books.

27.3 Storage of Original Documents

Storage of original documents should be a matter of concern for the judge of the probate court. After copying and indexing, originals are to be preserved, unless destruction is authorized by law or a retention schedule. The records should be stored in document files and properly indexed for ready reference. Before storing the records, all paper clips and rubber bands should be removed, since these can cause damage or faster deterioration.

One type of filing system which is widely used for original documents is a numerical system, in which each estate of a deceased, minor or incapacitated person is given a distinct identifying number. Individual pleadings are then identified by the estate number, type of pleading, filing party, and filing date.

The previous requirement that general court records be kept within the county has been eliminated, and the records of any court may be stored anywhere within Georgia, provided the type of facility meets the statutory safety standards, and provided the concurrence of certain officials is obtained. The governmental entity arranging such storage is responsible for retrieval costs, and must contract for specific retrieval times and optional fees for expedited service. The previous twenty-five mile restriction on storage of “county documents” (including wills and records documenting property rights) has been expanded to within 100 miles of the county under similar conditions. At night or when the county office is closed, a county officer is required to keep county documents either in a fireproof safe or vault, in fireproof cabinets, on microfilm if a security copy has been sent to the state archives, or at a location away from the courthouse as described above.

245 O.C.G.A. §§15-1-10, 15-6-86, and 36-9-5.
246 O.C.G.A. §36-9-5.
27.4 Retention Schedules

The judge of the probate court is required to maintain certain records in accordance with retention schedules which have been approved for use by the probate courts of Georgia. Certain retention schedules were established by the Georgia Supreme Court in 1981. Schedules established since 1981 have been approved by the State Records Committee with the concurrence of the Administrative Office of the Courts (“AOC”).

The retention schedules concerning traditional probate matters, which are modified from time to time, are available on AOC’s website. The most current schedule should always be consulted. Further guidance on records retention can be obtained by reviewing the Georgia Records Act or by contacting the Schedule Section, Georgia Department of Archives and History, Office of Secretary of State.

The cost to maintain and store original records has become a significant burden on the counties. Every effort should be made by the judge of the probate court to properly and timely dispose of records which are not required to be retained and to properly dispose of all records which may be destroyed after the expiration of a certain time period. Note, however, that some records must be maintained in perpetuity.

28. PUBLIC ACCESSIBILITY TO RECORDS AND CONFIDENTIAL RECORDS

28.1 Open Records Act

Georgia’s Public Records Inspection Act, commonly referred to as the Georgia Open Records Act (“ORA”), set forth in Article 4 of Chapter 18 of Title 50, requires that all “public records” of any “public agency” shall be open for personal inspection by any citizen of this state at a reasonable time and place, except those which by order of a court of this state or by law are prohibited or specifically exempted from being open to inspection by the general public. The intent of the ORA is to encourage public access to information and to promote confidence in government through openness to the public. Generally speaking, unless exempt, all records maintained by a public agency are open to inspection.

“Public record” means “all documents, papers, letters, maps, books, tapes, photographs, computer based or generated information, or similar material prepared and maintained or received in the course of the operation of a public office or agency.”

“Public agency, public office, or agency” means (1) every state department, agency, board, bureau, commission, public corporation, and authority; (2) every county, municipal corporation, school district or other political subdivision of this state; (3) every department, agency, board, bureau, commission, authority, or similar body of each such county, municipal corporation, or other political subdivision of this state; (4) every city, county, regional, or other authority established pursuant to the laws of this state; and (5) certain nonprofit organizations which need not be enumerated here.

Certain probate court records are, by statute, specifically “public,” thereby making them subject to the ORA. Furthermore, Uniform Probate Court Rule 17 provides that, with certain exceptions, all “court records” are public and available for public inspection. Court records have been held generally to constitute public records. Hence, all official records of the probate courts are “public records” subject to public inspection unless exempt under law or sealed by court order.

The ORA provides that, upon a request to inspect, the individual in control of such public record or records shall have a reasonable amount of time to determine whether or not the record or records requested are subject to access under the ORA, not to exceed three business days. The ORA provides for the inspection of public records as they exist; no public officer or agency is required to prepare reports, summaries, or compilations not in existence at the time of the request. The custodian of records is not required to comb through files in search of requested documents but complies with the ORA by granting reasonable access.

In all cases where an interested member of the public has a right to inspect or take extracts or make copies from any public records, instruments, or documents, any such person shall have the right of access to the records, documents, or instruments for the purpose of

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making photographs or reproductions of the same while in the possession, custody, and control of the lawful custodian thereof, or his authorized deputy. Such work shall be done under the supervision of the lawful custodian of the records, who shall have the right to adopt and enforce reasonable rules governing the work. The work shall be done in the room where the records, documents, or instruments are kept by law. While the work is in progress, the custodian may charge the person making the photographs or reproductions of the records, documents, or instruments at a rate of compensation to be agreed upon by the person making the photographs and the custodian for his services or the services of a deputy in supervising the work. Where fees for certified copies or other copies or records are specifically authorized or otherwise prescribed by law, such specific fee shall apply. Where no fee is otherwise provided by law, the agency may charge and collect a uniform copying fee not to exceed $.25 per page.

In addition, a reasonable charge may be collected for search, retrieval, and other direct administrative costs for complying with a request under this Code section. The hourly charge shall not exceed the salary of the lowest paid full-time employee who, in the discretion of the custodian of the records, has the necessary skill and training to perform the request; provided, however, that no charge shall be made for the first quarter hour. An agency shall utilize the most economical means available for providing copies of public records.

Where information requested is maintained by computer, an agency may charge the public its actual cost of a computer disk or tape onto which the information is transferred and may charge for the administrative time involved as set forth in subsection (d) of this Code section.

Upon receiving a request for public records, the public agency or office must provide the requestor an estimate of the cost of copying, search, retrieval, and other administrative fees authorized under the ORA as a condition of compliance prior to fulfilling the request, except that no fees other than those directly attributable to providing access shall be assessed where records are made available by electronic means.\textsuperscript{258}

Whenever any person has requested one or more copies of a public record and such person does not pay the copying charges and charges for search, retrieval, or other direct costs.

\textsuperscript{258} O.C.G.A. §50-18-71.2
administrative costs in accordance with the provisions of this Code section, a county or a
department, agency, board, bureau, commission, authority, or similar body of a county is
authorized to collect such charges in any manner authorized by law for the collection of
taxes, fees, or assessments owed to the county. This applies whether or not the person
requesting the copies has appeared to receive the copies. 259

The superior court has jurisdiction to entertain actions brought to force a person or
agency having custody of records subject to open inspection to comply with the ORA. The
court is empowered to award attorney's fees and litigation expenses. 260

28.2 Exemptions under the ORA

Certain records, which might otherwise fall within the definition of “public records,”
are exempted from inspection and disclosure. In addition to the general exemption from
inspection and disclosure of those records which by order of a court of this state or by law are
prohibited or specifically exempted, 261 the ORA sets forth a long list of exemptions and
exceptions to application of the ORA. 262 Of specific interest to the judges of the probate
courts are:

1. Records specifically required by federal statute or regulation to be kept
   confidential; 263
2. Medical or veterinary records and similar files, the disclosure of which would
   be an invasion of personal privacy; 264
3. An individual’s social security number and insurance or medical information
   in personnel records, which may be redacted from such records; 265
4. An individual’s social security number, mother’s birth name, credit card
   information, debit card information, bank account information, account
   number, including a utility account number, password used to access his/her
   account, financial data or information, and insurance and medical information

in all records, and if technically feasible at a reasonable cost, day and month of birth, which shall be redacted prior to disclosure (except for certain media organizations gathering data for new reports, courts, prosecutors, law enforcement, and other agencies for specific purposes); provided, however, that the day and month of birth and mother’s birth name of a deceased individual shall not be subject to disclosure;\textsuperscript{266}

5. Records that are kept by the probate court pertaining to guardianships and conservatorships except as provided in Code Section 29-9-18;\textsuperscript{267} and

6. Any application submitted to or any permanent records maintained by a judge of the probate court pursuant to Code Section 16-11-129, relating to licenses to carry pistols or revolvers, or pursuant to any other requirement for maintaining records relative to the possession of firearms (except for law enforcement purposes).\textsuperscript{268}

The Code Section containing the exemptions provides that it “shall be interpreted narrowly so as to exclude from disclosure only that portion of a public record to which an exclusion is directly applicable, and it shall be the duty of the agency having custody of a record to provide all other portions of a record for public inspection or copying.”\textsuperscript{269}

\section*{28.3 Confidentiality by Statute}

Confidentiality of some probate court records is mandated by statute. Records which are confidential should be kept in locked filing cabinets or in a locked room or both, so as not to be accessible to the general public.

\subsection*{28.3.1 Aids Confidential Information}

All records which disclose “AIDS confidential information” are confidential. “AIDS confidential information” is information which discloses that a person (A) Has been diagnosed as having AIDS; (B) Has been or is being treated for AIDS; (C) Has been determined to be infected with HIV; (D) Has submitted to an HIV test; (E) Has had a positive

\textsuperscript{266} O.C.G.A. §50-18-72(a)(11.3).
\textsuperscript{267} O.C.G.A. §50-18-72(a)(13.2).
\textsuperscript{268} O.C.G.A. §50-18-72(d).
\textsuperscript{269} O.C.G.A. §50-18-72(g).
or negative result from an HIV test; (F) Has sought and received counseling regarding AIDS; or (G) Has been determined to be a person at risk of being infected with AIDS, and which permits the identification of that person.\textsuperscript{270}

AIDS confidential information may be disclosed as a part of any proceeding authorized pursuant to Chapter 3, 4 or 7 of Title 37, regarding a person who is alleged to be mentally ill, mentally retarded, or alcoholic or drug dependent, or as a part of any proceeding authorized pursuant to Title 29, regarding the guardianship of a person or that person's estate if the person identified by the information consents, or if that person's legally qualified guardian, if any, consents, or if an order of a superior court judge allows such dissemination.\textsuperscript{271} Disclosure, if allowed, is limited and precautions must be taken to insure that such disclosure does not exceed the limitations. Any person or legal entity which discloses AIDS confidential information without authority is guilty of a misdemeanor.\textsuperscript{272}

\textbf{28.3.2 Firearms License Applications; Criminal History Reports; Mental Health Records}

As noted above, the firearms license applications and the records relating thereto are exempt from the ORA. However, law enforcement agencies may have access to those in connection with any lawful investigation.

The judge of the probate court may require any applicant to sign a waiver authorizing any mental hospital or treatment center to inform the judge whether or not the applicant has been an inpatient in any such facility in the last five years and authorizing the superintendent of such facility to make to the judge a recommendation regarding whether the applicant should be issued a firearms license. Any such hospitalization or treatment record must be kept confidential.\textsuperscript{273}

If an applicant is denied a license based upon criminal history information provided by the Georgia Crime Information Center (“GCIC”), the applicant must be informed that the denial was based upon the criminal history record and must be informed of the specific contents of the record upon which the adverse decision was made; the applicant may be

\textsuperscript{270} O.C.G.A. §31-22-9.1.
\textsuperscript{271} O.C.G.A. §24-9-47(bb).
\textsuperscript{272} O.C.G.A. §24-9-47(o).
\textsuperscript{273} O.C.G.A. §16-11-129.
provided with a copy of the record if one is requested. Failure to inform the applicant of the reason for the adverse decision is a misdemeanor.\textsuperscript{274} The information is otherwise confidential. The information required to be given to an applicant whose application is denied should be given in person and any correspondence should be limited to advising the applicant to come to the probate court concerning this application.

### 28.3.3 Marriage License Applications and Application-Supplement Marriage Report

Although the marriage license applications are open to public inspection, while in the temporary custody of the probate court before transmission to the state registrar or confirmation of transmission or receipt, the application supplement-marriage report forms are not available for public inspection or copying or admissible in any court of law.\textsuperscript{275}

### 28.3.4 Behavioral Health and Developmental Disabilities Records

All court files and records of proceedings under Chapters 3, 4 and 7 of Title 37 must remain sealed and are open to inspection only upon order of the court.\textsuperscript{276} Such records may be opened and inspected only upon a petition by, or upon notice to, the person who is the subject of the proceeding. However, the court may permit authorized representatives of recognized organizations compiling statistics for proper purposes to inspect and make abstracts from official records, but without personal identifying information and under whatever conditions upon their use and distribution that the court may deem proper; and the court may punish by contempt any violations of those conditions. Otherwise, inspection of the sealed files and records may be permitted only by an order of the court upon petition by the person who is the subject of the records and only by those persons named in the order.\textsuperscript{277}

While the court has apparently has broad discretion in determining whether a record should be opened, inspection by the person who is the subject of a record should be permitted unless there are compelling reasons why it should not but inspection by someone other than the person who is the subject of a court record should be permitted only upon compelling reasons.

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\textsuperscript{274} See Rules of the Georgia Crime Information Center Council, §140-2-.04(1)(b)(3).
\textsuperscript{275} O.C.G.A. §§19-3-34(b), 31-10-25(f).
\textsuperscript{276} O.C.G.A. §§37-3-167(d)(1), 37-4-126(d), and 37-7-167(d).
\textsuperscript{277} Id.
reasons why the record should be opened. The court order can restrict dissemination of the
information to certain persons and for certain purposes.278

28.3.5 Wills Filed for safekeeping

Wills filed for safekeeping are confidential, and only the testator, his/her legal
representative or attorney-in-fact may have access to the will prior to the death of the testator.
The testator may, of course, withdraw his/her will, as may his/her legal representative of
attorney-in-fact.279

28.3.6 Original Exhibits in Court Proceedings

Original exhibits tendered in court proceedings are not subject to inspection without
approval of the judge. If this approval is not given, the custodian must, on request, supply a
photograph, photocopy, or other similar reproduction.280

28.3.7 Guardianship and Conservatorship Proceedings under Title 29

As noted above, all records relating to any guardianship or conservatorship granted
under Title 29 must be kept sealed, except for a record of the names and addresses of the
minor or ward, the guardian and/or conservator, and their legal counsel of record, and the
date of filing, granting, and terminating the guardianship or conservatorship. The sealed
records may be examined by the ward and the ward’s legal counsel at any time. A request by
other interested parties to examine the sealed records must be by petition to the court and the
ward and guardian or conservator must have at least 30 days’ prior written notice of a hearing
on the petition. The matter must come before the court in chambers. The order allowing
access must be granted upon a finding that the public interest in granting access to the sealed
records clearly outweighs the harm otherwise resulting to the privacy of the person in
interest.281

278 O.C.G.A. §37-3-167(d)(3). This language is not repeated in Chapters 4 or 7, but, the same theory of access
should be applied by the Court with regard to inspection of court records of proceedings under those Chapters.
28.3.8 Confidentiality by Court Order

There are certain probate court records for which there is no statutory confidential classification, but the nature of which are such that they should be confidential. These records create a dilemma for a judge. Failure to open such records could bring accusations of willful violation of the Open Records Act, but opening the records could bring accusations of violation of privacy. It can be argued that any charge of willfulness should be rebutted by a showing that in a different proceeding similar information is treated as confidential.

In this context, the ORA specifically exempts records “which by order of a court of this state ... are prohibited ... from being open to inspection by the general public.” Uniform Probate Court Rule 17 provides that all court records are public unless public access is limited by law or by the procedure set forth in the rule, which requires that a motion by a party in interest be filed in order to limit access. If the motion is granted, a copy of the order would have to be transmitted to the Georgia Supreme Court pursuant to Uniform Probate Court Rule 17.

Requests to seal a record are rare and should be granted only for good cause. Such a motion may be filed in connection with a petition to compromise a claim of a minor or ward when the cause of action or the amount and terms of the settlement are such that public disclosure would not be in the best interest of the minor, ward, or obligors or tortfeasors.

28.3.9 Sterilization Proceedings

There is no specific provision regarding the confidentiality of records of sterilization proceedings in Chapter 20 of Title 31. However, to be a person subject to sterilization procedures, one must be “a person who, because of developmental disability, brain damage, or both, is irreversibly and incurably mentally incompetent to the degree that such person, cannot be expected to care and support for any children.” The person for whom the sterilization is sought may request that the hearing be closed to the public and unless an overriding or compelling reason can be shown why it should not be closed, the judge must

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283 See Chapter 11.
order it closed.\footnote{O.C.G.A. §31-20-3(c)(4).} There does not appear to be any reason why sterilization records should be open to public inspection.
Chapter 15

APPENDICES

The Revised
HANDBOOK FOR PROBATE
JUDGES OF GEORGIA
2010
Chapter 17
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Appendix 1-2 Order Appointing (Chief) Clerk

IN THE PROBATE COURT OF __________ COUNTY
STATE OF GEORGIA

IN RE: ______________________________: DOCKET NO.
(CHIEF) CLERK OF PROBATE COURT :

ORDER APPOINTING (CHIEF) CLERK

Pursuant to the authority granted in O.C.G.A. §15-9-36,
IT IS ORDERED that [NAME] is hereby appointed (Chief) Clerk of the Probate Court of County, effective on this date, to serve until further Order of this Court.
[If applicable in counties having a population of 96,000 or greater]
It further appearing to the Court that [NAME] ( ) has been admitted to the practice of law in Georgia for not less than three years or ( ) has been a Clerk in this Court for more than five years and that County has a population in excess of 96,000,
IT IS FURTHER ORDERED that [NAME] is hereby designated and granted the authority, pursuant to the provisions of O.C.G.A. §15-9-36(c)(1), to exercise all the jurisdiction of the judge of this Court concerning uncontested matters.
SO ORDERED on [DATE].

[NAME] JUDGE
PROBATE COURT OF __ COUNTY

OATH OF CLERK

I, [NAME], do solemnly swear or affirm that I will well and truly perform all the duties required of me as (Chief) Clerk of the Probate Court of __________ County, fairly and impartially and in full accordance with the laws of this State, to the best of my ability.
So help me, God.

[NAME] (CHIEF) CLERK
PROBATE COURT OF __ COUNTY

Sworn to and subscribed before me on [DATE].

Judge, Probate Court of __ County

Filed

(De p.) CLERK
Appendix 1-3 Request for Judicial Assistance and Order of Appointment of Judge Pro Tempore (Pro Tem)

IN THE PROBATE COURT OF ____________ COUNTY
STATE OF GEORGIA

IN RE: : DOCKET NO:

[Judge's Name] :

REQUEST FOR JUDICIAL ASSISTANCE AND ORDER OF APPOINTMENT OF JUDGE PRO TEMPORE

It appearing to the Court that the undersigned Judge of this Court will be absent from the Court (or requires the assistance of another Judge to dispose of matters pending before the Court) on [Date(s)], and

The undersigned having requested assistance in that regard from Hon. [Name] of the Court of _______ County, pursuant to O.C.G.A. §15-1-9.1(1), and

It appearing that the said Hon. [Name], being qualified to serve in this Court, has agreed to serve by appointment as Judge Pro Tempore.

IT IS, THEREFORE, ORDERED that Hon. [Name and Court] be, and he/she is hereby, appointed as Judge Pro Tempore of the Probate Court of _______ County to preside over all matters coming before this Court on [Date(s)], with full authority in the premises.

SO ORDERED, on [Date].

__________________________
[Judge's Name]
Judge, Probate Court of ________ County

__________________________
Filed

__________________________
(Dep.) CLERK
IN THE PROBATE COURT OF ____________ COUNTY
STATE OF GEORGIA

IN RE: : DOCKET NO.
:
:

ORDER APPOINTING ASSOCIATE JUDGE OF THE PROBATE COURT

Pursuant to the authority granted under O.C.G.A. §15-9-2.1 and with the approval of the Board of Commissioners of this county, as the governing authority of the county, there has been created in this Court the position of Associate Judge of the Probate Court.

It appearing to the Court that [NAME] has all of the qualifications which are required to serve as the elected judge of this Court, except the residency requirement and is, therefore, eligible for appointment under O.C.G.A. §15-9-2.1(c)(1), and

It appearing to the Court that the said [NAME] has agreed to serve as an Associate Judge of this Court on a (full-time) (part-time) basis, with the compensation for such service being fixed by the undersigned and having been approved by the governing authority of the county, which compensation has been accepted by the said [NAME],

IT IS, THEREFORE, ORDERED that [NAME] be and is hereby appointed as Associate Judge of the Probate Court of ______ County, upon the taking of the oath prescribed in O.C.G.A. §15-9-2.1(d) and the posting of a surety bond for his/her service as such Associate Judge in the amount of $_________. The Associate Judge shall serve solely at the pleasure of the undersigned, limited, however, to the term of the undersigned as the elected Judge of this Court.

IT IS FURTHER ORDERED that the herein appointed Associate Judge shall be vested with all authority, jurisdiction and power of the elected Judge of this Court in all matters, pursuant to O.C.G.A. §15-9-2.1(b), and all judgments made and entered by the Associate Judge shall have the same force, effect, and finality as if made and entered by the elected Judge of this Court.

IT IS FURTHER ORDERED that the said Associate Judge shall not, during the term of service as such, (engage in the practice of law outside the service as Associate Judge) (shall not engage, directly or indirectly, in the practice of law in any manner in any case, proceeding, or matter of any kind in this Court or in any other court in any case, proceeding, or other matters of which this Court has pending jurisdiction or has jurisdiction.

IT IS FURTHER ORDERED that the Clerk of this Court shall record this Order, the oath, and the bond of the herein appointed Associate Judge on the Minutes of the Court.

IT IS FURTHER ORDERED that the Clerk of this Court shall mail a certified copy of this Order to the Council of Probate Court Judges, and the Associate Judge herein appointed shall become a non-voting member of the Council but shall not be eligible to serve as an officer of same.

SO ORDERED on ________________.

_________________________________

[NAME] JUDGE
PROBATE COURT OF _____ COUNTY
OATH OF ASSOCIATE JUDGE

I do swear (or affirm) that I will well and faithfully discharge the duties of the Associate Judge of the Probate Court of _______ County during my continuance in office, according to the law, to the best of my knowledge and ability, without favor or affection to any party. So help me God.

I do further swear (or affirm) that I am not the holder of any unaccounted for money due this State or any political subdivision or authority thereof; that I am not the holder of any office of trust under the government of the United States, any other state, or any foreign state which I am prohibited by law from holding; that I am otherwise qualified to hold the office according to the Constitution and laws of Georgia; and that I will support the Constitution of the United States and of this State. So help me God.

Sworn to and subscribed before
me on ____________________.

________________________
Judge/Clerk
Probate Court of _____ County

_____________ Filed

(Dep.) CLERK
IN THE PROBATE COURT OF ______________ COUNTY 
STATE OF GEORGIA

IN RE: 
[Judge's Name] 

DOCKET NO: 

REQUEST FOR JUDICIAL ASSISTANCE 
AND ORDER APPOINTING A 
SENIOR JUDGE AS JUDGE PRO TEMPORE

It appearing to the Court that the undersigned Judge of this Court will be absent from the Court (or requires the assistance of another Judge to dispose of matters pending before the Court) on [Date(s)], and

The undersigned having requested assistance in that regard from Hon. [Name], a Senior Judge of the Probate Courts, pursuant to O.C.G.A. §15-9-141(b), and

It appearing that the said Hon. [Name], being qualified to serve in this Court, has agreed to serve by appointment as Judge Pro Tempore.

IT IS, THEREFORE, ORDERED that Hon. [Name], a Senior Judge of the Probate Courts, be, and is hereby, appointed as Judge Pro Tempore of the Probate Court of County to preside over all matters coming before this Court on [Date(s)], with full authority in the premises.

SO ORDERED, on [Date].

____________________________________ 
[Judge's Name] 
Judge, Probate Court of __________ County

__________________
Filed

__________________
(Dep.) CLERK
IN THE PROBATE COURT OF ___________ COUNTY
STATE OF GEORGIA

IN RE: [Judge's Name] : DOCKET NO: 

REQUEST FOR JUDICIAL ASSISTANCE
AND
APPOINTMENT OF JUDGE PRO TEMPORE

COMES NOW, [Judge's Name], Judge of the Probate Court, who will be absent from the Court and unable to serve in matters coming before the Court on [Date(s)], and, pursuant to O.C.G.A. §15-1-9.1(b)(2), hereby requests the assistance of a Judge of the [Court] to serve as Judge Pro Tempore in the Probate Court of ___________ County, and

It appearing that Hon. [Name and Court], being qualified, has agreed to serve by appointment as Judge Pro Tempore of the Probate Court of ___________ County, it is requested that he/she be so appointed.

Submitted this [Date].

[Judge's Name], JUDGE,
Probate Court, ___________ County

IT IS ORDERED that Hon. [Name and Court] be, and he/she is hereby, appointed as Judge Pro Tempore of the Probate Court of ___________ County to preside over all matters coming before the Court on [Date(s)], with full authority in the premises.

SO ORDERED, on [Date].

[Name of Chief Judge] CHIEF JUDGE
[Court]

Filed

(Dep.) CLERK
IN THE PROBATE COURT OF ____________ COUNTY
STATE OF GEORGIA

IN RE: ____________________________ DOCKET NO: ____________________________

[Judge's Name]:

APPOINTMENT OF JUDGE PRO TEMPORE

It appearing to the Court that the undersigned Judge of this Court, will be absent from the Court and unable to serve in matters coming before the Court on/during [dates] _______ and;

It appearing to the Court that ________________ is a competent and disinterested attorney at law who is a member of the State Bar of Georgia and who is duly admitted to the Bar of this Court, thereby being qualified to serve by appointment as Judge Pro Tempore of the Probate Court of ____________ County,

IT IS THEREFORE, ORDERED that ________________ be, and she/he is hereby, appointed as Judge Pro Tempore of the Probate Court of _______ County to preside over all matters coming before the Court on/during ______, with full authority in the premises.

SO ORDERED, on __________________.

____________________________________
[Judge's Name] JUDGE,
PROBATE COURT, _______ COUNTY

Filed _______________________

_____________________
(Dep.)CLERK
IN THE PROBATE COURT OF _____________ COUNTY
STATE OF GEORGIA

IN RE: [Judge's Name] : DOCKET NO: 

APPOINTMENT OF JUDGE PRO HAC VICE

It appearing to the Court that the undersigned Judge of this Court is unable to serve in matter of In Re: Estate of [Estate Name], Docket No. _____ and

It appearing to the Court that ________________ is a competent and disinterested attorney at law who is a member of the State Bar of Georgia and who is duly admitted to the Bar of this Court, thereby being qualified to serve by appointment as Judge Pro Hac Vice of the Probate Court of ___________ County,

IT IS THEREFORE, ORDERED that ________________ be, and she/he is hereby, appointed as Judge Pro Hac Vice of the Probate Court of ___________ County to preside over the above referenced matter, with full authority in the premises.

SO ORDERED, on _____________.

_____________________________________
[Judge's Name] JUDGE, PROBATE COURT, ___________ COUNTY

Filed

____________________
(Dep.)CLERK
Appendix A1-9 Sample Consent
of Parties for Judge to Act

IN THE PROBATE COURT OF __________ COUNTY
STATE OF GEORGIA

IN RE: ____________________________________________ DOCKET NO. ______.

[Case Caption] ____________________________

WAIVER OF ANY POTENTIAL CONFLICT OF INTEREST OR CAUSE FOR RECUSAL OF JUDGE

The Judge of the Probate Court of _______ County has disclosed to the parties and their counsel the following facts, which might, under certain circumstances, present a potential or perceived conflict of interest or grounds for recusal:

The undersigned counsel for all parties (and each pro se party) hereby voluntarily waive any disqualification of the Judge of the Probate Court of _______ County and specifically agree that he/she may hear and decide the matters pending before the Court and all subsequent matters which may arise in this case, until counsel for a party or any pro se party otherwise advises the Court in writing. All parties stipulate and agree that they do not find the facts disclosed to be of sufficient concern or impact as to warrant disqualification and agree and accept that the Court will render all rulings and decisions without regard to those facts.

Dated: ________________________

__________________________________
Name: ____________________________
Counsel for ____________________________
___ or Pro Se

__________________________________
Name: ____________________________
Counsel for ____________________________
___ or Pro Se

__________________________________
Name: ____________________________
Counsel for ____________________________
___ or Pro Se

Filed: ____________________________
Date

______________________________
(Dep.) CLERK
Appendix A1-10 Sample Order of Voluntary Recusal and Appointment

IN THE PROBATE COURT OF ___________ COUNTY
STATE OF GEORGIA

IN RE: : DOCKET NO.
: :

ORDER OF VOLUNTARY RECUSAL AND APPOINTMENT OF JUDGE PRO HAC VICE

On his own motion, the undersigned Judge of the Probate Court of ______ County does hereby voluntarily recuse himself from hearing and/or ruling upon (the pending matters in dispute in the above-styled case)(the following specific matters presently pending for which the undersigned has recused himself:).

With the consent of the parties, by and through counsel, the undersigned does hereby appoint the Honorable ____________________________, Judge of the ___________ Court of County (or an Attorney at law), as Judge Pro Hac Vice, to hear, determine and rule upon (the pending matters in dispute)(the specific matters set forth in the foregoing Order) with regard only to the above-styled case. This appointment shall terminate upon the disposition of (the presently pending matters)(the specific matters set forth above), unless additional proceedings are filed in which the undersigned also recuses himself, in which event such additional proceedings shall also be heard and determined by the said Judge Pro Hac Vice.

SO ORDERED on ________________

_________________________________
[NAME] JUDGE
PROBATE COURT OF __ COUNTY

Acknowledged and consented to by:

__________________________________
Attorney for Petitioner

__________________________________
Attorney for Caveator/Respondent

Filed

(Dep.) CLERK
IN THE PROBATE COURT OF ____________ COUNTY
STATE OF GEORGIA

IN RE: : DOCKET NO.

ORDER OF VOLUNTARY RECUSAL AND REFERRAL
FOR THE APPOINTMENT OF JUDGE PRO HAC VICE

On his own motion, the undersigned Judge of the Probate Court of ____________ County does hereby voluntarily recuse himself from hearing and/or ruling upon (the pending matters in dispute in the above-styled case)(the following specific matters presently pending for which the undersigned has recused himself):

Further, the undersigned does hereby refer to Hon. __________________________, Judge of the State/Superior Court of ____________ County, the matter of the appointment of a Judge Pro Hac Vice to hear, determine and rule upon (the pending matters in dispute)(the specific matters set forth above) with regard only to the above-styled case.

SO ORDERED on ________________.

[NAME] JUDGE
PROBATE COURT OF ____________ COUNTY

ORDER OF APPOINTMENT
OF JUDGE PRO HAC VICE

The foregoing Order of Voluntary Recusal having been referred to the undersigned for the appointment of a Judge Pro Hac Vice to hear, determine and rule upon (the pending matters in dispute)(the specific matters set forth in the foregoing Order) with regard only to the above-styled case,

IT IS ORDERED that the Honorable __________________________, Judge of the Court of ____________ County (or an Attorney at law), be and is hereby appointed as Judge Pro Hac Vice, to hear, determine and rule upon (the pending matters in dispute)(the specific matters set forth in the foregoing Order) with regard only to the above-styled case. This appointment shall terminate upon the disposition of (the presently pending matters in dispute)(the specific matters set forth above), unless otherwise ordered by this Court.
This Order shall be recorded in the records of the above-styled case in the Probate Court of __________ County.

SO ORDERED on ________________.

____________________________________

_____________________,JUDGE
STATE/SUPERIOR COURT
OF ____________ COUNTY

_____________________
Filed

_____________________
(Dep.) CLERK
IN THE PROBATE COURT OF _____________ COUNTY
STATE OF GEORGIA

IN RE: : DOCKET NO.
: :

ORDER REFERRING MOTION TO RECUSE
AND STAYING PROCEEDINGS

________________________ having filed a Motion to Recuse [Name], Judge of the Probate Court of ___________ County, in the above-styled matter, and the same having been read and considered,

IT IS ORDERED that the issue of recusal, as it applies to (the pending matters in dispute)(the following specific matters presently pending which are the subject of the Motion to Recuse: ), is hereby referred to the Honorable ________________________________, Judge of the State Court of ____________ County for determination.

IT IS FURTHER ORDERED that all matters presently pending before the Court which require an order or ruling from the Court, excepting only the Motion to Recuse hereby referred, are hereby stayed pending the determination of the Motion to Recuse.

SO ORDERED on ________.

___________________________
[NAME] JUDGE
PROBATE COURT OF __ COUNTY

ORDER SETTING HEARING ON
MOTION TO RECUSE

The foregoing Order Referring Motion to Recuse having been received and having been read and considered,

IT IS ORDERED that the said Motion to Recuse shall be heard by the undersigned on [Date] at __.M. in [Chambers][Courtroom __ of the State/Superior Court of County].

SO ORDERED on ________________.

___________________________
[NAME] JUDGE
ORDER OF APPOINTMENT
OF JUDGE PRO HAC VICE

The foregoing Motion to Recuse having been heard and, for good cause shown, the same is hereby granted, and

IT IS ORDERED that the Honorable ____________________________, Judge of the Court of ____________ County (or an Attorney at law), be and is hereby appointed as Judge Pro Hac Vice, to hear, determine and rule upon the pending matters in dispute with regard only to the above-styled case. This appointment shall terminate upon the disposition of the presently pending matters in dispute, unless otherwise ordered by this Court.

This Order shall be recorded in the records of the above-styled case in the Probate Court of ____________ County.

SO ORDERED on _______________.

____________________________________
________________________, JUDGE
STATE/SUPERIOR COURT
OF ____________ COUNTY

____________________
Filed

_________________________
(Dep.) CLERK
IN THE PROBATE COURT OF __________ COUNTY
STATE OF GEORGIA

IN RE:  :  DOCKET NO.

ORDER DENYING MOTION TO RECUSE

A Motion to Recuse the undersigned Judge of the Probate Court of __________ County having been filed by __________ in the above-styled case, and the same having been read and considered, and it appearing to the Court that the motion was not timely filed in accordance with Uniform Probate Court Rule 19 and/or that the allegations made in support of the Motion, even if assumed to be true, would not warrant recusal of the undersigned with regard to the matters pending before the Court in the above-styled case,

IT IS, THEREUPON, ORDERED that the Motion to Recuse be, and the same is hereby, DENIED by the Court.

SO ORDERED on _________________.

[NAME]  JUDGE
PROBATE COURT OF ____ COUNTY

Filed

(Dep.) CLERK
Georgia Code of Judicial Conduct

Preamble

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system.

Every judge should strive to maintain the dignity appropriate to the judicial office. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law. As a result, judges should be held to a higher standard, and should aspire to conduct themselves with the dignity accorded their esteemed position.

The Code of Judicial Conduct is intended to establish standards for ethical conduct of judges. It consists of broad statements called Canons, specific rules set forth in Sections under each Canon, a Terminology Section, an Application Section and Commentary. The text of the Canons and the Sections, including the Terminology and Application Sections, is authoritative. The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons and Sections. The Commentary is not intended as a statement of additional rules. When the text uses "shall" or "shall not," it is intended to impose binding obligations the violation of which can result in disciplinary action. When "should" or "should not" is used, the text is intended as advisory and as a statement of what is or is not appropriate conduct, but not as a binding rule under which a judge may be disciplined. When "may" is used, it denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific proscriptions.

The Canons and Sections are rules of reason. They should be applied consistent with constitutional requirements, statutes, other court rules and decisional law, as well as in the context of all relevant circumstances. The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions, or on judges' First Amendment rights of freedom of speech and association.

The Code is designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through disciplinary agencies. It is not designed for nor intended as a basis for civil liability or criminal prosecution. Furthermore, the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding.

The text of the Canons and Sections is intended to govern conduct of judges and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system. The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards. The mandatory provisions of the Canons and Sections describe the basic minimal ethical requirements of judicial conduct. Judges and candidates should strive to achieve the highest ethical standards, even if not
required by this Code. As an example, a judge or candidate is permitted under Canon 7, Section B, to solicit campaign funds directly from potential donors. The Commentary, however, makes clear that the judge or candidate who wishes to exceed the minimal ethical requirements would choose to set up a campaign committee to raise and solicit contributions. The Code is intended to state only basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.

Terms explained below are noted with an asterisk (*) in the Sections where they appear. In addition, the Sections where terms appear are referred to after the explanation of each term below.

"Appropriate Authority" denotes the authority with responsibility for initiation of disciplinary process with respect to the violation to be reported. See Sections 3D(1) and 3D(2).

"Candidate." A candidate is a person seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she appoints and/or forms a campaign committee, makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, or authorizes solicitation or acceptance of contributions or support. The term "candidate" has the same meaning when applied to a judge seeking election or appointment to non-judicial office. See Preamble and Sections 7A(1), 7A(2), 7B(1), 7B(2) and 7C.

"Comment" in connection with a case refers to valuative statements judging the professional wisdom of specific lawyering tactics or the legal correctness of particular court decisions. In contrast, it does not mean the giving of generally informative explanations to describe litigation factors including the prima facie legal elements of case types pending before the courts, legal concepts such as burden of proof and duty of persuasion or principles such as innocent until proven guilty and knowing waiver of constitutional rights, variable realities illustrated by hypothetical factual patterns of aggravating or mitigating conduct, procedural phases of unfolding lawsuits, the social policy goals behind the law subject to application in various cases, as well as competing theories about what the law should be. See Section 3B(9).

"Court personnel" does not include the lawyers in a proceeding before a judge. See Sections 3B(7)(c) and 3B(9).

"De minimis" denotes an insignificant interest that could not raise reasonable question as to a judge's impartiality. See Section 3E(1)(c).

"Economic interest" denotes ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party, except that:

(i) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(ii) service by a judge as an officer, director, advisor or other active participant in an educational, religious, charitable, fraternal or civic organization, or service by a judge's spouse, parent or child as an officer, director, advisor or other active participant in any organization does not create an economic interest in securities held by that organization;

(iii) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association, is not an economic interest in the organization unless a proceeding pending or impending before the judge could substantially
(iv) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities. See Section 3E(2).

"Fiduciary" includes such relationships as executor, administrator, trustee, and guardian. See Sections 3E(2) and 5D.

"Invidious discrimination" is any action by an organization that characterizes some immutable individual trait such as a person's race, gender or national origin, as well as religion, as odious or as signifying inferiority, which therefore is used to justify arbitrary exclusion of persons possessing those traits from membership, position or participation in the organization. See Section 2C.

"Knowingly", "knowledge", "known" or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances. See Sections 3D(1), 3D(2) and 3E(1).

"Law" denotes court rules as well as statutes, constitutional provisions and decisional law. See Sections 2A, 3A, 3B(2), 3B(7), 4A, 4B, 4C, 5C(4), 5F and 5G.

"Member of the judge's family residing in the judge's household" denotes any relative of the judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resided in the judge's household. See Sections 3E(1)(c) and 5C(4).

"Non-public information" denotes information that, by law, is not available to the public. Non-public information may include but is not limited to: information that is sealed by statute or court order, impounded or communicated in camera; and information offered in grand jury proceedings, pre-sentencing reports, dependency cases or psychiatric reports. See Section 3B(11).

"Political organization" denotes a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office. See Section 7A(1).

"Public election." This term includes primary and general elections; it includes partisan elections, nonpartisan elections and may include (as context demands) retention elections. See Sections 7A(1), 7A(2), 7B(1), and 7B(2).

"Require." The rules prescribing that a judge "require" certain conduct of others are, like all of the rules in this Code, rules of reason. The use of the term "require" in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control. See Sections 3B(3), 3B(4), 3B(6), 3B(9) and 3C(2).

"Third degree of relationship." The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew or niece. See Section 3E(1)(c).

**Canon 1**

**Judges Shall Uphold the Integrity and Independence of the Judiciary.** An independent and honorable judiciary is indispensable to justice in our society. Judges shall participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe such standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and
applied to further that objective.

Commentary: Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depends in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

Canon 2

Judges Shall Avoid Impropriety and the Appearance of Impropriety in All Their Activities.

A. Judges shall respect and comply with the law* and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Commentary: Public confidence in the judiciary is eroded by irresponsible or improper conduct of judges. Judges must avoid all impropriety and appearance of impropriety. Judges must expect to be the subject of constant public scrutiny. Judges must therefore accept restrictions on their conduct that might be viewed as burdensome by the ordinary citizen, and they should do so freely and willingly. The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired. See also, Commentary under Section 2C.

B. Judges shall not allow their family, social, political or other relationships to influence their judicial conduct or judgment. Judges shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor should they convey or permit others to convey the impression that they are in a special position to influence them. Judges should not testify voluntarily as character witnesses.

Commentary: Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and improper use of the prestige of office in all of their activities. For example, it would be improper for a judge to allude to his or her judgeship to gain a personal advantage such as deferential treatment when stopped by a police officer for a traffic offense. Similarly, judicial letterhead must not be used for conducting a judge's personal business.

A judge must avoid lending the prestige of judicial office for the advancement of the private interests of others. For example, a judge must not use the judge's position to gain advantage in a civil suit involving a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judgee's office. As to the acceptance of awards. See Section 5C (4)(a) and Commentary. Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation. However, a judge must not initiate the communication of information to a sentencing judge or probation or
corrections officer, but may provide to such person information for the record in response to a formal request.

Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for a judgeship. See also Canon 7, regarding use of a judge's name in political activities. A judge must not testify voluntarily as a character witness, because to do so may lend the prestige of the judicial office in support of a party for whom the judge testifies. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may, however, testify when properly summoned. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

C. Judges shall not hold membership in any organization that practices invidious discrimination*.

**Commentary:** Membership by a judge in an organization that practices invidious discrimination may give rise to perceptions that the judge's impartiality is impaired. Section 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but rather depends on how the organization selects members and other relevant factors, such as whether the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or whether it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex or national origin persons who would otherwise be admitted to membership. See New York State Club Ass'n v. City of New York, 108 S. Ct. 2225, 101 L.Ed.2d1 (1988); Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U. S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d. 474 (1987); Roberts v. United State Jaycees, 468 U. S. 609, 104 S. Ct. 3244, 82 L.Ed.2d.462 (1984). Ultimately, each judge must determine in the judge's own conscience whether an organization of which the judge is a member practices invidious discrimination.

**Canon 3**

Judges Shall Perform the Duties of Their Office Impartially and Diligently

A. Judicial Duties in General. The judicial duties of judges take precedence over all their other activities. Their judicial duties include all the duties of their offices prescribed by law*. In the performance of these duties, the following standards apply:

B. Adjudicative Responsibilities.

1. Judges shall hear and decide matters assigned to them, except those in which they are disqualified.

2. Judges should be faithful to the law* and maintain professional competence in it. Judges shall not be swayed by partisan interests, public clamor, or fear of criticism.

3. Judges shall require* order and decorum in proceedings over which they preside.
(4) Judges shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom they deal in their official capacity, and shall require similar conduct of lawyers, and of staffs, court officials, and others subject to their direction and control.

Commentary: The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and business-like while being patient and deliberate.

(5) Judges shall perform judicial duties without bias or prejudice. Judges shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status, and shall not permit staff, court officials and others subject to judicial direction and control to do so.

Commentary: Judges must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to their direction and control. Judges must perform judicial duties impartially and fairly. Judges who manifest bias on any basis in a proceeding impair the fairness of the proceeding and bring the judiciary into disrepute. Facial expression, body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. Judges must be alert to avoid behavior that may be perceived as prejudicial.

(6) Judges shall require* lawyers in proceedings before the court to refrain from manifesting, by words and conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status, against parties, witnesses, counsel or others. This Section, 3B(6), does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status, or other similar factors, are issues in the proceeding.

(7) Judges shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law*. Judges shall not initiate or consider ex parte communications, or consider other communications made to them outside the presence of the parties concerning a pending or impending proceeding, except that:

(a) where circumstances require, ex parte communications for scheduling, where administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) Judges may obtain the advice of a disinterested expert on the law* applicable to a proceeding before the court, if they give notice to the parties of the person consulted and the substance of the advice, and afford the parties reasonable opportunity to respond.

(c) Judges may consult with court personnel* whose function is to aid them in carrying out their adjudicative responsibilities, or with other judges.

(d) Judges may, with the consent of the parties, confer separately with the parties or their lawyers
in an effort to mediate or settle matters before the court.

(e) Judges may initiate or consider any ex parte communications when expressly authorized by law* to do so.

**Commentary:** The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge. Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if they party is unrepresented, the party, who is to be present or to whom notice is given. An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief amicus curiae. Certain ex parte communication is approved by Section 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, judges must discourage ex parte communication and allow it only if all the criteria stated in Section 3B(7) are clearly met. Judges must disclose to all parties all ex parte communications described in Section 3B(7)(a) and 3B(7)(b) regarding a proceeding pending or impending before them. Judges must not independently investigate facts in a case and must consider only the evidence presented. Judges may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions. Judges must take reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on their staff. If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.

(8) Judges shall dispose of all judicial matters fairly, promptly, and efficiently.

Commentary: In disposing of matters promptly, efficiently and fairly, judges must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. Judges should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. Judges should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by courts.

(a) The obligation of a judge to dispose of matters promptly and efficiently must not take precedence over the judge's obligation to dispose of matters fairly and with patience.

Commentary: Prompt disposition of the court's business requires judges to devote adequate time to their duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with them to that end.

(9) Judges shall not, while a proceeding is pending or impending in any court, make any public comment* that might reasonably be expected to affect its outcome or impair its fairness or make any non-public comment that might substantially interfere with a fair trial or hearing. Judges shall require* similar abstention on the part of court personnel* subject to their direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.
Commentary: The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. This Section does not prohibit judges from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where a judge is a litigant in an official capacity, the judge must not comment publicly.

(10) Judges shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

Commentary: Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial.

(11) Judges shall not disclose or use, for any purpose unrelated to judicial duties, non-public information* acquired in a judicial capacity.

C. Administrative Responsibilities

(1) Judges shall diligently discharge their administrative responsibilities without bias or prejudice, maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) Judges shall require* their staffs, court officials and others subject to their direction and control to observe the standards of fidelity and diligence that apply to the judges and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) Judges with supervisory authority for judicial performance of other judges should take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) Judges shall not make unnecessary appointments. Judges shall exercise the power of appointment impartially and on the basis of merit. Judges shall avoid nepotism and favoritism. Judges shall not approve compensation of appointees beyond the fair value of services rendered.

Commentary: Appointees of judges include assigned counsel, officials such as referees, commissioners, special masters, receivers, guardians and personnel such as clerks, secretaries, and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by Section 3C(4).

D. Disciplinary Responsibilities

(1) Judges who receive information indicating a substantial likelihood that another judge has committed a violation of this Code should take appropriate action. Judges having knowledge* that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the appropriate authority*.

(2) Judges who receive information indicating a substantial likelihood that a lawyer has committed a violation of the Standards of Conduct of the State Bar of Georgia should take appropriate action. Judges having knowledge* that a lawyer has committed a violation of the Standards of Conduct of the State Bar of Georgia that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the appropriate authority*. 
(3) Acts of judges, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1) and 3D(2) are part of their judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against these judges.

Commentary: Appropriate action may include direct communication with the judge or lawyer who has committed the violation, or other direct action if available, and reporting the violation to the appropriate authority or other agency or body. Section 3D(1) requires judges to inform the Judicial Qualifications Commission of any other judge's violation of the Code of Judicial Conduct, if the violation raises a substantial question of fitness for office and if the violation is actually known to the reporting judge. Section 3D(2) also requires judges to report to the State Bar of Georgia any violation by a lawyer of the Standards of Conduct, if the violation raises a substantial question of the lawyer's fitness as a lawyer and, again, if the violation is actually known to the reporting judge.

E. Disqualification

(1) Judges shall disqualify themselves in any proceeding in which their impartiality might reasonably be questioned, including but not limited to instances where:

Commentary: Under this rule, judges are subject to disqualification whenever their impartiality might reasonably be questioned, regardless of whether any of the specific rules in Section 3E(1) apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that firm appeared, unless the disqualification was waived by the parties after disclosure by the judge. Judges should disclose on the record information that the court believes the parties or their lawyers might consider relevant to the question of disqualification, even if they believe there is no legal basis for disqualification. The rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as possible.

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer in the matter of controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

Commentary: A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b); judges formerly employed by a governmental agency, however, should disqualify themselves in a proceeding if their impartiality might reasonably be questioned because of such association.

(c) the judge or the judge's spouse, or a person within the third degree of relationship* to either of them, or the spouse of such a person, or any other member of the judge's family residing in the judge's household*:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;
(iii) is known* by the judge to have a more than de minimis* interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge* likely to be a material witness in the proceeding.

Commentary: The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Section 3E(1)(c)(iii) requires the judge's disqualification.

(2) Judges shall keep informed about their personal and fiduciary* economic interests*, and make a reasonable effort to keep informed about the personal financial interests of their spouses and minor children residing in their households.

F. Remittal of Disqualification.

Judges disqualified by the terms of Section 3E may disclose on the record the basis of their disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other that personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

Commentary: A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently to the court, judges must not solicit, seek or hear comment on possible remittal or waiver of the disqualification, unless the lawyers jointly propose remittal after consultation as provided in Section 3F. A party may act through counsel, if counsel represents on the record that the party has been consulted and consents. As a practical matter, judges may wish to have all parties and their lawyers sign a remittal agreement.

CANON 4

Judges May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice.

Judges, subject to the proper performance of their judicial duties, may not engage in the following quasi-judicial activities, if in so doing they cast doubt on their capacity to decide impartially any issue that may come before them;

A. Judges may speak, write, lecture, teach and participate in other activities concerning the law*, the legal system, and the administration of justice.

B. Judges may appear at public hearings before an executive or legislative body or official on matters concerning the law*, the legal system, and the administration of justice, and they may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice.

C. Judges may serve as members, officers, or directors of an organization or governmental agency devoted to the improvement of the law*, the legal system, or the administration of
justice. They may assist such organizations in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. They may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

Commentary: As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, judges are encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law. Non quasi-judicial, or non law-related, extra-judicial activities are governed by Canon 5.

**CANON 5**

Judges Shall Regulate Their Extra-Judicial Activities to Minimize the Risk of Conflict with Their Judicial Duties.

A. Avocational Activities.

Judges may not engage in such avocational activities as detract from the dignity of their office or interfere with the performance of their judicial duties.

Commentary: Complete separation of judges from extra-judicial activities is neither possible nor wise; they should not become isolated from the society in which they live.

B. Civic and Charitable Activities.

Judges may not participate in civic and charitable activities that reflect adversely upon their impartiality or interfere with the performance of their judicial duties. Judges may serve as officers, directors, trustees, or non-legal advisors of educational, religious, charitable, fraternal, or civic organizations not conducted for the economic or political advantage of their members, subject to the following limitations:

1. Judges shall not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before them or will be regularly engaged in adversary proceedings in any court.

Commentary: The changing nature of some organizations and of their relationship to the law makes it necessary for judges regularly to re-examine the activities of each organization with which they are affiliated to determine if it is proper for them to continue their relationship with it. For example, in many jurisdictions charitable hospitals are now more frequently in court than in the past. Similarly, the boards of some legal aid organizations now make policy decisions that may have political significance or imply commitment to causes that may come before the courts for adjudication.

2. Judges shall not solicit funds for any educational, religious, charitable, fraternal or civic organization, or use or permit the use of the prestige of their office for that purpose, but they may be listed as officers, directors, or trustees of such organizations. A judge should not be a speaker or the guest of honor at any organization’s fund raising event, but may attend such events.

3. Judges shall not give investment advice to such an organization, but they may serve on its
board of directors or trustees even though it has the responsibility for approving investment decisions.

*Commentary:* A judge's participation in an organization devoted to quasi-judicial, or law-related, extra-judicial activities is governed by Canon 4.

C. Financial Activities.

(1) Judges should refrain from financial and business dealings with lawyers, litigants, and others that tend to reflect adversely on their impartiality, interfere with the proper performance of their judicial duties, or exploit their judicial positions.

(2) Subject to the requirement of subsection (1), judges may hold and manage investments, including real estate and engage in other remunerative activity including the operation of a business.

(3) Judges should manage their investments and other financial interests to minimize the number of cases in which they are disqualified. As soon as they can do so without serious financial detriment they should divest themselves of investments and other financial interests that might require frequent disqualification.

(4) Neither judges nor members of their families residing in their households should accept a substantial gift, bequest, favor or loan from anyone except as follows:

(a) judges may accept gifts incident to a public testimonial to them; books supplied by publishers on a complimentary basis for official use; or invitations to judges and their spouses to attend bar-related functions or activities devoted to the improvement of the law, the legal system, or the administration of justice;

(b) judges or members of their families residing in their households may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges, or a scholarship or fellowship awarded on the same terms applied to other applicants.

(c) judges or members of their families residing in their households may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before them, and if its value exceeds $100, the judges report it in the same manner as they report compensation in Canon 6C.

*Commentary:* This subsection does not apply to contributions to a judge's campaign for judicial office, a matter governed by Canon 7.

5) Judges are not required by this Code to disclose their income, debts, or investments, except as provided in this Canon and Canons 3 and 6.

*Commentary:* Canon 3 requires judges to disqualify themselves in any proceeding in which they have a financial interest; Canon 5 requires judges to refrain from financial activities that might interfere with the impartial performance of their judicial duties; Canon 6 requires them to report all compensation they receive for activities involving personal services outside their judicial office. Judges have the rights of an ordinary citizen, including the right to privacy in their financial affairs, except to the extent that limitations thereon are required to safeguard the proper performance of their duties. Owning and receiving income from investments do not as such affect the performance of a judge's duties.
(6) Information acquired by judges in their judicial capacity should not be used or disclosed by them in financial dealings or for any purpose not related to their judicial duties.

D. Fiduciary* Activities.

Judges should not serve as executors, administrators, trustees, guardians, or other fiduciaries, except for the estates, trusts, or persons of members of their families and then only if such service will not interfere with the proper performance of their judicial duties. "Member of their families" include a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. As family fiduciaries, judges are subject to the following restrictions:

(1) They should not serve if it is likely that as fiduciaries, they will be engaged in proceedings that would ordinarily come before them, or if the estates, trusts, or wards become involved in adversary proceedings in the court on which they serve or one under its appellate jurisdiction.

(2) While acting as fiduciaries, judges are subject to the same restrictions on financial activities that apply to them in their personal capacities.

Commentary: Judge's obligations under this Canon and their obligations as fiduciaries may come into conflict. For example, a judge should resign as trustee if it would result in detriment to the trust to divest it of holdings whose retention would place the judge in violation of Canon 5C(3).

E. Arbitration.

Judges shall not act as arbitrators or mediators for compensation. This prohibition does not apply to senior judges who serve as judges.

F. Practice of Law.

Judges shall not practice law, unless allowed by law*.

G. Extra-judicial Appointments.

A judge should not accept appointment to a governmental committee, commission, or other position hat is concerned with issues of fact or policy on matters other than the improvement of the law*, the legal system, or the administration of justice, if acceptance of such appointment might reasonably cast doubt upon the judge's impartiality or demean the judge's office.

Commentary: Valuable services have been rendered in the past to the states and the nation by judges appointed by the executive to undertake important extra-judicial assignments. The appropriateness of conferring these assignments on judges must be reassessed, however, in light of the demands on judicial manpower created by today's crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not be expected or permitted to accept governmental appointments that could interfere with the effectiveness and independence of the judiciary.

**CANON 6**

Judges Should Regularly File Reports of Compensation Received for Quasi-Judicial and Extra-Judicial Related Activities.
Judges may not receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, if the source of such payments gives the appearance of influencing the judge in his judicial duties or otherwise gives the appearance of impropriety. Such compensation is subject to the following restrictions:

A. Compensation.

Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.

B. Expense Reimbursement.

Expense reimbursement should be limited to the actual cost of travel, food, and lodging and other necessary expense reasonably incurred by the judge and, where appropriate to the occasion, by their spouses. Any payment in excess of such an amount is compensation.

C. Reports.

Except as hereinafter provided to the contrary, full-time judges should report the dates, places, and nature of any activities involving personal services for which they received compensation, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. Judge's reports for each calendar year should be filed between January first and April fifteenth of the following year in the office of the Clerk of the Supreme Court of Georgia. A copy of a judge's federal income tax return shall be considered a sufficient compliance with this paragraph. Such report or tax return shall be filed under seal and shall be available for inspection only by the Justice of the Supreme Court of Georgia and the members of the Judicial Qualifications Commission.

CANON 7

Judges Shall Refrain from Political Activity Inappropriate to Their Judicial Office.

A. Political Conduct in General.

(1) A judge or a candidate* for public election* to judicial office shall not:

(a) act or hold himself or herself out as a leader or hold any office in a political organization*;

(b) make speeches for a political organization or candidate or publicly endorse a candidate for public office;

Commentary: A candidate does not publicly endorse another candidate for public office by having his name on the same ticket.

(c) solicit funds for or pay an assessment or make a contribution to a political organization, or purchase tickets for political party dinners, or other functions, except as authorized in subsection A(2).

(2) Judges holding an office filled by public election* between competing candidates*, or candidates for such office, may attend political gatherings and speak to such gatherings on their own behalf when they are candidates for election or re-election.
B. Campaign Conduct

(1) Candidates*, including an incumbent judge, for any judicial office that is filled by public election* between competing candidates:

(a) shall prohibit officials or employees subject to their direction or control from doing for them what they are prohibited from doing under this Canon and shall not allow any other person to do for them what they are prohibited from doing under this Canon;

(b) shall not make statements that commit the candidate with respect to issues likely to come before the court;

Commentary: This Canon does not prohibit a judge or a candidate from publicly stating his or her personal views on disputed issues, see Republican Party V. White, 536 U.S. 765 (2002). To ensure that voters understand a judge's duty to uphold the constitution and laws of Georgia where the law differs from his or her personal belief, however, judges and candidates are encouraged to emphasize in any public statement their duty to uphold the law regardless of their personal views.

(c) shall not use or participate in the publication of a false statement of fact concerning themselves or their candidacies, or concerning any opposing candidate or candidacy, with knowledge of the statement's falsity or with reckless disregard for the statement's truth or falsity;

Commentary: The determination of whether a candidate knows of falsity or recklessly disregards the truth or falsity of his or her public communication is an objective one, from the viewpoint of a "reasonable attorney", using the standard of "objective malice". See In re Chmura, 608 N.W. 2d 31 (Mich. 2000)

(d) shall be responsible for the content of any statement or advertisement published or communicated in any medium by a campaign committee if the candidate knew of or recklessly disregarded the content of said statement or advertisement prior to its release;

(e) and except where a statement or advertisement is published or communicated by a third party, shall be responsible for reviewing and approving the content of his or her statements and advertisements, and those of his or her campaign committee. Failure to do so will not be a defense to a complaint for violation of this Canon.

(2) Candidates*, including an incumbent judge, for a judicial office that is filled by public election* between competing candidates, may personally solicit campaign contributions and publicly stated support. Candidates, including incumbent judges, should not use or permit the use of campaign contributions for the private benefit of themselves or members of their families.

Commentary: Although judges and judicial candidates are free to personally solicit campaign contributions and publicly stated support, see Weaver Bonner, 309 F 3d 1312 (11th Cir. 2002), they are encouraged to establish campaign committees of responsible persons to secure and manage the expenditure of funds for their campaigns and to obtain public statements of support of their candidacies. The use of campaign committees is encouraged because they may better maintain campaign decorum and reduce campaign activity that may cause requests for recusal or the appearance of partisanship with respect to issues or the parties which require recusal.

C. Applicability

(a) This Canon generally applies to all incumbent judges and judicial candidates*. A successful
candidate, whether or not an incumbent, is subject to judicial discipline by the Judicial Qualifications Commission for his or her campaign conduct.

(b) A lawyer who is a candidate* for judicial office shall comply with all provisions of the Code of Judicial Conduct applicable to candidates* for judicial office. An unsuccessful lawyer candidate* is subject to discipline for campaign conduct by the State Bar of Georgia pursuant to applicable standards of the State Bar of Georgia, and the Judicial Qualifications Commission shall immediately report any such alleged conduct to the office of the General Counsel of the State Bar of Georgia for such action as may be appropriate under applicable bar rules.

(c) An unsuccessful non-lawyer candidate* is subject to discipline for campaign misconduct by the Judicial Qualifications Commission, and in addition to any other sanctions authorized by the Rules of the Judicial Qualifications Commission, the Commission, after full hearing, is authorized to recommend that such individual be barred from seeking any elective or appointive judicial office in this State for a period not to exceed 10 years.

Application of the Code of Judicial Conduct

Anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions, including an officer such as an administrative law judge of an executive branch agency or of the Board of Worker’s Compensation, an associate judge, special master, or magistrate, or any person who is a candidate for any such office is a judge for the purpose of this Code. All judges shall comply with this Code except as provided below.

A. Part-time judges.

A part-time judge is a judge who serves on a continuing or periodic basis, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge. Part-time judges:

(1) are not required to comply with Canon 5D [fiduciary activities], 5E [arbitration], 5F [practice of law], and 5G [extra-judicial appointments], and are not required to comply with Canon 6C [annual financial reporting].

(2) should not practice law in the court on which they serve, or in any court subject to the appellate jurisdiction of the court on which they serve, or act as lawyers in proceedings in which they have served as judges or in any proceeding related thereto.

B. Judge Pro Tempore.

A judge pro tempore is a person who is appointed to act temporarily as a judge.

(1) While acting as such, a judge pro tempore is not required to comply with Canon 5C(3) [financial activities], 5D [fiduciary activities], 5E [arbitration and mediation], 5F [practice of law], and 5G [extra-judicial appointments], and Canon 6C [annual financial reporting].

(2) Persons who have been judges pro tempore should not act as lawyers in proceedings in which they have served as judges or in other proceeding related thereto.

C. Time for Compliance.

A person to whom this Code becomes applicable shall comply immediately with all provisions of this Code except Sections 5C(1), 5C(2), 5C(3) [personal and family financial activities] and 5D
[fiduciary activities], and shall comply with these Sections as soon as reasonably possible and shall do so in any event within the period of one year.

Commentary: If serving as a fiduciary when selected as judge, a new judge may, notwithstanding the prohibitions in Section 5D, continue to serve, but only for that period of time necessary to avoid serious adverse consequences to the beneficiary of the fiduciary relationship, and in no event longer than one year. Similarly, if engaged at the time of judicial selection in a business activity, a new judge may, notwithstanding the prohibitions in Section 5C(1), 5C(2), and 5C(3), continue in that activity for a reasonable period, but in no event longer than one year.

D. In addition to the foregoing, the Commission shall have continuing jurisdiction over individuals to whom this Code is applicable regarding allegations of misconduct occurring during such individual’s service as an officer of a judicial system if a complaint is filed no later than one (1) year following service of such judicial officer.

This Code shall become effective January 7, 2004.
DEFINITION OF SANCTIONS

The Constitution of the State of Georgia of 1983 provides that "The Supreme Court shall adopt rules of implementation" for discipline, removal, and involuntary retirement of judges (O.C.G.A Article VI, Section VII, Paragraph VII). The following are rules adopted by the Supreme Court governing the functions of the Judicial Qualifications Commission:

The following working definition for disciplinary sanctions shall apply in all proceedings of the Commission, both formal and informal:

(a) **Admonition**: A private communication reminding a judge of ethical responsibilities and giving a gentle or friendly warning to avoid future misconduct or inappropriate practices. An admonition may be used to give authoritative advice and encouragement or to express disapproval of behavior that suggests the appearance of impropriety even though it meets minimum standards of judicial conduct.

(b) **Private Reprimand**: A private communication that declares a judge's conduct unacceptable under one of the grounds for judicial discipline but not so serious as to merit a public sanction.

(c) **Public Reprimand**: A public communication administered by a judicial officer which declares a judge's conduct unacceptable under one of the grounds for judicial discipline but not so serious as to warrant a censure.

(d) **Censure**: A public declaration by the Supreme Court that a judge is guilty of misconduct that does not require removal from office.

(e) **Suspension**: A decision by the Supreme Court to suspend a judge from office temporarily, with or without pay, for serious misconduct that merits more than a censure but less than removal. This sanction is flexible, and there are no restrictions on the length of a suspension.

(f) **Removal**: A decision by the Supreme court to remove a judge permanently from office for serious misconduct.

(g) **Retirement**: A decision by the Supreme Court to retire a judge for a disability that seriously interferes with the performance of judicial duties that is or is likely to become permanent.
**RULE 1  Members and Their Terms**

(a) The power to discipline, remove and cause involuntary retirement of judges is vested in the Judicial Qualifications Commission, which consists of seven members, as follows:

(1) Two judges of any court of record selected by the Supreme Court;
(2) Three members of the State Bar of Georgia, who have been active status members of the State Bar for at least ten years, and who shall be elected by the Board of Governors of the State Bar; and
(3) Two citizens, neither of whom shall be members of the State Bar, who shall be appointed by the Governor (Article VI, Section VII, Paragraph VI, Constitution of Georgia of 1983).

(b) All members of the Commission shall serve for terms of four years each and until their successors are elected or appointed and are qualified. Whenever any member ceases to hold the office or to possess the qualifications which entitle the member to be appointed a member, the member's membership shall terminate, and the appointing authority shall select a successor for the unexpired term. No member of the Commission shall receive any compensation for services, but shall be allowed necessary expenses for travel, board and lodging incurred in the performance of Commission duties. No member of the Commission, except judges, shall hold any other public office or be eligible for appointment to a State judicial office while holding membership on the Commission. No member shall hold office in any political party or organization. No act of the Commission shall be valid unless concurred in by a majority of its membership.

(c) A vacancy shall occur when a Commission member becomes unable to continue service for any reason. An appointment to fill a vacancy for the duration of the unexpired term shall be made by the appropriate authority. If a vacancy is not filled at the end of sixty (60) days, the Commission shall appoint from the category to be represented a member who shall serve until such time as an appointment shall be made by the appropriate authority.

(d) A temporary vacancy shall occur when a Commission member becomes unable to attend a formal hearing for any reason. The Commission is authorized but not required to appoint a former member from the category to substitute at such formal hearing and subsequent action related to the hearing in lieu of such non-serving member.

**RULE 2  Officers and Their Duties**

(a) The Commission shall select from its members a Chairperson, a Vice Chairperson, and such other officers as the Commission may consider proper and helpful in carrying out its functions, who shall serve at the pleasure of the Commission. A member may be elected to more than one office.

(b) The Chairperson shall preside at all general meetings of the Commission as well as at formal hearings concerning the conduct or disability of a judge. If the Chairperson is not a lawyer, the Chairperson shall appoint a member of the Commission who is a lawyer to preside at any hearing held by the Commission. The Chairperson shall be responsible for the custody and safekeeping of all the records of the Commission, shall promptly furnish to members of the Commission copies of all complaints, notices, answers and other documents filed in connection with proceedings before the Commission, and shall perform such other duties as are indicated in these rules or as are customarily performed by a Chairperson. The Chairperson shall also annually make a report to the Supreme Court of the actions of the Commission, but shall not set forth...
(c) In the event the Chairperson is absent, or is otherwise unable to attend a meeting or to perform the duties of office at a particular time, those duties shall be performed by the Vice Chairperson, and in the absence of the Vice Chairperson, by a member of the Commission designated by those present.

(d) The Director or, if the Director is absent, such member of the Commission as the Chairperson shall designate, shall have the duty of recording in the minute book, as a permanent record of the Commission, the action of the Commission at each meeting.

(e) The Commission may, at its discretion, designate a Director who shall serve at the pleasure of the Commission and shall have such duties, powers and authority as may be, from time to time, fixed, determined or delegated by the Commission. The Director may be authorized by the Commission to issue subpoenas on its behalf.

(f) Notwithstanding the foregoing provisions, the Chairperson, with the concurrence of a majority of the Commission, may at any time designate any judicial member of the Commission to preside at any formal hearing held by the Commission. Any such designation shall be made by written order signed by the Chairperson or the Director.

**RULE 3 Meetings**

(a) The Chairperson may, and upon the request of three members shall, call a meeting of the Commission. The Chairperson shall give reasonable notice to each member by telephone or other means of the time and place of the meeting.

(b) Decisions by the Commission to conduct an investigation of a judge, order a judge to submit to a physical examination, proceed against a person for contempt for failing to respond to a subpoena of the Commission, issue a public statement, institute contempt proceedings against a person for violation of the confidentiality provisions of the rules, hold or not to hold a formal hearing, hear additional evidence, make a report to the Supreme Court recommending removal, other discipline or retirement of a judge, or deciding after a formal hearing not to make such a report, shall be made at a formal meeting of the Commission. Decisions with respect to other matters may be arrived at through communications between the members of the Commission, but a report of such action shall be made by the Chairperson at the next meeting of the Commission and entered in the minutes of that meeting.

(c) Four members of the Commission shall constitute a quorum for the transaction of business at any formal meeting or for the conduct of a formal hearing, and if a quorum is present at a meeting, the vote of a majority of those in attendance shall be considered the official action of the Commission, except that a vote of a majority of the members of the Commission shall be required for a recommendation of discipline to the Supreme Court.

**RULE 4 Complaints and Investigations**

(a) The Commission shall require that all complaints shall be made to it in writing and the Commission, when it considers it appropriate, may require that the same be verified. A complaint shall not be a prerequisite to action by the Commission, but the Commission may act
on its own motion in those cases where the Commission considers it appropriate.

(b) Upon receiving a complaint or otherwise receiving information indicating that a judge may have been guilty of willful misconduct in office, or willful and persistent failure to perform the duties of a judge, or habitual intemperance, or conduct prejudicial to the administration of justice which brings the judicial office into disrepute, or that a judge may have a disability that seriously interferes with the performance of the judge's duties which is or is likely to become permanent, the Commission may make an initial inquiry of the judge for such written comments with respect to the matters involved as the judge may wish to make; and, with or without making such initial inquiry, and with or without notice or other information being given to the judge, as the Commission may consider best, the Commission may conduct an investigation of the conduct or condition of the judge for the purpose of determining whether formal proceedings should be instituted and a hearing held. However, prior to any determination that a formal hearing will be held, the judge shall be sent a copy of the complaint or a synopsis of the matters to be or which have been investigated and the judge shall thereafter be given reasonable opportunity to make such statement to the Commission as the judge considers desirable. Such statement may be made, as the judge may elect, personally or by counsel, verbally or in writing, and may or may not be under oath. In exercising this right, the judge shall not have the right to call witnesses nor to confront nor cross-examine the person making the complaint or any person interviewed by the Commission or its duly authorized representative. If, after being notified by the Commission, the judge does not respond within a reasonable time or within the time fixed by the Commission, the right to make such statement shall thereupon terminate. In making an investigation, the Commission may issue subpoenas for witnesses to appear before the Commission's representative for the purpose of making a sworn statement and may likewise issue subpoenas for the production of books, papers and other evidentiary matters which are pertinent to the inquiry.

(c) Whenever the Commission reaches the conclusion that a complaint fails to state, or the facts developed upon an initial inquiry to the judge or an investigation fail to show, any reason for the institution of disciplinary proceedings, the Commission shall so advise the complainant. The Commission shall also so notify the judge, except that with respect to complaints which are rejected because they fail to state any grounds for disciplinary proceedings, the Commission may, but is not required to, advise the judge thereof.

(d) After receipt of a complaint or of information indicating that a judge may have been guilty of conduct which might warrant discipline, or that a judge may be disabled, the Commission, before voting to hold a formal hearing, may delegate to one or more of its members the authority and responsibility to personally and confidentially confer with the judge subject to the inquiry, and to make informal recommendations to the judge concerning the subject matter of the inquiry and a satisfactory disposition thereof; and if the judge agrees to the Commission's suggested disposition, the matter may be disposed of on the basis of the agreement reached. The Commission shall file a report of the disposition in the Supreme Court.

(e) The foregoing shall not be construed to mean that the Commission may not at any time entertain and act upon a proposal from a judge for disposition of any matter pending before the Commission concerning such a judge, provided that if such proposal is made after notice of formal hearing, and is found acceptable to the Commission, a report thereof shall be filed in the Supreme Court and such report shall not be considered confidential.

(f) At any time after receipt of a complaint or otherwise receiving information indicating that a judge may have been guilty of conduct which, while insufficient to warrant the institution of formal proceedings, nevertheless warrants sanctions, the Commission may informally: (i) admonish and/or reprimand a judge; (ii) direct professional counseling and assistance for a
RULE 5 Institution of Formal Proceedings – Notice – Judge’s Answer

(a) When after receiving a complaint or otherwise obtaining information concerning the conduct or physical or mental condition of a judge, the Commission has made such investigation of the complaint or information as the Commission considers needful and proper, and the judge has been given the opportunity to make a statement to the Commission as stated in Rule 4(b), the Commission concludes that a formal hearing should be held, the Commission shall issue, as promptly as possible, a written notice to the judge advising the judge of the institution of formal proceedings to inquire into the charges against the judge. The proceedings shall be entitled: "Before the Commission on Judicial Qualifications, Inquiry Concerning Judge _________________."

(b) The notice shall specify the charges against the judge with sufficient fullness to enable the judge to understand the nature thereof and shall advise the judge of the right to file a written answer to the charges; and a copy of such notice shall be filed in the Supreme Court.

(c) Within thirty (30) days after service of the notice of formal proceedings, the judge shall file with the Commission an original and six (6) copies of a verified answer. The notice of formal proceedings and the answer shall constitute the pleadings. No further pleadings shall be filed, except by way of amendment as provided for in Rule 9.

RULE 6 Hearings Before Commission or a Special Master

Upon the filing of an answer or upon expiration of the time for its filing, the Commission shall promptly order a hearing to be held before it concerning the removal, other discipline or retirement of the judge, or the Commission may request the Supreme Court to appoint a Special Master to hear and take evidence in such matter and to report thereon to the Commission. The Commission shall set a time and place for the hearing, and shall give notice thereof to the judge at least twenty (20) days before the date thereof.

RULE 7 Conduct of Hearing

(a) At the time and place set for the hearing, the Commission or the Special Master may proceed with the hearing whether or not the judge has filed an answer or appears at the hearing.

(b) The proceedings at the hearing shall be reported by a qualified reporter.

(c) At the hearing before the Commission or a Special Master appointed by the Supreme Court, legal evidence only shall be received, and oral evidence shall be taken on oath or affirmation.

(d) The Chairperson or presiding member of the Commission, if the hearing is held before the Commission, or the Special Master appointed to conduct the hearing, shall administer oaths or affirmations to witnesses, rule on the admissibility of evidence, and otherwise direct the manner or order of proceedings as a judge of a court of record.

(e) The Rules of Evidence applicable to civil cases shall apply at all hearings before the
Commission or the Special Master, and the standard of proof shall be clear and convincing evidence. In all such hearings, the burden of proof shall be upon the counsel for the Commission.

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**RULE 8 Rights of Judge in Connection with Hearing**

(a) Within fifteen (15) days after such notice of formal hearing has been mailed to or otherwise served upon the judge, it shall be the duty of the Commission to furnish to the judge as of the time of such notice the names of all persons and their addresses who have been interviewed by the Commission or its representative in investigating the charges set out in the notice of a formal hearing, as well as a copy or transcript of all statements of testimony, whether signed or unsigned, of any person so interviewed in connection with such charges and copies of all documents, writings, papers, records or other evidentiary material relevant to such charges which have been obtained by the Commission or its representative and reviewed by the Commission.

(b) If, after furnishing such information and prior to the date of the hearing, the Commission or its representative shall interview any other person or persons in connection with such charges, the Commission shall promptly inform the judge or the judge's counsel of the name and address of such other person or persons.

(c) If a witness is discovered or interviewed or any documentary or other tangible evidence is discovered or comes into the possession of the Commission or its representative after the hearing has begun, the Commission shall promptly inform the judge or the judge's counsel of the name and address of such witness and promptly furnish a copy of such documentary or other tangible evidence to the judge or the judge's counsel.

(d) The foregoing provisions shall not be construed as requiring that the Commission furnish to the judge any communications between members of the Commission or its representative or any other records of the Commission.

(e) In either of the situations described in Paragraphs (b) and (c), the Commission, upon compliance with the requirements of such paragraphs, shall be authorized to hear the testimony of any such witness or to admit into evidence any documentary or tangible evidence. However, the Commission may take such action with respect to the hearing either by way of postponement, recess or adjournment of the hearing to some future date as, upon a specific motion made by the judge therefore, may seem proper for the protection of the judge in the adequate presentation of a defense.

(f) At the hearing the judge shall have the right and reasonable opportunity to defend against the charges by the introduction of evidence; to be represented by counsel; to examine and cross-examine witnesses; and to have subpoenas issued for attendance of witnesses to testify or for the production of books, papers and other evidentiary matters.

(g) When a transcript of testimony has been prepared at the expense of the Commission, a copy thereof, upon request, shall be available for use by the judge and counsel in connection with the proceedings, or the judge may arrange to procure a copy at his or her expense. The judge shall have the right, without any order or approval, to have all or any portion of the testimony in the proceedings transcribed at the judge's expense.

(h) If, in a proceeding before the Commission, the Commission should be in doubt as to the competency of the judge, the Commission may appoint a guardian ad litem or take such other action as the Commission may consider appropriate.
RULE 9 Amendments to Notice and Answer

The Special Master, at any time prior to the conclusion of the hearing, or the Commission, at any time prior to its determination, may allow or require amendments to the notice of formal proceedings and may allow amendments to the answer. The notice may be amended to conform to proof or set forth additional facts and charges whether occurring before or after the commencement of the hearing. In case an amendment is allowed to the notice of formal hearing, the judge shall be given reasonable time both to answer the amendment and to prepare and present a defense against the matters set forth therein.

RULE 10 Report of Special Master

(a) Within twenty (20) days after the conclusion of a hearing before a Special Master and the Master's receipt of a transcript of the evidence, the Special Master shall prepare and transmit to the Commission a report which shall contain a brief statement of the proceedings, findings of fact, any conclusions of law with respect to the issues presented by the notice of formal hearing and the answer thereto, or if there be no answer, findings of fact and any conclusions of law with respect to the allegations in the notice of formal hearing. The report shall also contain the Special Master's recommendation as to whether the Commission shall or shall not recommend discipline. The report shall be accompanied by a transcript of the evidence.

(b) Upon receiving the report of the Special Master, the Commission shall promptly serve a copy on the judge.

RULE 11 Objections and Briefs

(a) Within fifteen (15) days after a copy of the Special Master's report is served on the judge, the judge may file with the Commission an original and six (6) copies of a statement of objections to the findings of fact and conclusions of law contained in the report of the Special Master and may file an original and six (6) copies of a brief in support thereof.

(b) If the judge does not contest the findings of fact or conclusions of law as set forth in the Special Master's report, the judge may, nevertheless, within such time file an original and six (6) copies of a brief in support of a claim that such findings and conclusions are not sufficient to justify removal, other discipline or retirement.

(c) In making a report, the Commission, when there is a report of a Special Master, may accept, modify or reject any or all of the findings of fact and conclusions of law of the Special Master as well as the Special Master's recommendation to the Commission that it recommend or not recommend discipline.

(d) If a formal hearing is held by the Commission, the judge may, within a reasonable time after the termination of the hearing as may be fixed by the Commission, file an original and six (6) copies of a brief with the Commission in support of the judge's claim that the Commission should not recommend removal, other discipline or retirement.

RULE 12 Additional Evidence
In a proceeding pending before it, the Commission may, at any time after a formal hearing is held, order an additional hearing for the taking of additional evidence; provided that where a Special Master has been appointed, additional evidence shall be taken by the Special Master upon his or her own motion or by order of the Commission, and no such hearing for the taking of additional evidence shall be held by the Commission itself until after the Special Master has made a report. After the Special Master has made a report, the Commission may take additional evidence, or direct the Special Master to do so and report findings of fact and conclusions of law with respect thereto. The judge shall be given ten (10) days notice of the hearing to take additional evidence.

**RULE 13 Extension of Time**

The Chairperson of the Commission may extend the periods not to exceed thirty (30) days in the aggregate for filing an answer, for the commencement of a hearing before the Commission, for the transmittal of the Special Master’s Report to the Commission, and for filing a statement of objections to the report of the Special Master, and a Special Master may similarly extend the time for the commencement of a hearing. The Commission may grant such additional extension of time as it may consider proper.

**RULE 14 Recommendation of the Commission of Removal, Other Discipline, or Retirement**

(a) The Commission may make a report recommending to the Supreme Court that a judge be (1) removed from office; (2) removed from office and prohibited from thereafter holding judicial office; (3) suspended from office for a specified period of time together with such other conditions and restrictions as the Commission may consider proper; (4) censured; (5) reprimanded; (6) retired; or (7) subjected to such other discipline as may seem to the Commission appropriate. In the case of a recommendation of censure, the same, if approved by the Supreme Court, shall be administered in open Court. If the Commission recommends a reprimand and such recommendation is approved by the Court, the same shall be administered by the Court at such place and in such manner as the Court may consider proper.

(b) The report shall be signed by the members of the Commission concurring therein and shall indicate if any member or members dissent from the report. Any member who does not agree with the report of the majority of the Commission may file a written dissent or special concurrence which shall be made a part of the record. The report shall be filed in the Supreme Court and shall be accompanied by the Special Master's report, if any, and a transcript of the evidence. A copy of the report as filed shall be promptly served upon the judge and evidence of such service shall be filed in the Supreme Court.

**RULE 15 Suspension by the Commission for Felony Indictment**

(a) Upon indictment for a felony by a grand jury of this State or by a grand jury of the United States of any judge, the Commission shall, subject to subparagraph (b) of this Rule, review the indictment, and if it determines that the indictment relates to, and adversely affects the administration of the office of this indicted judge, and that the rights and interests of the public are adversely affected thereby, the Commission shall suspend the judge immediately and without further action pending the final disposition of the case or until the expiration of the judge's term of office, whichever occurs first. During the term of office to which such judge was elected and in which the indictment occurred, if a nolle prosequi is entered, if the public official is acquitted,
or if after conviction the conviction is later overturned as a result of any direct appeal or application for a writ of certiorari, the judge shall be immediately reinstated to the office from which he or she was suspended. While a judge is suspended under this subparagraph and until final conviction, the judge shall continue to receive compensation. For the duration of any suspension under this subparagraph, the Governor shall appoint a replacement judge. Upon a final conviction with no appeal or review pending, the office shall be declared vacant and a successor to that office shall be chosen as provided in the Constitution of the State of Georgia of 1983 or the laws enacted in pursuance thereof.

(b) The Commission shall not review the indictment for a period of fourteen (14) days from the day the indictment is received. This period of time may be extended by the Commission. During this period of time, the indicted judge may, in writing, authorize the Commission to suspend him or her from office. Any such voluntary suspension shall be subject to the same conditions for review, reinstatement or declaration of vacancy as are provided in this subparagraph for a nonvoluntary suspension.

(c) After any suspension is imposed under this subparagraph, the suspended judge may petition the Commission for a review. If the Commission determines that the judge should no longer be suspended, the judge shall immediately be reinstated to office.

(d) The findings and records of the Commission and the fact that the public official has or has not been suspended shall not be admissible in evidence in any court for any purpose. The finding and records of the Commission shall not be open to the public.

(e) The provisions of this subparagraph shall not apply to any indictment handed down prior to January 1, 1985.

(f) If a judge who is suspended from office under the provision of this subparagraph is not first tried at the next regular or special term following the indictment, the suspension shall be terminated and the judge shall be reinstated to office. The judge shall not be reinstated under this provision if he or she is not so tried based on a continuance granted upon a motion made only by the defendant.

RULE 16  Petition to Modify or Reject Commission’s Recommendation

(a) A petition to the Supreme Court to modify or reject the recommendation of the Commission for removal, other discipline or retirement of a judge may be filed with six (6) copies within thirty (30) days after service of a copy of the Commission's report on the judge. The petition shall be verified, shall be based on the record, shall specify grounds relied on, and shall be accompanied by proof of service of seven (7) copies of the petition and of the brief on the Commission. Within twenty (20) days after service of the petition and brief, the Commission may serve and file a responsive brief. Within fifteen (15) days after service of such brief, the petitioner may file a reply brief, seven (7) copies of which shall be served on the Commission.

(b) Failure to file a petition within the time provided may be deemed a consent to a determination on the merits based upon the record filed by the Commission.

(c) A petition filed under this rule shall be heard in such manner as may be ordered by the Supreme Court.

RULE 17  Commission’s Power to Secure Assistance
(a) In conducting investigations, the preparation of notices, presentation of evidence at a formal hearing, preparation and filing of briefs and other documents, or in otherwise carrying out its functions, the Commission may utilize the services of the Attorney General of this State or one of the Attorney General's deputies or assistants, and in addition thereto, or in lieu thereof, may secure and pay for the services of a member of the Bar of this State in any or all of such matters.

(b) The Commission may also employ such assistants as it considers necessary for the performance of the duties and in the exercise of the powers conferred upon the Commission; subpoena or arrange for and compensate medical or other experts and reporters; subpoena witnesses; and arrange for the attendance of witnesses not subject to subpoena; and pay from funds available to it all expenses reasonably necessary for effectuating the purposes of Article VI, Section VII, Paragraph VII, of the 1983 Constitution of the State of Georgia.

RULE 18 Powers of Commission
Subpoenas, Depositions, Contempt, Physical Examinations, Witness Fees

(a) The Commission, through its Chairperson or Director, shall have the power to issue subpoenas for the attendance of witnesses at a formal hearing held before the Commission or a Special Master under Rule 7, for the production at such hearing of books, papers and other evidentiary matter.

(b) After notice is given to a judge that a formal hearing will be held under Rule 5, either the Commission or the judge may take the depositions of any witness upon reasonable written notice thereof given to the judge or the Commission of the time and place of taking of such depositions. The original of the deposition shall be returned to the Commission and at the hearing may be opened and used by either party under the same conditions and in the same manner and for the same purposes as depositions in civil cases. In connection with the taking of such depositions, the Commission, through its Chairperson or Director, shall have the power to issue a subpoena for the attendance of the witness whose testimony is to be taken and for the production at the taking of the deposition of books, papers and other evidentiary matter.

(c) If any person refuses to attend, testify, or produce any writings or things required by a subpoena issued by the Commission, as authorized under subparagraph (b) of Rule 4 or under this rule, the Commission may petition the judge of the Superior Court of the circuit in which the person may be found, or if a judge of that circuit is involved in the proceedings, then to any judge of an adjoining circuit, for an order compelling the person to attend and testify or produce the writings or things required by the subpoena. The Court shall order the person to appear before it at a specified time and place and then and there shall consider why the person has not attended, testified or produced writings or things as required. A copy of said order shall be served upon the person to whom the subpoena of the Commission was directed. If it appears to the Court that the subpoena was regularly issued, the Court shall order the person to appear before the Commission, or a Special Master, at the time and place fixed in the order and to testify or produce the required writings or things. Failure to obey the order shall be punishable as contempt of court. The proceedings so instituted shall state in general terms, without identifying the judge, the nature of the pending matter, the name and residence of the person whose testimony is desired, and directions, if any, of the Commission requesting an order requiring the person to appear and testify and to produce writings or things as required by the Commission's subpoena. If the proceedings are instituted prior to the giving of notice of a formal hearing, the proceedings shall not identify the judge by name but only as a number.

(d) Each witness shall receive for attendance the same fees and allowances prescribed by OCGA Section 24-10-24 for witnesses in civil cases.
(e) The Commission shall also have the authority, after notice to the judge and a hearing, to require that a judge involved in proceedings before the Commission submit to a physical or mental examination, or both, and specify the time, place, manner, conditions and scope of the examination and the physician or physicians by whom it is to be made.

**RULE 19  Notices**

(a) All notices provided for under these rules shall be in writing and shall be served upon the judge personally by a member of the Commission, or by a representative designated by the Chairperson, or may be served by registered or certified mail, return receipt requested.

(b) All notices provided for under these rules shall be in writing and shall be served upon the judge personally by a member of the Commission, or by a representative designated by the Chairperson, or may be served by registered or certified mail, return receipt requested.

(c) All notices mailed to a judge or counsel shall be enclosed in a sealed envelope marked on the face thereof, “Confidential – to be opened by addressee only.

**RULE 20  Confidentiality and Exceptions**

(a) The proceedings of the Commission, including, but not limited to, the fact of filing of complaints with the Commission, investigations to determine whether there is probable cause that judicial misconduct has occurred, conferences of the Commission with respect to matters pending before it, correspondence and other communications, information learned from any investigation by the Commission and all other papers and documents shall be kept confidential. Information obtained independently of any such complaint or investigation need not be maintained as confidential. Further, the requirement that participants maintain confidentiality shall cease at the time of the decision of the Commission on whether to initiate formal hearing against a judge, or at the time the complaint in question is resolved, closed, or otherwise settled through formal disposition. However, this confidentiality requirement shall not apply to notice of a formal hearing, a formal hearing, reports of the Commission to the Supreme Court recommending discipline, and decisions of the Commission made after a formal hearing that the judge with respect to whom the hearing was held was not guilty of misconduct justifying a recommendation of discipline. When, notwithstanding the rule of confidentiality set out in the first sentence of this subparagraph, the existence of a complaint filed with the Commission or any investigation of a judge whether or not based upon a complaint shall in some way become public, the Commission, at the request of the judge or upon its own motion if it considers such to be desirable, may make such statement with respect to the handling and status of the proceedings as the Commission may consider appropriate. When, in the exercise of its functions, the Commission has information concerning conduct of a member of the Bar which the Commission feels should be considered by the Disciplinary Board of the State Bar of Georgia for the purpose of determining whether such conduct constitutes a violation of the Code of Professional Responsibility, the Commission shall have the authority and it shall be its duty to refer the matter to the Board for such action as the Board may consider appropriate. The Commission shall be further authorized, in its discretion, to disclose to the Judicial Nominating Commission of the State of Georgia and to the Governor of the State, or any Commission, Board or Committee officially appointed to evaluate nominees for federal judgeships, including, but not limited to, a committee appointed by the American Bar Association for such purpose, any information involving any prospective nominee for judicial appointment which the Commission feels such Commission, Board or Committee should consider in passing upon the qualifications and fitness
of the nominee for judicial appointment.

(b) All persons acting for the Commission in investigating a judge or participating in an official capacity in any proceedings relating thereto, including court reporters, shall be specifically advised by the Chairperson or by the Commission's representative of the requirement of confidentiality with respect to such matters as are confidential under subparagraph (a) of this Rule and shall be directed not to disclose any information acquired by them to any person not officially or formally connected with the investigation or proceedings.

(c) All subpoenas and other proceedings which may be issued or conducted by the Commission prior to service of a notice of formal hearing shall not name the judge against whom the charges are pending, but shall style the proceedings by number as set out in Rule 5.

(d) If there shall be probable cause for inquiry concerning, or prosecution of, a witness for perjury in proceedings before the Commission, the record of the proceedings or papers filed in connection therewith shall be disclosed to the extent required by the inquiry or prosecution.

(e) A judge about whom an inquiry or investigation is being made may request release of information concerning the complaint and investigation, and the Commission, if it considers appropriate, may comply with such request.

(f) Any person violating the rule of confidentiality as set forth in this section shall be subject to punishment for contempt of the Supreme Court.

(g) The rule of confidentiality as set forth in this section shall not apply to any information which the Commission considers to be relevant to any current or future civil or criminal action against a judge, and upon receipt of a duly issued subpoena or court order by any state or federal court of record, the Commission is authorized to comply with the same to the extent required by such subpoena or court order.

(h) The rule of confidentiality set forth in this section shall not apply to any complaint alleging a violation of Canon 7 of the Code of Judicial Conduct which the Commission, in its sole discretion, determines should be handled on an expedited basis in manner set forth in Rule 27.

**RULE 21 Immunity**

Complaints, reports or testimony in the course of proceedings under these rules shall be deemed to be made in the course of judicial proceedings. Members of the Commission, Commission counsel and the Commission staff shall be absolutely immune from suit for all conduct in the course of their official duties. All other participants shall be entitled to all rights, privileges and immunities afforded to participants in actions filed in the courts of this state, and shall be immune from civil liability with respect to all papers filed with, or statements made or testimony given to, the Commission or the Supreme Court or given in any investigation or proceeding pertaining to a complaint against a judge, when done in good faith.

**RULE 22 Advisory Opinions**

(a) The Commission shall be authorized to render official formal advisory opinions concerning a proper interpretation of the Code of Judicial Conduct, which advisory opinions the Commission shall publish and disseminate.
(b) The Commission shall examine and reconsider any of its advisory opinions upon the request of the Supreme Court.

(c) The Commission and the Supreme Court shall consider compliance with an advisory opinion to be evidence of a good faith effort to comply with the Code of Judicial Conduct, but only to the extent that the underlying facts are identical.

(d) The Supreme Court’s determination of the propriety of particular conduct shall supersede any conflicting advisory opinion of the Commission.

**RULE 23 Other Powers**

The Commission shall have such other powers and authority as may be reasonably necessary for the proper and efficient performance of its functions in carrying out the intent of the constitutional amendment creating the Commission.

**RULE 24 Complaint Against a Member of the Supreme Court**

A complaint against a member of the Supreme Court shall proceed in the same manner as a complaint against any other judge except:

(a) If the Commission recommends a sanction and the respondent consents to the sanction, the Commission shall impose the sanction and there shall be no appeal or further review by the Court.

(b) If the Commission recommends a sanction and the respondent objects to the sanction, the Commission shall proceed in the manner outlined in Rule 14. However, all current members of the Court shall be automatically disqualified and a substitute Court consisting of the current Chairperson and the six (6) immediate past Chairpersons of the Council of Superior Court Judges shall be impaneled to decide the matter in lieu of the sitting members of the Supreme Court. If any such Chairperson shall be disqualified or otherwise fails or refuses to serve, the next preceding Chairperson of the Council shall serve as a member of the substitute Court.

**RULE 25 Emergency Interim Relief**

(a) Incident to any preliminary investigation or formal proceeding conducted pursuant to these rules or upon receipt of sufficient evidence demonstrating that the continued service of any judge is causing immediate and substantial public harm and an erosion of public confidence in the orderly administration of justice and appears to be violative of the Georgia Code of Judicial Conduct, the Commission may petition the Supreme Court for injunctive or other relief, including temporary suspension or reassignment of the judge.

(b) The petition shall state the evidence justifying the emergency relief sought with particularity and shall be verified by the Chairperson and/or the Director of the Commission.

(c) Simultaneously with the filing of said petition, a copy shall be personally served upon the Respondent by any person approved by the Chairperson and/or the Director of the Commission. In the event personal service cannot be perfected, service may be perfected by registered or certified mail, return receipt requested, to the last known address of the Respondent as set forth in the most current issue of the Georgia Courts Directory published by the Administrative Office.
of the Courts.

(d) A written acknowledgment of service from the Respondent and/or his or her counsel shall constitute conclusive proof of service and eliminate the need to utilize any other form of service.

(e) Upon receipt of the verified petition for emergency relief, the Clerk of the Supreme Court shall immediately file the same; assign the matter a docket number; and notify the Chief Justice that the appointment of a Special Master is appropriate. Within 10 days after the docketing of said petition, the Court shall appoint a Special Master to conduct a hearing at which the Commission shall show cause why the relief sought by the Commission should be granted pending further disciplinary proceedings.

(f) Within 10 days after receipt of the Order of Appointment, the Special Master shall conduct a hearing at such time and place as may be designated by said Special Master or as may be mutually agreed upon by the parties.

(g) Within 10 days following the completion of said hearing, the Special Master shall file a report and recommendation with the Clerk of the Supreme Court and simultaneously serve copies thereof upon the Commission and the Respondent.

(h) The Supreme Court shall give expedited consideration to the report of the Special Master and may suspend the Respondent, with or without pay, pending final disposition of the disciplinary proceedings giving rise to the petition for emergency suspension or order such other action as it deems appropriate under all the circumstances.

**RULE 26 Involuntary Retirement of Judges**

In addition to other methods and causes provided in these Rules, a judge of any court in this State shall be subject to involuntary retirement for a mental or physical disability which constitutes a serious and likely permanent interference with the performance of the duties of office on the following terms and conditions:

(a) Upon receiving a complaint or otherwise receiving information indicating that a judge has been judicially declared incompetent; voluntarily committed by reason of incompetency or disability by a final judicial order after a judicial hearing; or may have a mental or physical disability that seriously impairs or interferes with the performance of the duties of office which is or is likely to become permanent, and after determining that said condition adversely affects the administration of the office of the disabled judge and the rights and interests of the public, the Commission shall, without further action, enter an order requiring the judge to show cause, within 10 days after service of said order, why said disabled judge should not be temporarily transferred to a disability inactive status pending the final disposition of the matter. A copy of said order shall be immediately served by hand delivery upon the judge, his or her guardian, or the director of the institution in which any such judge may be confined or otherwise receiving treatment.

Unless subsequently extended by consent, any such order shall automatically expire 90 calendar days after service upon the disabled judge, and during such time, said disabled judge shall continue to receive the compensation normally paid for such office.

(b) Simultaneously with the service of said order, the Commission shall request the judge to submit, within 10 days, all pertinent medical and other records to the Commission and shall designate one or more qualified medical, psychiatric or psychological experts to examine the
disabled judge prior to any hearing on the matter. Said experts may or may not be agreed upon by the Commission and the disabled judge, but in any event, the written reports of all such experts shall be provided to the Commission and to the disabled judge as soon as medically feasible, and in any event, not less than 20 days prior to any hearing on the matter. The cost of any such examinations shall be borne solely by the Commission.

(c) The failure or refusal of a judge to submit the requested medical records or to submit to an independent medical examination, unless due to circumstances beyond the judge's control, shall preclude the judge from submitting reports of medical examinations done on his or her behalf, and the Commission may consider such failure or refusal as evidence that the judge has a disability.

(d) In the event the disabled judge shall desire independent medical examinations by experts other than those designated by the Commission, said judge shall have the absolute right to have such examinations conducted, provided, however, that any such examination shall be at the sole expense of the disabled judge and, provided further, that written reports of such examinations are provided to the Commission as soon as medically feasible and, in any event, not less than 20 days prior to any hearing on the matter.

(e) After receipt and review of the written reports of any and all such examinations and prior to any hearing on the matter, the Commission and the disabled judge may agree upon a proposed stipulated disposition of the matter. Said proposed stipulated disposition, which shall contain, as appropriate, (i) findings of fact, conclusions of law and recommended final disposition; (ii) copies of the original complaint or other material giving rise to the complaint; and (iii) all written reports of examinations received and reviewed by the Commission, shall be immediately filed with the Supreme Court for approval, rejection or modification. In such filing, the disabled judge shall not be identified, but the matter shall be captioned: "Stipulated Disposition Concerning Judge No.___________."

(f) The final decision on such stipulated disposition shall be made by the Supreme Court as soon as practicable, but in any event, not later than thirty (30) days after the matter is docketed in said Court, and the Court shall forthwith enter an appropriate order.

(g) In the event the proposed stipulated disposition is rejected and/or modified or revised in any substantial and material way, the disabled judge may, within ten (10) days of the receipt of the order of the Court, notify the Commission that he or she is withdrawing his or her agreement to the same, and said proposed stipulated disposition cannot thereafter be used against said disabled judge in any subsequent proceedings, nor shall the same be available for public inspection.

(h) If any such matter is not resolved by stipulated disposition, all such subsequent proceedings shall be conducted in the same manner as disciplinary proceedings, except:
   (1) All such proceedings shall be and remain confidential until the final order of the Supreme Court;
   (2) The Commission may appoint and compensate, if necessary, a lawyer to represent the disabled judge if the judge is without representation;
   (3) If, after a formal hearing, the Commission concludes that the judge is incapacitated to continue to hold judicial office by reason of either physical or mental disability, it shall not be empowered to recommend any disciplinary action against said judge, but rather shall be limited to recommending a suspension from office, either temporary or permanent, on such terms and conditions as may appear just and proper under the circumstances, until such time as an appropriate petition for reinstatement to active status has been filed by the disabled judge and granted by the Supreme Court.
(4) For the duration of any suspension under this subparagraph, the Governor shall appoint a replacement judge who shall serve until the disabled judge is reinstated to active status or until the expiration of the disabled judge's term of office, whichever first occurs.

RULE 27 Special Committee on Judicial Election Campaign Intervention

(a) In every year in which a general election is held in this State and at such other times as the Commission may deem appropriate, the Chair shall name three (3) members to a Special Committee on Judicial Election Campaign Intervention ("Special Committee") whose responsibility shall be to deal expeditiously with allegations of ethical misconduct in campaigns for judicial office. The membership of such committee shall consist of the senior member of each of the three (3) categories of Commission membership if available, and if not, the next most senior member from that category. The Commission Director shall also serve as an ex-officio member. The objective of such committee shall be to alleviate unethical and unfair campaign practices in judicial elections, and to that end, the Special Committee shall have the following authority:

(b) Upon receipt of a complaint or otherwise receiving information facially indicating a violation by a judicial candidate of any provision of Canon 7 during the course of a campaign for judicial office, the Director shall immediately forward a copy of the same by facsimile and U.S. Mail to the Special Committee members and said Committee shall:

(1) seek, from the complainant and/or subject of the complaint, such further information on the allegation of the complaint as it deems necessary;
(2) conduct such additional investigations as the Committee may deem necessary;
(3) determine whether the allegations of the complaint warrant speedy intervention; if no intervention is needed, dismiss the complaint and so notify the complaining party;
(4) if further investigation is deemed necessary, request confidential written responses from the subject of the complaint and the complaining party on the following schedule:
   (A) within 3 business days of receiving such a request from the Committee, a written response from the subject of the complaint;
   (B) the Committee will share the subject’s written response with the complaining party on a confidential basis, who shall be requested to provide a written response within 3 business days; and
   (C) the Committee will share the complaining party’s response with the subject of the complaint, who then shall be requested to submit a written rebuttal within 1 business day.

In the event a complaint is filed within two (2) weeks before a judicial election, or if circumstances otherwise dictate, the Committee may accelerate the above schedule or eliminate the need for steps (B) and (C) as the Committee deems necessary. Each of the above papers must be served on the Committee only, and will be kept confidential except as described above. The identity of the complaining party will remain confidential until the Committee’s decision is communicated to the parties unless that confidentiality is waived by the complaining party. Any party breaching the confidentiality of the above process shall be subject to a Public Statement as set forth in this Rule.

(5) if it is determined after the papers from the parties are reviewed that the allegations do warrant intervention, the Committee is authorized:
   (A) to immediately release to the complaining party and the person and/or organization complained against, a non-confidential “Public Statement” setting out violations believed to exist; and/or
   (B) to refer the matter to the full Commission for such action as may be appropriate under the applicable rules.
(5) if it is determined after the papers from the parties are reviewed that the allegations do not warrant intervention, the Committee shall dismiss the complaint and so notify the complaining party and the subject of the complaint

(c) All proceedings under this Rule shall be informal and nonadversarial, and the Special Committee shall act on all complaints within ten (10) days of receipt, either in person; by facsimile; by U.S. Mail; or by teleconference.

(d) Except as hereinabove specifically authorized, the proceedings of the Special Committee shall remain confidential as provided in Rule 20, and in no event, shall the Committee have the authority to institute disciplinary action against any candidate for judicial office, which power is specifically reserved to the full Commission under applicable rules.

**RULE 28 Recusal of Commission Members**

Commission Members shall recuse themselves in any proceeding in which their impartiality might reasonably be questioned, including, but not limited to instances where:

- (a) the member is a party, or witness, or has a personal familial or financial relationship or interest involving the matter, any party or witness;
- (b) the member is an attorney or party in any matter pending before the respondent;
- (c) the member has personal knowledge or information which could interfere with that member impartially considering such matter;
- (d) the member, as a judge similarly situated, would be required to recuse under the Code of Judicial Conduct; or
- (e) the member believes that, for any reason, that member cannot render a fair and impartial decision.

If the propriety of a member’s participation is raised, the issue shall be decided by a majority of the members present and voting. Temporary appointments to replace disqualified members, when necessary, shall be made in the same manner as authorized in Rule 1(d).
APPENDIX A2-1

IN THE PROBATE COURT OF __________ COUNTY
STATE OF GEORGIA

IN RE: __________________________

, Decedent

DOCKET NO. __________________

ORDER FOR MEDIATION

Re: Petition

The Court hereby directs and encourages the parties above to seek an equitable settlement of the issues in dispute in this matter. If an agreement is reached, the Court is to be notified immediately.

If no agreement has been reached within fifteen (15) days of the date of this Order, however, the parties are hereby ordered to attend together and to participate in good faith in at least one mediation session with a mediator chosen (from the official list maintained by the ADR Program for the __________ Judicial Circuit) (by the parties from among the mediators duly registered with the Georgia Office of Dispute Resolution). Mediation is a process which focuses on the parties themselves, and the Court strongly encourages the parties to carefully review the mediator list and to personally select a mediator. All parties must agree upon the chosen mediator and select a date for mediation within thirty (30) days of receipt by the attorneys for the petitioners of this Order. If the parties do not select a mediator within the time frame directed, one will be selected and appointed by the program director. The fees of the chosen or appointed mediator, as published in the Mediator List, shall be borne by [FEES]. [ATTORNEY AT LAW], as attorney for [PARTY] shall be responsible for completely filling out the mediation referral forms and scheduling the mediation session. All parties are responsible for compliance with the general mediation rules.

Each party must report to the Court the terms of any settlement reached. If no settlement is reached or if the Court has not received notification of the outcome of mediation within ninety (90) days of the date hereof, the matter will be scheduled by the Clerk for final trial.

Copies of this Order for Mediation shall be mailed to the office of the ADR Program for the __________________________ Judicial Circuit, to each petitioner’s attorney, to the guardian-ad-litem, if any, and to the Estate’s attorney.

SO ORDERED on _________________

__________________________________
Judge, Probate Court
CERTIFICATE OF MAILING

This is to certify that copies of the within and foregoing order were this date mailed by first-class, postage prepaid mail to the following named persons at the addresses shown:

Dated: __________________.

_______________________________
(Dep.) CLERK
IN THE PROBATE COURT OF ____________ COUNTY
STATE OF GEORGIA

IN RE: : Docket No:

NOTICE OF INTENT TO DISMISS
ACTION FOR WANT OF PROSECUTION

Take notice that the Petition for ________________ filed in the above-styled matter by
______________________, on ________________ will be DISMISSED by the Court on
______________________, for want of prosecution by the said petitioner UNLESS prior to
that date the matter is otherwise brought before the Court for disposition or further hearing.

By direction of Hon. ________________, Judge, this ___ day of ____________, 20__.  

_________________________
(Dep) CLERK

CERTIFICATE OF MAILING

This is to certify that copies of the within and foregoing document were this date mailed
by first-class, postage prepaid mail to the following named persons at the addresses shown:

Dated:

_________________________
(Dep.) CLERK
IN THE PROBATE COURT OF ____________ COUNTY
STATE OF GEORGIA

IN RE: : Docket No:

ORDER OF COURT

The within and foregoing Notice having been served by first class mail upon _________________, petitioner(s), and

It appearing to the Court that no response has been made to the Notice and that no further hearing, action or disposition has been made of the pending proceeding,

IT IS, THEREUPON, ORDERED that the Petition for _________________ filed in the above-styled matter by _________________, on _________________ be, and the same is hereby, DISMISSED by the Court for want of prosecution, without prejudice.

IT IS FURTHER ORDERED that all costs for such proceeding are hereby taxed against the applicant/petitioner.

SO ORDERED, this _____ day of ______________, 20__.

_______________________________
Judge, Probate Court

CERTIFICATE OF MAILING

I certify I have mailed a Copy of the Order of Court dismissing for lack of prosecution to:

This ___ day of ______________, 20____.

_______________________________
(Dep.) CLERK
Appendix A3-1

PETITION TO ENTER AND EXAMINE
SAFE DEPOSIT BOX AND FOR ORDER
AUTHORIZING DELIVERY OF CERTAIN CONTENTS

GEORGIA, _____________ COUNTY

To the Honorable Judge of the Probate Court:

The petition of ________________________________, whose mailing address is ________________________, respectfully shows to the Court:

1. On _________________, _______________________________ died. Sufficient proof of such death is submitted herewith in the following form(s): ( ) certified copy of death certificate; ( ) copy of obituary published in the ____________________________ (newspaper); ( ) order of funeral service from a local church, synagogue, temple, mosque or funeral home; ( ) written statement from funeral home in possession of the bodily remains of decedent; ( ) written confirmation of death from coroner, hospital, or skilled care nursing facility; or ( ) (other) ____________________________.

2. The decedent had contracted the use of the following safe deposit box(es) at the following financial institutions located in the State of Georgia:

<table>
<thead>
<tr>
<th>Financial Institution</th>
<th>Address</th>
<th>Box No(s.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>______________________</td>
<td>____________________________</td>
<td>____________________</td>
</tr>
<tr>
<td>______________________</td>
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<tr>
<td>______________________</td>
<td>____________________________</td>
<td>____________________</td>
</tr>
</tbody>
</table>

3. Petitioner, whose relationship to decedent is ________________________, desires to open and examine the contents of such safe deposit box(es) and to have delivered to the appropriate person(s) or entity(ies) certain contents thereof in accordance with Georgia law.

WHEREFORE, Petitioner prays that an Order issue directing the above named financial institution(s) to permit Petitioner to open and examine the contents of such safe deposit box(es) in the presence of an officer of the financial institution, and, if requested by Petitioner, directing such financial institution(s):

(1) To remove from any safe deposit box any writing purporting or appearing to be a Last
Will and Testament of the decedent and to deliver same to this Court;

(2) To remove from any safe deposit box any writing purporting to be a deed or permit to a burial or cemetery plot or to give burial instructions and to deliver same to Petitioner;

(3) To remove from any safe deposit box any insurance policy or policies on the life of the decedent and to deliver same to the beneficiary named in each such policy; and

(4) Within five banking days after a copy of this Order is presented, to permit Petitioner, the presence of an officer of the financial institution, to inventory the contents of any safe deposit box, which inventory shall be reduced to writing signed by the Petitioner and the officer of the financial institution in whose presence same was taken, a copy of which shall be retained by the financial institution and a copy of which may be filed with this Court.

________________________________
PETITIONER

Sworn to and subscribed before me,
on _______________________

________________________________
___________________________
Clerk of Probate Court or Notary Public

ORDER OF COURT

Upon consideration of the within and foregoing petition, it appearing to the Court that satisfactory proof of death of the named decedent has been presented by Petitioner,

IT IS, THEREUPON, ORDERED AND ADJUDGED that each of the financial institutions named in the petition shall, upon presentation by the Petitioner of a certified copy of this Order, permit the Petitioner, ______________________, to open and examine, in the presence of an officer of the financial institution, the contents of any safe deposit box(es) at such financial institution leased in the name of ______________________, decedent, or to which the decedent had sole access at the time of the death of the decedent, and

IT IS FURTHER ORDERED that, if requested by Petitioner, each such financial institution shall:

(1) Remove from any safe deposit box any writing purporting or appearing to be a Last Will and Testament of the decedent and shall deliver same to this Court;

(2) Remove from any safe deposit box any writing purporting to be a deed or permit to a burial or cemetery plot or to give burial instructions and shall deliver same to Petitioner;

(3) Remove from any safe deposit box any insurance policy or policies on the life of the decedent and shall deliver same to the beneficiary named in each such policy; and

(4) Within five banking days after a copy of this Order is presented, permit Petitioner, in
the presence of an officer or employee of the financial institution, to inventory the contents of any safe deposit box, which inventory shall be reduced to a writing signed by the Petitioner and the officer or employee of the financial institution in whose presence same is taken, a copy of which shall be retained by the financial institution and a copy of which shall be promptly filed with this Court by the financial institution or the Petitioner.

SO ORDERED, this ___ day of _____________, 20____.
INVENTORY OF SAFE DEPOSIT BOX
PURSUANT TO PROBATE COURT ORDER

Financial Institution: _______________________________

Safe Deposit Box No(s). _______________

Decedent: _______________________________________

In compliance with Order of the Probate Court of ___________ County, dated ____________, the Petitioner and I, _________________________, as the authorized officer or employee of the above-named financial institution, did on the date shown below, in each other’s presence, enter into the safe deposit box(es) shown above and did perform an inventory of the contents thereof, which consisted of the following described items (list and briefly described contents):

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

(Attach additional sheets or copies of this page if needed).

No items found in the safe deposit box(es) were removed therefrom, except (indicate any items removed and identify the person to whom same were delivered):

(____) A writing purporting or appearing to be a Last Will and Testament of the decedent, which was delivered by the financial institution to the Probate Court of Bibb County. [NOTE: Do NOT deliver a purported will to the petitioner. It is the responsibility of the financial institution to delivery same to the probate court.]

(____) A writing purporting to be a deed or permit to a burial or cemetery plot or appearing to give burial instructions, which was delivered to Petitioner.

(____) The following insurance policy/policies on the life of the decedent were delivered to the beneficiaries named in each such policy, as noted:

<table>
<thead>
<tr>
<th>Company, Policy Number, and Face Amount</th>
<th>Beneficiary Receiving Policy</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
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</tr>
</tbody>
</table>

A copy of this Inventory will be filed by the (____) petitioner or by the (____) financial institution with the Probate Court of __________ County within three (3) days after this date.

Date: __________________.
Petitioner

______________________________________________

Officer/Emp. of Financial Institution

Petitioner

______________________________________________

Officer/Emp. of Financial Institution
IN THE PROBATE COURT OF ________ COUNTY
STATE OF GEORGIA

IN RE: ____________________________  Docket No: _____________

AFFIDAVIT REGARDING TESTATOR’S SIGNATURE ON WILL

Personally before me, the undersigned attesting officer, came ________________, who, after being first duly sworn, deposes and states:

1. My name is _______________________________, and I am a resident of ________ County, Georgia.

2. During his/her lifetime, I knew the testator ________________________, by virtue of ____________________________________________________.

3. I have examined the copy of the alleged Will of ____________________, attached hereto, and can state that, to the best of my own personal knowledge and belief, the signature of the testator thereon is the signature of ____________.

4. I further state that I am not interested as an heir, beneficiary or creditor of the Estate of the deceased.

5. I have been advised that this affidavit will be filed with the Probate Court of ________ County in support of the Petition of ______________________to probate the original of the attached copy as the true last Will and Testament of _______________________________, deceased.

________________________________
Sworn to and subscribed before me, __________________________

Printed Name

Notary Public/Dep. Clerk, Probate Court

SEAL:
IN THE PROBATE COURT OF __________ COUNTY  
STATE OF GEORGIA

IN RE: ___________________________  DOCKET NO. ________________

PETITION FOR THE APPOINTMENT OF SUCCESSOR EXECUTOR OF PREVIOUSLY PROBATED WILL

COMES NOW ______________________ and petitions the court for the appointment of a successor executor and the issuance of successor Letters Testamentary on the Estate of _____________________________, deceased, and shows:

(1) The Last Will and Testament of named deceased was duly probated and admitted to record in (common)(solemn) form by order of this court dated ________.

(2) Letters Testamentary were issued by this court to ______________________, the named executor, on ________.

(3) The above-named executor died on ________, prior to fully completing administration of the Estate of ______________________, and it is necessary that a successor executor be granted leave to qualify as such and that successor Letters Testamentary issue accordingly.

(4) ______________________ was named by the testator as the alternate executor and is ready, willing and able to serve in such capacity.

(5) Notice to the heirs at law is unnecessary because (a) the will is admitted to probate in common form only or (b) the will has been admitted to probate in solemn form and notice was previously given to all heirs at law.

(6) Below are the names and addresses of every beneficiary under the said will with a continuing interest in the estate who should be notified of this petition and given an opportunity to show cause, if any exists, why _____________ should not be appointed successor executor:

<table>
<thead>
<tr>
<th>NAME</th>
<th>AGE</th>
<th>ADDRESS</th>
<th>INTEREST</th>
</tr>
</thead>
<tbody>
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</tr>
</tbody>
</table>
WHEREFORE, Petitioner prays that notice be given to the beneficiaries having a continuing interest in said estate for them to show cause, if any exists, why should not be appointed successor executor and why successor Letters Testamentary should not issue to him/her, unless service is acknowledged and consent to such appointment is filed by each such beneficiary; that ________________ be appointed as successor executor; and that successor Letters Testamentary issue to him/her upon qualification.

_______________________________________
Attorney (or Petitioner if pro se)
Address: ________________________________
_______________________________________
State Bar No. ________________

VERIFICATION

GEORGIA, _______ COUNTY

Personally appeared before me the undersigned petitioner(s) who on oath states(s) that the facts set forth in the foregoing petition are true.

_________________________________________  _______________________________________
Petitioner                                Petitioner
Address:                                  Address:

Telephone:                                Telephone:

Sworn to and subscribed before me,
this ____ day of __________, ____.

_______________________________________
Clerk/Notary Public
ACKNOWLEDGMENT OF SERVICE AND ASSENT TO APPOINTMENT OF SUCCESSOR EXECUTOR

RE: Petition of ______________________ for the appointment of ______________________ as successor executor of the Will of _______________________, Deceased.

We, the undersigned beneficiaries under the Will of _____________, deceased, hereby acknowledge service of the petition for appointment of successor executor, waive copies of same, waive issuance of citation and all further service and notice, and hereby assent to the appointment of the named alternate executor as successor executor without further delay.

SIGNATURE(S) OF BENEFICIARIES

Sworn to and subscribed before me, this ____ day of ____________, 20__. __________________________________________

NOTARY/CLERK OF PROBATE COURT Printed Name

Sworn to and subscribed before me, this ____ day of ____________, 20__. __________________________________________

NOTARY/CLERK OF PROBATE COURT Printed Name

Sworn to and subscribed before me, this ____ day of ____________, 20__. __________________________________________

NOTARY/CLERK OF PROBATE COURT Printed Name

Sworn to and subscribed before me, this ____ day of ____________, 20__. __________________________________________

NOTARY/CLERK OF PROBATE COURT Printed Name
IN THE PROBATE COURT OF ________ COUNTY
STATE OF GEORGIA

IN RE: ____________________________ DOCKET NO. ________________

ORDER APPOINTING SUCCESSOR EXECUTOR OF PREVIOUSLY PROBATED WILL

It being shown to the court that the Last Will and Testament of the above-named deceased was previously duly probated and admitted to record in (COMMON)(SOLEMN) form and Letters Testamentary were previously issued to the named and qualified executor, and

It being shown to the court that the said executor died prior to completion of administration of the estate, and

It being shown to the court that notice has been given to all beneficiaries having a continuing interest in said estate that the petitioner has requested the appointment of ________________ as successor executor of said will, same having been named by the testator as alternate executor, and has requested the issuance of successor Letters Testamentary to such alternate executor, and no objections having been made,

IT IS ORDERED that _____________ have leave to qualify as successor executor and, upon so doing, that successor Letters Testamentary issue to said alternate executor.

IT IS FURTHER ORDERED that Letters Testamentary heretofore issued to be, and the same are hereby, rescinded by the court.

SO ORDERED, this __ day of ________, ___.

_____________________________________
JUDGE OF THE PROBATE COURT

FILED: __________________
DATE
CLERK

OATH

I do solemnly swear (or affirm) that this writing contains the true last will of the within named ____________________, deceased, and that I will well and truly execute the same in accordance with the laws of the State. So help me God.

_____________________________________
Executor

Sworn to and subscribed before me, this __ day of _____. ___.

_____________________________________
CLERK/Notary Public
STATE OF GEORGIA
COUNTY OF ____________
DOCKET NO: ______________

SUCCESSOR
LETTERS TESTAMENTARY
(Relieved of Filing Returns)

By ____________________________, Judge of the Probate Court of said County.

KNOW ALL WHOM IT MAY CONCERN:

That on the ___ day of __________________, 20___, at a regular term of the Probate Court, the Last Will and Testament dated ________________________, 20 ______, of deceased, at the time of death a resident of said County, was legally proven in ________ form and was admitted to record by order, and it was further ordered that named as Executor(s) in said Will, be allowed to qualify, and that upon so doing, Letters Testamentary be issued to such Executor(s).

On ____________________, the said Executor(s) died before the estate could be fully administered. A petition for appointment as the Successor Executor(s) was filed, and, on ___, an order was entered appointing _____________________________ as Successor Executor(s) and directing that Successor Letters Testamentary issue upon the taking of the prescribed oath.

NOW, THEREFORE, the said _____________________________, having taken the oath of office and complied with all the necessary prerequisites of the law, is/are legally authorized to discharge all the duties and exercise all the powers of Executor(s) under the Will of said deceased, according to the Will and the law.

Given under my hand and official seal, the _____ day of ____________, 20___.

____________________________________
Judge of the Probate Court

NOTE: The following must be signed if the judge does not sign the original of this document:

Issued by: ____________________________
(SEAL)

Clerk, Probate Court
IN THE PROBATE COURT OF ____________ COUNTY
STATE OF GEORGIA

IN RE:

: DOCKET NO. ______________
: PETITION FOR LETTERS OF
: ADMINISTRATION AND APPOINTMENT
: OF COUNTY ADMINISTRATOR FOR
: PURPOSES OF LAWSUIT

The petition of _________________________ whose domicile is ________________,
and whose mailing address is ________________________________, shows to the Court that:

1. _________________________________________________________________, whose
   First          Middle          Last Name
   domicile was ____________________________________________________.
   Street                City             County             State
   departed this life on _________________________, 20_____.

2. The estate of the decedent is unrepresented, and it is necessary that the County Administrator
   be appointed for the sole purpose of making it possible to commence or continue a lawsuit against the
   said estate, in which lawsuit the petitioner is an interested party.

3. Listed below are the names of all the decedent’s heirs with the age or majority status, address,
   and relationship to decedent set opposite the name of each:

   Name                  Age               Address               Relationship
   ______________________________________________________________
   ______________________________________________________________
   ______________________________________________________________
   ______________________________________________________________

4. Additional Data: Where full particulars are lacking, state here the reasons for any such omission.
   Also, state here all pertinent facts which may govern the method of giving notice to any party and which
may determine whether or not a guardian ad litem should be appointed for any party. If any heirs listed above are cousins, grandchildren, nephews or nieces of the decedent, please indicate the deceased ancestor through whom they are related to the decedent.

5.

(Check one):

___ Notice of this petition must be published because the identities and/or addresses of all the heirs are not known.

___ Notice of this petition need not be published because the identities and addresses of all the heirs are known.

6.

To the knowledge of the petitioner, no other proceedings with respect to this estate are pending, or have been completed, in any other probate court in this state.

Wherefore, petitioner prays that service be perfected and that, if no good cause is shown to the contrary:

a. The County Administrator be appointed as Administrator of the estate of said decedent for the sole purpose of commencing or continuing a lawsuit against the said estate; and

b. The Court relieve the said Administrator from all liabilities, duties and obligations otherwise imposed on the administrator of an estate, including but not limited to the marshaling of assets, the publication of notice to creditors, the filing of an inventory, the filing of returns, and the posting of a separate bond, except for these duties and obligations directly related to the acceptance of service of process and qualification as administrator and other duties directly related to the lawsuit.

______________________________  ______________________________
Signature of Attorney (or petitioner if pro se)  Signature of Attorney (or petitioner if pro se)
Address:

Telephone Number:  Telephone Number:
State Bar #:  State Bar #:
VERIFICATION

GEORGIA, ________ COUNTY

Personally appeared before me the undersigned petitioner(s) who on oath state(s) that the facts set forth in the foregoing petition are true.

______________________________________
Petitioner
Residence Address:

______________________________________
Petitioner
Residence Address:

Telephone Number:                           Telephone Number:

Sworn to and subscribed before me, this ___ day of _____________, 20______.

Clerk of Probate Court or Notary Public
SELECTION AND CONSENT BY HEIRS

Note: If an heir is not sui juris, the guardian appointed by the Court or the person that the Court determined may act as guardian is authorized to consent for such non sui juris heir in accordance with the provisions of Chapter 11 of Title 53 of the Revised probate Code of 1998.

We, being heirs of the estate of _________________________________________, deceased, and being sui juris unless otherwise indicated, do hereby acknowledge service, waive all further notice, and consent to the appointment of the County Administrator as Administrator of the estate of said decedent for the sole purpose of making it possible to commence or continue a lawsuit against the said estate. We further acknowledge that the County Administrator will be relieved by the Court from all liabilities, duties and obligations otherwise imposed on the administrator of an estate, including but not limited to the marshaling of assets, the publication of notice to creditors, the filing of an inventory, the filing of returns, and the posting of a separate bond, except for these duties and obligations directly related to the acceptance of service of process and qualification as administrator and other duties directly related to the lawsuit.

SIGNATURE(S) OF HEIRS

Sworn to and subscribed before me, this ____ day of __________,20__. __________________________________________

NOTARY/CLERK OF PROBATE COURT

Printed Name

Sworn to and subscribed before me, this ____ day of __________,20__. __________________________________________

NOTARY/CLERK OF PROBATE COURT

Printed Name

Sworn to and subscribed before me, this ____ day of __________,20__. __________________________________________

NOTARY/CLERK OF PROBATE COURT

Printed Name

Sworn to and subscribed before me, this ____ day of __________,20__. __________________________________________

NOTARY/CLERK OF PROBATE COURT

Printed Name

Revised Handbook Ch. 15, pg. 15-68 January, 2010
ORDER FOR SERVICE OF NOTICE

Probate Court of ________ County

(Check only if applicable:)

Since the heirs have not made a unanimous selection and consent to the appointment, it is ordered that notice be issued and served as follows upon any heirs who did not acknowledge service. Notice of this petition must be mailed by first-class mail to each heir with a known address at least 13 days prior to the date on or before which any objection is required to be filed. If there is any heir whose current address is unknown or any heir who is unknown, notice must be published once each week for four weeks prior to the week which includes the date on or before which any objection must be filed.

____________________  __________________________
DATE                  JUDGE OF THE PROBATE COURT

NOTICE

GEORGIA, ________ COUNTY PROBATE COURT

_______________________________ has petitioned for the appointment of the County Administrator as Administrator of the estate of ______________ deceased, of said County for the sole purpose of making it possible to commence or continue a lawsuit against the estate of said decedent. If the petition is granted, the County Administrator shall be relieved by the Court from all liabilities, duties and obligations otherwise imposed on the administrator of an estate, including but not limited to the marshaling of assets, the publication of notice to creditors, the filing of an inventory, the filing of returns, and the posting of a separate bond, except for these duties and obligations directly related to the acceptance of service of process and qualification as administrator and other duties directly related to the lawsuit. All interested parties are hereby notified to show cause why said petition should not be granted. All objections to the petition must be in writing, setting forth the grounds of any such objections, and must be filed with the court on or before ___________. 20______. If any objections are filed, a hearing will be (held on ______________ ) (scheduled at a later date). If no objections are filed, the petition may be granted without a hearing.

__________________________________________
JUDGE OF THE PROBATE COURT

By:_____________________________
CLERK OF THE PROBATE COURT
CERTIFICATE OF MAILING

GEORGIA, ________ COUNTY

I do hereby certify that I have this day mailed by first-class mail a copy of the above Notice in this matter to each heir with a known current address as listed by the petitioner who did not acknowledge service in an envelope, properly addressed and with adequate postage thereon, and deposited in the United States Mail, with the return address of this Court thereon.

_________________________  ______________________________
DATE                                    CLERK, PROBATE COURT
IN THE PROBATE COURT OF __________ COUNTY
STATE OF GEORGIA

IN RE: ____________________

DOCKET NO. ________________

PETITION FOR LETTERS OF
ADMINISTRATION AND APPOINTMENT
OF COUNTY ADMINISTRATOR FOR
PURPOSES OF LAWSUIT

FINAL ORDER

The petition of ____________________ for issuance of Letters of Administration on the estate of ____________, deceased, has been duly filed. Service was perfected according to law. It appears that said decedent died domiciled in said county with an estate currently unrepresented and that there exists a necessity for the appointment of an administrator for the sole purpose of making it possible to commence or continue a lawsuit against the said estate.

IT IS THEREFORE ORDERED that ________________ as the County Administrator of this County, be, and is hereby, appointed Administrator of the estate of said decedent for the sole purpose of commencing or continuing a lawsuit against the estate, and that appropriate Letters be issued upon said Administrator's taking the oath as provided by law. It is further ordered that the said Administrator be, and is hereby, relieved from all liabilities, duties and obligations otherwise imposed on the administrator of an estate, including but not limited to the marshaling of assets, the publication of notice to creditors, the filing of an inventory, the filing of returns, and the posting of a separate bond, except for these duties and obligations directly related to the acceptance of service of process and qualification as administrator and other duties directly related to the lawsuit.

IT IS FURTHER ORDERED that the petitioner shall pay to said Administrator a fee in (the sum of $___________) (an amount to be determined by the Court hereafter) for the time devoted to and expenses incurred in the performance of the duties and obligations with respect to the estate.

______________________________________________
DATE JUDGE OF THE PROBATE COURT

FILED: ________________
DATE

DEPUTY CLERK
OATH

Georgia, ______ County

I do solemnly swear or affirm that ______________________, deceased, died with an estate currently unrepresented, so far as I know or believe, and that, having been appointed for the sole purpose of making it possible to commence or continue a lawsuit against the estate, I will discharge to the best of my ability all my duties as such Administrator and for such purposes. So help me God.

______________________________________________________________
County Administrator

Sworn to and subscribed before me this ___ day of _____________, 20____.

______________________________________________________________
Clerk/Judge, Probate Court
LETTERS OF ADMINISTRATION
(County Administrator for Lawsuit Only)

BY JUDGE PROBATE COURT OF _______________ COUNTY

WHEREAS, ____________ died intestate (check one:)

_____ domiciled in this County;

_____ not domiciled in this State but is alleged to be the County of venue for a cause of action against the decedent’s estate.

and this Court granted an order appointing _________________, County Administrator as Administrator of the estate of said decedent, on condition that said Administrator give oath as required by law; and the said Administrator having complied with said conditions; the Court hereby grants unto said administrator full power to do and perform the duties directly related to the acceptance of process and other duties directly related to the lawsuit according to the laws of this State, and without further duties, powers, or responsibilities for administration of the estate of the decedent.

IN TESTIMONY WHEREOF, I have hereunto affixed my signature as Judge of the Probate Court of said County and the seal of this office, this ___ day of __________, 20____.

_________________________________
Judge of the Probate Court

(SEAL)

Note: The following must be signed if the Judge does not sign the original of this document:

Issued by:

_________________________________
Clerk, Probate Court
Appendix A5-1

NOTICE TO DEBTORS AND CREDITORS

IN RE: ESTATE OF _________________________________

All creditors of the estate ____________________, late of Bibb County, deceased, are hereby notified to render in their demands to the undersigned according to law, and all persons indebted to said estate are required to make immediate payment.

This __ day of __________, 20__.

NAME _________________________________

ADDRESS _________________________________

CITY/STATE _________________________________

ATTORNEY: ________________________________

______________________________

______________________________

PUBLICATION DATES: ________________________________
IN THE PROBATE COURT OF __________ COUNTY
STATE OF GEORGIA

ESTATE OF: DOCKET NO. _______

Decedent

INVENTORY

<table>
<thead>
<tr>
<th>ITEM/DESCRIPTION</th>
<th>APPROXIMATE VALUE</th>
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</thead>
<tbody>
<tr>
<td>(Attached additional sheets, if necessary)</td>
<td></td>
</tr>
</tbody>
</table>

1. REAL ESTATE (Give address or brief description)
   - Parcel One: __________________________________________
   - Parcel Two: __________________________________________
   - Parcel Three: _________________________________________
   - Parcel Four: _________________________________________
   - Approximate value of real estate from additional sheets (No. ____)

   TOTAL APPROXIMATE VALUE OF REAL ESTATE

2. PERSONAL PROPERTY
   A. Bank Accounts (Give name of financial institution and account number)
      1. Savings Accounts:
         a. ______________________________________________
         b. ______________________________________________
      2. Checking Accounts:
         a. ______________________________________________
         b. ______________________________________________

   B. Stocks (Give # shares and company), Bonds (Give face amount), and other securities (Describe):
      1. ________________________________________________
      2. ________________________________________________
      3. ________________________________________________
      4. ________________________________________________

   C. Vehicles (Automobiles, trucks, boats, etc.)
      1. ________________________________________________
      2. ________________________________________________
      3. ________________________________________________

   D. Other personal property and personal effects (Describe)
      1. ________________________________________________
      2. ________________________________________________
3. ________________________________________________
4. ________________________________________________
5. ________________________________________________
6. ________________________________________________

Approx. value of personal property from additional sheets (No. )

TOTAL APPROX. VALUE OF PERSONAL PROPERTY

AMOUNT OF BOND POSTED PREVIOUSLY
AMOUNT OF BOND POSTED HEREWITH
TOTAL AMOUNT OF CURRENT BOND

Affidavit

GEORGIA, __________ County

I (We), ____________________________________________, personal representative(s) of the Estate of ______________________________________, Decedent, do swear that the foregoing schedule contains a just, true and complete INVENTORY of property, real and personal, belonging to the said Estate within my (our) hands, possession, control or knowledge, so help me (us) God.

____________________________________
(Administrator)(Executor)

Sworn to and subscribed before me,
on __________________________

________________________________
Notary Public or Clerk of Probate Court

GEORGIA, __________ COUNTY

I declare that I (we) have this date delivered by first-class mail a true and correct copy of the foregoing INVENTORY filed for the Estate of _____________________________, Decedent, to each [beneficiary of the testate estate] [heir of the intestate estate] as required by law, except to each of the following who have delivered to me (us) a written waiver of the of the right to receive such copy, which waiver has not been revoked:

_________________________________________________________________________________
_________________________________________

Sworn to and subscribed before me,
on __________________________

________________________________
Notary Public or Clerk of Probate Court
ORDER ADMITTING TO RECORD

PROBATE COURT OF ____________ COUNTY

The within and foregoing INVENTORY of the Estate of the named Decedent having been on file for thirty days in this office, and the same appearing correct, and no objections having been filed, it is hereby ordered that said Inventory be admitted to record.

SO ORDERED on ____________________.

___________________________________
JUDGE, PROBATE COURT OF
______________ COUNTY, GA

Filed: ____________________
Recorded: ____________________

Clerk: _________________
Clerk: _______________

Minute Book: ________ Page: _______
APPENDIX A5-3

Instructions for Completing
Annual Return of Temporary Administrator
Or Personal Representative

The annual returns of temporary administrators and/or personal representatives required to file accountings with the Probate Court must be full, complete and accurate. Estimations and rounding of figures are not permitted. The return is, in essence, a transaction report of every receipt and every expenditure and is similar to a simple check register on a personal bank account. If all funds are deposited into the estate account(s) and all payments are made by check or drafts from the estate account(s), completing the return should be no more difficult than transferring the information from the bank records to these forms. It is the responsibility of the temporary administrator or personal representative to fully and properly complete the returns required; it is not the responsibility of court staff to prepare or correct returns. Incorrect, incomplete or unbalanced returns will simply be returned to the fiduciary for completion or correction. Please NOTE: all returns must be typed or legibly printed in black ink. Illegible returns will NOT be accepted for filing.

Page 1
1. Enter the Estate Name (Decedent) in the box at the top right.
2. Enter the name of the Temp. Administrator or Personal Representative on the line in the next box.
3. Enter the Docket No. (the case number) on the line indicated.
4. Enter the Estate Name again on the line indicated.
5. Circle “Final” or “Annual” to indicate the type of return.
6. Enter the dates covered by the return. If this is the first return, the beginning date will be the ending date from the last return.
7. Complete the Summary Accounting.
   A. Enter the balance from the last accounting. If this is the first return, the beginning balance is zero; everything received will be reported under Receipts.
   B. Enter the Total Receipts for the period covered by the return. Include all funds and accounts initially transferred to and/or deposited into the estate account(s) and all additional funds received, including all income received from all sources and all interest paid on any accounts or deposits. “If you received it, you must report it.” Note: an itemized statement of receipts or a transaction report is required. This will be a report of all cash receipts and will report all transactions in all cash or cash equivalent accounts, as well as any transactions made in cash.
   C. Add the beginning balance and the receipts, and enter the Subtotal.
   D. Enter the Total Expenditures for the period covered by the return. Include every amount disbursed, spent or paid out, including any automatic drafts from accounts and any bank charges, check printing charges, service charges or other fees. Include also any funds paid out in cash (a practice discouraged by the court). “If you spent it, you must report it.” Note: an itemized statement of expenditures or a transaction report is required. This will be a report of all cash expenditures and will report all transactions in all cash or cash equivalent accounts, as well as any transactions made in cash.
   E. Subtract the expenditures from the Subtotal, and enter the ending balance on the next line.
   F. Enter the value of all other assets from the schedule on Page 3; add that amount to the ending cash balance, and enter the Total Value of the Estate.
8. Complete and sign the Verification. Your signature must be notarized or be witnessed by a Probate Court Clerk. Include the full information on how you may be contacted if there are any questions about your return.

Page 2
1. **Bank Account Verifications:** The balances in all accounts must be verified. A certificate signed by a bank employee for each account is required unless you provide the court a copy of the bank statement for the account showing the account balance on the ending date of the return.

2. **Affidavit in Estates of Decedents:** A copy of the return must be provided to each heir or beneficiary, and the Temporary Administrator or Personal Representative must sign the Affidavit on Page 2. The signature must be notarized or witnessed by a Probate Court Clerk.

Page 3
1. **Investments:** If there are stocks, bonds or other investments in the estate, these must be itemized and disclosed on Page 3. Cash management accounts, money market accounts and any other accounts which are handled essentially the same as checking or savings accounts should be included in the reporting of cash receipts and expenditures and should not be listed here. Investments should be shown at their original cost, if known, or at the value at the time of receipt into the estate. Gains or losses will be reported only when sales or other transfers occur.

2. **Other Assets:** All other property in an estate must be itemized and valued. Unless required by the court, a formal appraisal is not necessary. The value should be the approximate fair market value. Tax values and “blue book” values may be used.

3. **Verification of Investments:** All investments held by a broker or financial institution must be verified. A certificate signed by an employee of each brokerage firm or institution is required unless you provide the court a copy of a statement of holdings showing the investments held on the ending date of the return.

**Receipts**
You must attach an itemization of the Cash Receipts shown in the Summary Accounting. Include all funds and accounts initially transferred to and/or deposited into the estate account(s) and all additional funds received, including all income received from all sources and all interest paid on any accounts or deposits. Include also any funds received in cash but not deposited (a practice discouraged by the court). “If you received it, you must report it.” A printed transaction report from an accounting or bookkeeping software program may be attached in lieu of the Receipts page, if preferred.

**Expenditures**
You must attach an itemization of the Cash Expenditures shown in the Summary Accounting. Each transaction must be separately itemized by date, check number, payee, purpose and exact amount. Include every amount disbursed, spent or paid out, including any automatic drafts from accounts and any bank charges, check printing charges, service charges, penalties, or other fees. Include also any funds paid out in cash (a practice discouraged by the court). “If you spent it, you must report it.” A printed, itemized transaction report from an accounting or bookkeeping software program may be attached in lieu of the Expenditure page, if preferred.
| ACCOUNTING OF TEMPORARY ADMINISTRATOR OR PERSONAL REPRESENTATIVE OF DECEDENT’S ESTATE | ESTATE NAME |
| IN THE PROBATE COURT OF BIBB COUNTY, GEORGIA | DOCKET NO. _______________________________
| TEMPORARY ADMINISTRATOR(S)/PERSONAL REPRESENTATIVE(S) | |
| IN THE MATTER OF THE ESTATE OF ) Final – Annual STATEMENT OF ACCOUNT | |
| ) ) Decedent From To |

### SUMMARY ACCOUNTING

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>CASH BALANCE FROM LAST ACCOUNTING</td>
<td>$</td>
</tr>
<tr>
<td>ADD: TOTAL RECEIPTS*</td>
<td>$</td>
</tr>
<tr>
<td>SUBTOTAL</td>
<td>$</td>
</tr>
<tr>
<td>SUBTRACT: TOTAL EXPENDITURES*</td>
<td>$</td>
</tr>
<tr>
<td>CASH BALANCE IN ESTATE AT END OF REPORTING PERIOD**</td>
<td>$</td>
</tr>
<tr>
<td>OTHER ASSETS (Cost, Acquisition or Fair Market Value)</td>
<td>$</td>
</tr>
<tr>
<td>TOTAL VALUE FROM SCHEDULE</td>
<td>$</td>
</tr>
<tr>
<td>TOTAL VALUE OF ESTATE AT END OF PERIOD</td>
<td>$</td>
</tr>
</tbody>
</table>

* NOTE: All receipts and expenditures must be itemized on the sheets attached or by attaching a printed and complete transaction report.

** NOTE: All balances must be verified by signed certificates or by attaching copies of bank statements showing balances on the ending date.

### VERIFICATION BY FIDUCIARY

STATE OF GEORGIA COUNTY OF BIBB

I, ______________________, being duly sworn, depose and say that I am the ______________________ of the estate of ______________________, that I now reside at ______________________, and that this is a full and true account of the estate for the period stated, to the best of my knowledge and belief. For purposes of contacting me with regard to this return, my daytime telephone number is ______________________, my evening telephone number is ______________________, my cell telephone number is ______________________, and my email address is ______________________.

Sworn to and subscribed before me, on ______________________

(Notary or Clerk, Probate Court) (Signatures Temp. Administrator(s)/Personal Rep.(s))

### TO BE COMPLETED BY COURT STAFF: Calculation of Bond Sufficiency

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
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<tbody>
<tr>
<td>TOTAL VALUE OF ESTATE AT END OF PERIOD FROM ABOVE</td>
<td>$</td>
</tr>
<tr>
<td>LESS: TOTAL VALUE OF REAL PROPERTY IN ESTATE</td>
<td>-</td>
</tr>
<tr>
<td>NON REAL ESTATE VALUE OF ESTATE AT END OF PERIOD</td>
<td>$</td>
</tr>
<tr>
<td>CURRENT SURETY BOND AMOUNT</td>
<td>$</td>
</tr>
<tr>
<td>AMOUNT OF BOND EXCESS/DEFICIENCY</td>
<td>$</td>
</tr>
</tbody>
</table>
ORDER ADMITTING RETURN TO RECORD

The foregoing Return and its affidavit having been carefully examined and found correct, and having remained on file in office for ______________ days and no objections having been filed thereto, the same is allowed; and it is ordered that said return together with its affidavit be recorded as the law requires.

___________________________________________
Filed

___________________________________________
(Deputy) Clerk

.Recorded this _____ day of ______________, 20____.

____________________________________________
Deputy Clerk, Probate Court

JUDGE, PROBATE COURT
NOTE: Use the certificates on this page to verify balances in each account held OR attach copies of blank statements for each account showing balances on ending date.

**AFFIDAVIT OF TEMPORARY ADMINISTRATOR OR PERSONAL REPRESENTATIVE**

The undersigned Temporary Administrator/Personal Representative does hereby certify to the Court that:

- all bond premiums due for the surety bond of the fiduciary have been paid
- that all income tax returns required to be filed to date have been filed
- that all income and estate taxes, if any, have been paid to date
- that all ad valorem taxes, if any, due on property of the Estate have been paid

(Signature of Temporary Administrator/Personal Representative)

Sworn to before:

CLERK of Probate Court/Notary Public

**CERTIFICATE OF BALANCES ON DEPOSIT**

(Name and Address of Institution)

I do certify that on _____________________, 20____, there was on deposit in this institution to the credit of the estate managed by this Fiduciary the following:

Checking Account Balance: $__________________  Savings Account Balance: $__________________

Certificate(s) of Deposit at Face Value: $__________________

Interest paid and credited to the above accounts during period of this Statement of Account totaled $__________________.

(Do NOT include accrued but unpaid interest)

(Signature and Title of Certifying Official)

NOTE: The following affidavit must be completed by the administrator or executor (or the attorney for the administrator or executor) of the estate of a decedent who is required by law or court order to file returns.

**Affidavit of Service of Copies for Decedent’s Estate**

I (we) certify that I (we) have this date delivered in person or by first-class mail a true and correct copy of the attached Annual/Final Return filed for the Estate of _____________________, 20____, decedent, to each (beneficiary of the testate estate) (heir of the intestate estate) as required by law, except to each of the following who have delivered to me (us) a written waiver of the right to receive such copy, which waiver has not been revoked: ____________________________________________________________________________________________.

Sworn to and subscribed before me

on _____________________, 20____.

CLERK of Probate Court/Notary Public
### OTHER ASSETS IN ESTATE

<table>
<thead>
<tr>
<th>DATE ACQUIRED</th>
<th>DESCRIPTION</th>
<th>Cost or Value at Acquisition</th>
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<tbody>
<tr>
<td></td>
<td>Investments Held by Broker/Institution (e.g., stocks, bonds, etc.): (Itemize)</td>
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**Present Value**

<table>
<thead>
<tr>
<th>Other Assets (e.g., real estate, automobiles, personal property, etc.): (Itemize and describe)</th>
<th>Present Value</th>
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**TOTAL VALUE OF OTHER ASSETS IN ESTATE**

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**CERTIFICATE OF INVESTMENTS HELD**

(Name and Address of Institution)

I do certify that on ______________, 20__, there were held by this institution to the credit of the estate managed by this Fiduciary the Investments shown above and that the cost or value at acquisition are correct.

______________________________________________
(Signature and Title of Certifying Official)

(Note: Please copy this page if additional space is needed)
NOTE: All RECEIPTS must be itemized on this page, OR a printed transaction report, showing all RECEIPTS for the period, must be attached to the Return.

<table>
<thead>
<tr>
<th>DATE</th>
<th>SOURCE AND DESCRIPTION OF ALL SUMS RECEIVED</th>
<th>AMOUNT</th>
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TOTAL RECEIPTS $  

(Note: Please copy this page if additional space is needed)
NOTE: All EXPENDITURES must be itemized on this page, OR a printed transaction report, showing all EXPENDITURES for the period, must be attached to the Return.

<table>
<thead>
<tr>
<th>DATE</th>
<th>CHECK NO.</th>
<th>TO WHOM WRITTEN AND PURPOSE</th>
<th>AMOUNT</th>
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TOTAL EXPENDITURES $ 

(NOTE: Please copy this page if additional space is needed)
APPENDIX A7-1  
Department of Revenue  
Motor Vehicle Division  

Affidavit of Inheritance of a Motor Vehicle  

State of Georgia, ___________________________ County  

(Name of County)  

Except for the signature, this form must be typed, electronically completed and printed; or printed legibly by-hand in blue or black ink and signed. All applicable fields on this form must be completed without alterations.

Personally appeared before me, the undersigned person, who first being duly sworn, certifies that the deceased, ____________________________________________________________,  

(Full Legal Name of the Deceased)  

who at the time of his or her death was the owner of the motor vehicle described below, left no will; no application for the administration of the estate of the deceased is to be had; the estate is not indebted; and the surviving spouse, if any, and the heirs, if any, have amicably agreed among themselves upon a division of the estate that the certificate of title for said vehicle be issued to the person named below.

<table>
<thead>
<tr>
<th>Applicant Information</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Applicant’s/Inheritor’s Full Legal Name</td>
<td></td>
</tr>
<tr>
<td>Street Address</td>
<td></td>
</tr>
<tr>
<td>City, State &amp; Zip</td>
<td></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Vehicle Information</th>
<th></th>
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</thead>
<tbody>
<tr>
<td>Vehicle’s Year Model &amp; Make</td>
<td>Vehicle Identification Number</td>
</tr>
<tr>
<td>Vehicle’s Current Title Number</td>
<td>State of Issue</td>
</tr>
<tr>
<td>License Plate Number</td>
<td></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Applicant’s Printed Name &amp; Signature</th>
<th></th>
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</thead>
<tbody>
<tr>
<td>(Applicant’s Printed Name)</td>
<td>(Applicant’s Signature)</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Notarization</th>
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<tbody>
<tr>
<td>Sworn to and subscribed before me this day of , (Day) (Month) (Year)</td>
<td></td>
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<tr>
<td>(Notary Public’s Signature &amp; Notary Seal or Stamp)</td>
<td>(Date Notary Commission Expires)</td>
</tr>
</tbody>
</table>

**Important:** If the deceased left a Will that is not to be probated, a legible copy of the Will must accompany this completed form. A certified copy of the deceased’s death certificate and the vehicle’s original valid title, issued in the deceased name or properly assigned to the deceased, must also accompany this form. If the vehicle is currently titled in Georgia in the deceased’s name, the title should be submitted if it is available. All liens and security interests shown on the Motor Vehicle Division’s records must be released.

**Note:** Any correction or alteration will void this form.
INFORMATION SHEET FOR IDENTIFICATION OF HEIRS OF A DECEDENT

Heirs of a decedent are determined in accordance with O.C.G.A. §53-2-1. “Heirs” of a decedent are those persons who would inherit the estate of a Georgia domiciled decedent who died without a will (intestate). The term is not synonymous with the term “beneficiaries,” a term which refers to those persons who receive a benefit under a lawful will of a decedent (although “heirs” certainly may be “beneficiaries,” and vice versa). This form may help you properly and completely determine the heirs of a decedent for purposes of notice requirements in a probate court in Georgia.

For purposes of inheritance under Georgia law and for purposes of identifying the legal heirs of a decedent, the following rules apply:

A. The legal spouse of a decedent who is in life at the time of the decedent's death is always an heir of the decedent. Although common law marriages were abolished in Georgia as of January 1, 1997, any common law marriage in legal existence on December 31, 1996 remains valid under Georgia law. There is no common law divorce under Georgia law, and a simple separation of the parties, no matter for what length of time, will not dissolve a legal marriage, whether a ceremonial and licensed marriage or a common law marriage. The death of a spouse or the entry of a final decree of divorce by a court of competent jurisdiction prior to the death of the decedent terminates the spousal relationship for purposes of inheritance, and the deceased or divorced spouse is not an heir of a decedent.

B. Children of a decedent who are born after the death of the decedent are considered children in being at the decedent's death, provided they were conceived prior to the decedent's death, were born within ten months of the decedent's death, and survived 120 hours or more after birth.

C. The half-blood, whether on the maternal or paternal side, are considered equally with the whole-blood, so that the children of any common parent are considered brothers and sisters to each other.

D. Legally adopted children are considered equally with natural born children. The legal adoption of a child by someone other than the natural parents ends the parental relationship and such child is no longer an heir of either natural parent. Children born out of wedlock are the heirs of their mother, and vice versa. Children born out of wedlock are the heirs of their father, and vice versa, provided paternity has been established in accordance with law. For purposes of notice requirements in a probate court in Georgia, children believed to be the offspring of a decedent father should be listed as "heirs," except when paternity has already been disproved in a court of competent.
jurisdiction. All children born within wedlock or within the usual period of
gestation thereafter who have been conceived by artificial insemination are
irrebuiltably presumed legitimate if both spouses have consented in writing to
the use and administration of artificial insemination.
Determination Inquiries:

Name of Decedent: __________________________________________
Date of Death: __________________________________________
Legal Residence: __________________________________________

1. Was the decedent survived by a spouse? If yes, please provide the name and age of the spouse:
   
   Spouse: _______________________________  Age: ________

2. Was the decedent survived by children or descendants of any deceased children? If not, **you may STOP**. If a decedent is survived by a spouse but not by any children or descendants of deceased children, the surviving spouse is the sole heir. If yes, please provide the names and ages of each child ever born to adopted by the decedent:

   (b) Children of decedent born as issue of any marriage:

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<tr>
<th>Name</th>
<th>Age</th>
<th>Name</th>
<th>DOD</th>
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   (b) Children of decedent born out of wedlock:

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<th>Name</th>
<th>Age</th>
<th>Name</th>
<th>DOD</th>
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</table>

**NOTE**: IF ALL OF THE CHILDREN OF DECEDED ARE ALIVE, YOU MAY STOP. The spouse, if any, and all the children are the heirs of the decedent.
3. Were any of the deceased children of the decedent survived by a child or children (grandchildren of the decedent)? If yes, please give the names and ages of each child ever born to or adopted by the deceased child of the decedent:

<table>
<thead>
<tr>
<th>Living Grandchildren</th>
<th>Age</th>
<th>Parent’s Name</th>
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<tr>
<th>Deceased Grandchildren</th>
<th>DOD</th>
<th>Parent’s Name</th>
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**NOTE:** IF ALL OF THE GRANDCHILDREN OF THE DECEDENT ARE ALIVE, YOU MAY STOP. The spouse, if any, the surviving children and the surviving grandchildren who are the children of deceased children of the decedent are the heirs of the decedent.

4. Were any of the deceased grandchildren of the decedent survived by a child or children (great-grandchildren of the decedent)? If yes, please give the names and ages of each child ever born to or adopted by the deceased grandchild of the decedent:

<table>
<thead>
<tr>
<th>Living Great-grandchildren</th>
<th>Age</th>
<th>Parent’s Name</th>
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</table>
Deceased Great-grandchildren

<table>
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<tr>
<th>Name</th>
<th>DOD</th>
<th>Parent’s Name</th>
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NOTE: IF ALL OF THE GREAT-GRANDCHILDREN OF THE DECEDED ARE ALIVE, YOU MAY STOP. IF THERE ARE ANY DECEASED GREAT-GRANDCHILDREN, YOU MUST ATTACH AN ADDITIONAL SHEET FOR THEIR CHILDREN. If the decedent was survived by a spouse and/or any lineal descendants, there is no need to proceed further on this form. The persons in the categories below are not “heirs” of a decedent who is survived by a spouse and/or lineal descendants.

5. Was the decedent survived by a parent? If yes, please provide the names and ages of the parents:

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<thead>
<tr>
<th>Name</th>
<th>Age</th>
<th>Date of Death, if Deceased</th>
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<tbody>
<tr>
<td>Mother:</td>
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<tr>
<td>Father:</td>
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NOTE: IF ANY PARENT IS ALIVE, YOU MAY STOP. If both parents survived, they are the sole heirs of the decedent; if only one parent survived, that parent is the sole heir of the decedent.

6. Did the decedent ever have any brothers or sisters (of whole or half blood)? If yes, please give the names and ages of all brothers and sisters of the decedent:

<table>
<thead>
<tr>
<th>Living Brothers and Sisters</th>
<th>Deceased Brothers and Sisters</th>
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<tbody>
<tr>
<td>Name</td>
<td>Age</td>
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NOTE: IF ALL OF THE BROTHERS AND SISTERS OF THE DECEDED ARE ALIVE, YOU MAY STOP. The brothers and sisters are the heirs of the decedent.

7. Were any of the deceased siblings of the decedent survived by a child or children (nieces or nephews of the decedent)? If yes, please give the names and ages of each child ever born to or adopted by the deceased sibling of the decedent:
### Living Nieces and Nephews

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<th>Name</th>
<th>Age</th>
<th>Parent’s Name</th>
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### Deceased Nieces and Nephews

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<th>Name</th>
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**NOTE:** IF ALL OF THE NIECES AND NEPHEWS OF THE DECEDED ARE ALIVE, YOU MAY STOP. The surviving brothers and/or sisters, if any, and the children of deceased siblings are the heirs of the decedent.

8. Were any of the deceased nieces and/or nephews of the decedent survived by a child or children (grand-nieces or grand-nephews of the decedent)? If yes, please give the names and ages of each child ever born to or adopted by the deceased niece or nephew of the decedent:

### Living grand-nieces and grand-nephews

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<th>Name</th>
<th>Age</th>
<th>Parent’s Name</th>
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</table>
### Deceased grand-nieces and grand-nephews

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<th>Name</th>
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<th>Parent’s Name</th>
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**NOTE:** IF ALL OF THE GRAND-NIECES AND GRAND-NEPHEWS OF THE DECEDENT ARE ALIVE, YOU MAY STOP. IF THERE ARE ANY DECEASED GRAND-NIECES OR GRAND-NEPHEWS, YOU MUST ATTACH AN ADDITIONAL SHEET FOR THEIR CHILDREN. If there are any persons in the above categories, there is no need to proceed further with this form.

9. Who were the decedent’s grandparents? Please provide the names and ages of the grandparents:

<table>
<thead>
<tr>
<th>Name</th>
<th>Age</th>
<th>Date of Death, if Deceased</th>
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<tbody>
<tr>
<td>Mother’s Mother:</td>
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<td>Mother’s Father:</td>
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<td>Father’s Mother:</td>
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<tr>
<td>Father’s Father:</td>
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</table>

**NOTE:** IF ANY GRANDPARENT OF THE DECEDENT IS ALIVE, YOU MAY STOP.

10. Was the decedent survived by aunts or uncles (maternal and/or paternal)? If yes, please provide the names and ages of the aunts and/or uncles:

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<tr>
<th>Name</th>
<th>Age</th>
<th>Parent’s Name</th>
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</table>
Deceased aunts and uncles

<table>
<thead>
<tr>
<th>Name</th>
<th>DOD</th>
<th>Parent’s Name</th>
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**NOTE:** IF ALL OF THE AUNTS AND UNCLE OF THE DECEDED ARE ALIVE, YOU MAY STOP.

11. Were any of the deceased aunts and/or uncles of the decedent survived by a child or children (first cousins of the decedent)? If yes, please give the names and ages of each child ever born to or adopted by the deceased aunt or uncle of the decedent:

First Cousins of the decedent who are alive:

<table>
<thead>
<tr>
<th>Name</th>
<th>Age</th>
<th>Parent’s Name</th>
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**NOTE:** IF THERE ARE NO PERSONS IN ANY OF THE ABOVE CATEGORIES, THE HEIRS OF THE DECEDED ARE DETERMINED UNDER O.C.G.A. §53-2-1(b)(8).
Table of Consanguinity
Showing Degrees of Relationship by Blood

**Instructions**
Place the subject/decedent for whom you need to establish relationships in the blank box. The labeled boxes will then list the relationship by title to the subject and the degree of distance from the subject.

![Diagram of Table of Consanguinity showing relationships and degrees of relationship by blood.](image)
IN RE: ______________________ )
)
)

PETITION TO TERMINATE TEMPORARY GUARDIANSHIP OF MINOR BY NATURAL GUARDIAN(S)

MINOR(S) )
)

The petition of ______________________ shows:

1. Petitioner(s) is/are the natural guardian of the above named minor as

   __ a parent of the minor presently married to the other parent,
   __ the sole surviving parent,
   __ the parents of the minor who remain married or, if divorced, have joint legal custody,
   __ a divorced parent having sole custody of the minor, or
   __ a divorced parent having joint legal custody of the minor.

2. On ______________________, 20_____. this Court appointed as temporary guardian(s) of the above named minor after petitioner:

   __ temporarily relinquished parental rights; or
   __ did not object to the appointment of the temporary guardian.

3. Pursuant to O.C.G.A. § 29-2-8, petitioner(s) now desire(s) to terminate the temporary guardianship and revoke(s) any temporary relinquishment previously signed by petitioner(s).

   WHEREFORE, petitioner(s) pray(s) that the Court enter an Order dissolving the temporary guardianship:

   __ immediately because the temporary guardian(s) has/have consented in writing; or
   __ at the expiration of thirteen (13) days after notice is given to the temporary guardian(s) and no objection is filed.
VERIFICATION

GEORGIA, __________________________ COUNTY

Personally appeared before me the undersigned petitioner(s) who on oath state(s) that the facts set forth in the foregoing petition are true.

Sworn to and subscribed before me this ___ day of __________, 20__.

______________________________________________
First Petitioner

______________________________________________
Second Petitioner

______________________________________________
First Petitioner

______________________________________________
Second Petitioner
ACKNOWLEDGMENT AND CONSENT

The undersigned temporary guardian(s) of the above-named minor does/do hereby acknowledge service of the foregoing Petition and further consent(s) to the termination, instanter, of the temporary guardianship.

Date: ________________
Witness: __________________
Temporary Guardian

NOTARY/CLERK OF PROBATE COURT Printed Name

Date: ________________
Witness: __________________
Temporary Guardian

NOTARY/CLERK OF PROBATE COURT Printed Name

ORDER FOR SERVICE

The foregoing Petition to Terminate Temporary Guardianship of Minor(s) having been considered, and one or more temporary guardians having failed to consent in writing,

IT IS ORDERED that Citation issue and be served upon each temporary guardian who has not consented by personal service if resident in the State of Georgia, by first-class mail if resident at a known address outside the State of Georgia, or by publication if the address of the temporary guardian is unknown.

SO ORDERED on ________________, 20______.

____________________________________
Judge, Probate Court of _____ County

CITATION TO TEMPORARY GUARDIAN(S)

TO: 
Temporary Guardian
Temporary Guardian

Address
Address

City, ST ZIP
City, ST ZIP

All objections to the Petition of ____________________________ to Terminate Temporary Guardianship of ______________________, Minor, must be in writing and must be
filed with this court no later than ten days after personal service or after the date of the mailing of this Citation to you if served by mail, or no later than ten days after publication if you are served by publication.

If an objection is timely filed, this Court will either (1) set a hearing at a time certain before the Probate Judge for a determination whether a continuation or dissolution of the temporary guardianship is in the best interest of the minor, or (2) transfer the records relating to the temporary guardianship to the Juvenile Court of this County, which shall determine, after notice and hearing, whether a continuation or dissolution of the temporary guardianship is in the best interest of the minor.

If no objection is timely filed, the Court will remove you as temporary guardian(s) and dissolve the temporary guardianship without a further hearing.

This ______ day of ______________________, 20____.

WITNESS the Honorable _______________________

By: _______________________
(Deputy) Clerk

RETURN OF SHERIFF

I have this day served ________________________ personally with a copy of the within petition, order and notice.

This ___ day of ________________, 20__.

_________________________________________
Deputy Sheriff ________________________ County, Georgia

CERTIFICATE OF MAILING

I hereby certify that I have this date mailed, by first class mail, a copy of the above Citation to the temporary guardian(s) to whom the Citation is directed and at the address set forth therein, in a properly addressed and stamped envelope.

This ___ day of ____________, 20__.

_________________________________________
Deputy Clerk
IN THE PROBATE COURT OF ________ COUNTY

STATE OF GEORGIA

IN RE: ______________________________, ) ESTATE NO.

_______________________________, ) PETITION TO TERMINATE

MINOR ) TEMPORARY GUARDIANSHIP OF

_______________________________, ) BY NATURAL GUARDIAN(S)

ORDER

The foregoing Petition having been filed, read and considered, and it appearing to the court:

that the temporary guardian(s) have consented in writing to the dissolution;

that Citation was served upon the temporary guardian(s) of the minor and no objection to the dissolution of the temporary guardianship has been timely filed; or

that Citation was served upon the temporary guardian(s) of the minor and an objection to the dissolution of the temporary guardianship has been timely filed;

WHEREUPTON, IT IS ORDERED that

the temporary guardianship be, and the same is, dissolved by the Court, the Temporary Letters of Guardianship heretofore issued are rescinded, and the temporary guardian(s) is/are hereby removed as such.

the records relating to the temporary guardianship shall be transferred by the Deputy Clerk of this Court to the Juvenile Court of this County, which shall determine, after notice and hearing, whether a continuation or dissolution of the temporary guardianship is in the best interest of the minor; the Clerk shall prepare an exemplified copy of the records of this Court relating to the temporary guardianship, including the petition to terminate, the objection thereto, and this Order, and shall transmit same to the Juvenile Court; copies of this Order shall be sent by the Clerk to the Temporary Guardian and to the natural guardian(s) seeking termination; and all other notices shall hereafter be sent by the Juvenile Court.

the petitioner(s) and temporary guardian(s) are hereby ordered and directed to be and appear before this Court at ______ M. on _____________, 20____ in Courtroom
___ County Courthouse, _______, GA, then and there to show cause whether a continuation or dissolution of the temporary guardianship is in the best interest of the minor and why the prayers of the petition should not be granted.

SO ORDERED on ____________________, 20____.

____________________________________
Judge, Probate Court of ________ County

FILED: _____________________________
Date

________________________
Deputy Clerk
DESIGNATION OF STANDBY GUARDIAN

(1) IDENTIFICATION OF DESIGNATING INDIVIDUAL:

I, ____________________ (insert name of person designating the standby guardian),
whose address is _________________________________ (insert address) and whose county
and state of domicile are ____________________________ (insert name of county and state), am:

(Check and complete the ones which apply)

(A) ______ The parent with physical custody of the minor child or children listed
below and my parental rights are not terminated; and the other parent, whose name is
__________________ (insert name of other parent) and whose address is
_____________________________________ (insert address of other parent), of the minor
child or children listed below:
    _____ (A-1) Is deceased;
    _____ (A-2) Has his or her parental rights to the minor or minors terminated;
    _____ (A-3) Cannot be found after a diligent search has been made; or
    _____ (A-4) Has consented to the designation of and service by the standby
guardian as set forth below; or

(B) ______ The guardian of the minor child or children listed below, who is duly
appointed and serving pursuant to court order.

(2) IDENTIFICATION OF MINOR(S): The minor or minors for whom I am designating a
standby guardian are:

<table>
<thead>
<tr>
<th>NAME</th>
<th>ADDRESS (include county of domicile)</th>
<th>DATE OF BIRTH</th>
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(3) DESIGNATION AND IDENTIFICATION OF STANDBY GUARDIAN: Pursuant to
Part 4 of Article 1 of Chapter 2 of Title 29 of the Official Code of Georgia Annotated, I
hereby designate ___________________________ (insert name of standby guardian), whose address is _________________________________ (insert address) and whose county and state of domicile are _____________________ (insert name of county and state), to serve as the standby guardian of the minor(s) whom I have identified above.

(4) POWERS OF STANDBY GUARDIAN: The standby guardian whom I have designated above shall have all the rights, duties, and responsibilities under Georgia law of a guardian of a minor who has been appointed by a court.

(5) DURATION OF STANDBY GUARDIANSHIP: I understand that upon a health care professional determining in writing that, due to my physical or mental health condition, I am not able to care for the minor(s) identified above, this standby guardianship shall become effective and the person whom I have designated above shall become the standby guardian of the person of the minor(s).

I understand that I can revoke this standby guardianship by destroying this document, obliterating it, or by revoking it in writing with proper witnesses. I understand that if I wish to revoke the standby guardianship after the health determination has been made I must file a notice of the revocation of the standby guardianship with the probate court and mail a copy of the notice of revocation to the standby guardian.

Finally, I understand that this standby guardianship will automatically end 120 days after the health care professional makes the determination that I am unable to care for the minor(s), unless the standby guardian has filed a petition for guardianship of the minor. If the standby guardian files such a petition, the standby guardianship will remain in effect, unless otherwise revoked, until the judge rules on the petition. In considering such a petition for guardianship, I understand that the judge will give preference for the appointment to the individual whom I name as the standby guardian in this document.
(6) SIGNATURE: I certify that the statements contained herein are true and correct, this ___ day of ________________, 20__.  

__________________________________  
(Designating individual signs here)  
__________________________________  
(Print name of designating individual)  

We, the undersigned witnesses, are at least 18 years of age, are not designated as the standby guardian, and state that the designating individual signed this designation in our presence.

__________________________  
(Signature of first witness)  
__________________________  
(Print first witness's address)  

__________________________  
(Signature of second witness)  
__________________________  
(Print second witness's address)  

(7) CONSENT OF PARENT (To be completed only if line A-4 in paragraph (1) above has been checked):

I, ________________________ (insert name of parent other than the one designating the standby guardian), whose address is __________________________ (insert address), am the parent of the above named minor(s). I understand that by this form, an individual is being designated to serve as a standby guardian of my child (or children). I understand that this standby guardian will have all the rights, duties, and responsibilities under Georgia law of a guardian of the person of a minor who has been appointed by a court.

I further understand that I may object to this designation. Knowing this, I consent to the designation of _____________________________ (insert name of standby guardian).

This _____ day of ____________, __________.

__________________________________  
(Other parent signs here)  
__________________________________  
(Print name of other parent)  

We, the undersigned witnesses, are at least 18 years of age, are not designated as the
standby guardian in this document, and state that the above-named parent signed this consent in our presence.

__________________________________________  ______________________________________
(Signature of first witness)                   (Print first witness's address)

__________________________________________  ______________________________________
(Signature of second witness)                  (Print second witness's address)

(8) ACCEPTANCE OF DESIGNATION BY STANDBY GUARDIAN:

I, _____________________________ (insert name of designated standby guardian), am the individual designated as the standby guardian in this document. I hereby accept this designation with full knowledge that upon a health care professional making a written determination that the parent of the minor(s) is not able to care for the minor(s) due to his or her physical or mental health or condition, I automatically take on this guardianship.

Further, I understand that I must file a notice of my becoming a standby guardian, a copy of this designation, and a copy of the health determination with the probate court as soon as the health determination has been made. I understand that within 120 days of the health determination being made I must petition the probate court to name me as guardian of the minor(s).

This _____ day of _____________, ______.

__________________________________________  ______________________________________
(Standby guardian signs here)                   (Print name of standby guardian)

We, the undersigned witnesses, are at least 18 years of age, are not designated as the standby guardian in this document, and state that the standby guardian signed this document in our presence.

__________________________________________  ______________________________________
(Signature of first witness)                   (Print first witness's address)

__________________________________________  ______________________________________
(Signature of second witness)                  (Print second witness's address)
NOTICE OF HEALTH DETERMINATION
AND ACTIVATION OF STANDBY GUARDIANSHIP

TO: Probate Court of __________ County

Designating Individual: _________________________
Standby Guardian: _________________________
Effective Date: _________________________
Minor(s): _________________________

I, the undersigned, do hereby state that I am the Standby Guardian designated as such by _________________________ in a Designation of Standby Guardian dated ______, a true and complete copy of which is attached hereto.

A “health determination” was made by _________________________ (physician) (licensed nurse practitioner) on _________, and a copy of same is attached hereto.

Therefore, pursuant to O.C.G.A. §29-2-10(2)(c), notice is hereby filed with the probate court of the domicile of the minor(s).

I understand that, pursuant to O.C.G.A. §29-2-13, the Standby Guardianship shall automatically terminate 120 days from the date of the health determination (effective date) unless I shall have filed prior to such automatic termination a petition for the appointment of a temporary guardian for the minor(s).

________________________
Signature of Standby Guardian

________________________
Printed Name of Standby Guardian

Witness:

________________________
Judge/Clerk of Probate Court

Filing Date: _________________
APPENDIX A10-4

PROBATE COURT OF ____________________ COUNTY
STATE OF GEORGIA

MINOR:________________________

ESTATE NO. ________________

CONSERVATOR(S):

MINOR CONSERVATORSHIP INVENTORY
AND ASSET MANAGEMENT PLAN SHORT FORM

A. INVENTORY

Approx. Current Value

1. Checking/Savings/Money Market/Certificates of Deposit/Liquid Accounts:

<table>
<thead>
<tr>
<th>Bank/Financial Institution/Broker</th>
<th>Acct. No.</th>
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2. Stocks/Bonds/Investments (including retirement and profit-sharing accounts):

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<tr>
<th>Brokerage Firm or Institution</th>
<th>Acct. No.</th>
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</table>

3. Real Estate:

<table>
<thead>
<tr>
<th>Brief Description</th>
<th>Minor’s Interest</th>
<th>Co-Owner(s)</th>
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4. Personal Property (Vehicles, furniture, etc.):

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<tr>
<th>Brief Description</th>
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TOTAL ASSET VALUE: $
B. **ESTIMATED MONTHLY INCOME FROM ALL SOURCES:**

Interest, dividend, or investment income $____________________
Social Security $____________________
Other (describe) ________________________________ $____________________

**TOTAL AVERAGE MONTHLY INCOME:** $____________________

The minor:

_____ I. is not a beneficiary of a Trust

_____ II. is a beneficiary of a Trust, and the following is the name of the Trust, the Trustee, his/her address, and telephone number; state when and how payments are required to be made under the Trust and the criteria for payment (attach outline if necessary): __________________________________________________________

C. **BUDGET**

I/We plan during the following reporting year (initial one)

_____ a. not to expend any of the minor’s funds but to allow it to accumulate; OR

_____ b. to expend the **interest earned** on the minor’s estate for the following purposes: __________________________________________________________; OR

_____ b. **regardless** of interest earned, to expend from the minor’s estate the sum of $____________________ per month for the following purposes: __________________________________________________________; and

If b. or c. above is selected, the following are the monthly estimated expenses for the care, support, health and education of the minor:

- Room and board allowance: $____________________
- Child care: $____________________
- School Tuition/Supplies/Expenses/Lunches: $____________________
- Clothing/Diapers/Grooming/Hygiene: $____________________
- Medical/Dental/Prescription: $____________________
- Health/Life/Disability Insurance: $____________________
- Entertainment/Activities: $____________________
- Personal Caretakers/home health care: $____________________
- Transportation: $____________________
- Miscellaneous: $____________________
- **Average Monthly Expenses:** $____________________
SUMMARY

1. Average Monthly Income $__________________
2. Monthly support provided by parent(s) $__________________
Subtotal $______________
3. Less Average Monthly Expenses - ____________.
Requested spending amount $______________

D. ASSET MANAGEMENT PLAN
I/We plan to: (initial one)

_____ a. maintain the investment plan for the minor’s assets as indicated in the above Inventory, OR

_____ b. expend the amount requested above and maintain and invest the remaining funds as authorized by law or in accordance with an investment plan approved by the court.

E. AFFIDAVIT
I/We, ____________________________, Conservator(s) of the above minor, do swear that the foregoing Inventory and Asset Management Plan contains a just, true, and complete inventory and budget of all property belonging to said minor within my/our possession, control, or knowledge, in addition to the financial information of the parent(s), if provided. This Inventory and Asset Management Plan has been provided to the Guardian of the ward, if any, by first class mail.

Sworn to and subscribed before me this __ day of ________, 20____.

Conservator

____________________________

NOTARY/CLERK OF PROBATE COURT
My Commission Expires: _______________

____________________________

Printed Name

NOTARY/CLERK OF PROBATE COURT
My Commission Expires: _______________

____________________________

Printed Name
IN THE PROBATE COURT OF ____________ COUNTY

STATE OF GEORGIA

IN RE: ) ESTATE NO. __________

) INVENTORY AND
MINOR ) ASSET MANAGEMENT PLAN

) FOR A MINOR

) CONSERVATOR(S)

ORDER

The Conservator(s) having filed an Inventory/Asset Management Plan for the above estate on ________________, 20 ____,

IT IS HEREBY ORDERED that said Inventory/Asset Management Plan is hereby APPROVED.

(initial if applicable)

__ IT IS FURTHER ORDERED that Conservator(s) is/are authorized to disburse from the minor's estate:

__ a. the sum of $______ per month for the support of the minor.

__ b. the income for the support of the minor.

__ c. a one time lump sum distribution of $________ for the following purpose(s):

________________________________________________________________________

________________________________________________________________________.

IT IS FURTHER ORDERED that said Conservator(s) shall show in the annual return how such funds actually were spent.

SO ORDERED this __ day of __________, 20__. 

________________________________________
Judge, Probate Court of __________ County

FILED: _____________________ DATE

(DEP.) CLERK
APPENDIX A10-5

IN THE PROBATE COURT OF _____________ COUNTY
STATE OF GEORGIA

IN RE: _______________________________ : DOCKET NO. ________________ :
Minor: PERSONAL STATUS REPORT
_____________________________ : Annual Report on Condition of
Guardian: Minor

NOTE: THIS FORM MUST BE TYPED OR LEGIBLY PRINTED IN BLACK INK.

1. I/We, ________________________________, am/are the guardian(s) of the above-named minor, and my/our annual report on the condition of the minor is as follows:

2. Present age of minor: ________ Date of Birth: ____________.

3. Living Arrangements:
   a. Current physical address of the minor is: ________________________________
   b. The ward/minor has been in the present residence since _________________. If moved within the past year, state change(s) and reason(s) for change:
   ____________________________________________________________
   c. The minor ☐ does ☐ does not live full time with the guardian(s). If not, the minor has lived with the following person(s) during the past year for the period(s) of time indicated:
   ____________________________________________________________
   d. I/We recommend a more suitable living arrangement for the minor as follows:
   ___________________________________________________________________

4. Physical Health
   a. The minor's general, physical condition is ☐ excellent ☐ good ☐ fair ☐ poor.
   b. During the past year, the minor’s physical condition has
      ☐ remained about the same.
      ☐ improved; explain: ________________________________________________
      ☐ worsened; explain: ________________________________________________

5. Education
   a. The minor is ☐ not yet of school age ☐ is enrolled in school at:

   b. The minor's performance in school is ☐ excellent ☐ good ☐ fair ☐ poor. If only fair or poor, the following is the guardian's plan for improving the school performance of the minor:
   ____________________________________________________________________
6. **Social Activities/Services**
   a. The minor’s current social condition is ☐ excellent ☐ good ☐ fair ☐ poor.
   b. During the past year, the minor’s social condition has
      ☐ remained about the same.
      ☐ improved; explain: ________________________________
      ☐ worsened; explain: ________________________________
   c. During the past year, the minor has participated in the following activities
      (explain):
      ☐ recreational: ________________________________
      ☐ social: ________________________________

7. We believe that the minor has the following unmet needs (if any):
   ___________________________________________________________________

8. The guardianship ☐ should ☐ should not be continued because:
   ___________________________________________________________________

9. ☐ I/We also serve as conservator(s) for the minor. If so, my/our accounting for the
    current year ☐ is filed simultaneously with this report ☐ was filed earlier on
    ☐ is not yet due but will be filed on _____________ ☐ has not been filed because
    _____________________________________________________________________:
    OR
    ☐ I/We do not serve as conservator(s) for the ward/minor. I/We ☐ have ☐ have not
    received funds for the support, care, education, health and welfare of the ward/minor. If
    so, following is a description of the amount(s) and expenditures of all such funds
    received by me/us during the reporting period: ________________________________
    _____________________________________________________________________

10. My/Our current contact information is:

    | Printed Name of Guardian | Printed Name of Co-Guardian |
    |--------------------------|-----------------------------|
    | Street Address           | Street Address              |
    | City, State, ZIP         | City, State, ZIP            |
    | Mailing Address, if different | Mailing Address, if different |
    | Home Telephone | Work Telephone |
    | Electronic Mail (Email) Address | Electronic Mail (Email) Address |
Verification

The answers to the foregoing questions and the information provided with regard to the ward/minor are true and correct to the best of my/our personal knowledge and belief and are hereby made under oath.

_______________________________  ________________________________
Guardian’s Signature            Co-Guardian’s Signature

_______________________________  ________________________________
Printed Name of Guardian        Printed Name of Co-Guardian

Sworn to and subscribed before me
on _________________________________  Sworn to and subscribed before me
on _________________________________

_______________________________  ________________________________
Notary Public or Clerk of Probate Court  Notary Public or Clerk of Probate Court

ORDER ADMITTING TO RECORD

The within and foregoing Personal Status Report is hereby accepted, approved and ordered admitted to record on _________________________________.

Filed: _________________________________  ________________________________
Judge/Clerk of Probate Court

Recorded in the Imaged Records of Probate Court of _____________ County
on _________________________________, 20____.

Deputy Clerk ________________________________.
APPENDIX A10-6

PROBATE COURT OF __________ COUNTY
Instructions for Completing
Annual/Final Return of Conservator

1. Returns of conservators must be full, complete and accurate. Estimates and rounding are not permitted.
2. The return is a report of every receipt and every expenditure of cash and is similar to a simple check register on a personal bank account.
3. If all funds are deposited into the conservatorship account(s) and all payments are made by check or drafts from those account(s), completing the return should be no more difficult than transferring the information from the bank records to these forms.
4. It is the responsibility of the conservator to fully and properly complete the returns required. It is not the responsibility of court staff to prepare or correct returns. Incorrect, incomplete or unbalanced returns will simply be returned to the conservator for completion or correction.
5. Please NOTE: all returns must be typed or legibly printed in black ink. Illegible returns will NOT be accepted for filing.

Page 1 of Return

1. Enter the name(s) of the Conservator(s) on the line in the box at the top of Page 1.
2. Enter the Docket No. (the case number) on the line indicated.
3. Enter the Name of the Ward or Minor on the line indicated.
4. Circle “Final” or “Annual” to indicate the type of return.
5. Enter the dates covered by the return. If this is the first return, the beginning date will be the date of your appointment. If this is not the first return, the beginning date will be the ending date from the last return.
6. Complete the Combined Summary Accounting.
   A. Enter the total beginning balance from the last accounting. If this is the first return, the beginning balance is zero; everything received will be reported under Receipts.
   B. Enter the Total Receipts in all accounts for the period covered by the return. Include all money and accounts initially transferred to and/or deposited into the conservatorship account(s) and all additional money received. Include all income received from all sources and all interest paid on any accounts or deposits. “If you received it, you must report it.”
   C. Add the beginning balance and the Receipts, and enter the Subtotal.
   D. Enter the Total Expenditures from all accounts for the period covered by the return. Include all money spent or paid out, including any amounts automatically deducted from accounts and any bank charges, check printing charges, service charges or other fees. Include also any money paid out in cash (a practice discouraged by the court). “If you spent it, you must report it.”
   E. Subtract the Expenditures from the Subtotal, and enter the ending balance on the next line.
8. You are REQUIRED to file with each Return and updated Inventory and Asset Management Plan. Check the box to indicate that you have attached it to your Return.
9. Complete and sign the Verification. Your signature must be notarized or be witnessed by a Probate Court Clerk. Include the full information on how you may be contacted if there are any questions about your return.
10. Remainder of Page 1 is to be completed by Court staff.
Page 2 of Return

1. **Transaction Register(s)**
   A. Complete a **TRANSACTION REGISTER** [Page 2] for EACH conservatorship account for the full period covered by your Return. If all transactions for the period covered will not fit on one page, make copies of Page 2. The period covered for each account must be the same.

   B. If you prefer, instead of the Transactions Register, you may attach a printed and complete computer software transaction report for each conservatorship account, provided it includes all of the required information.

   C. You **MUST** report and show all receipts and all expenditures. Any money you received, from any source, is a **Receipt**. and any money you spent or paid out is an **Expenditure**. Be sure to include any money automatically deposited into an account and any interest earned on an account. Also be sure to include any automatic payments from an account and all service charges, check printing charges and other bank fees.

   D. If you have more than one account, use the following Worksheet to combine the amounts from all accounts into totals for the Combined Summary on Page 1.

   **WORKSHEET TO RECAP ALL ACCOUNTS**

   If you have more than one account, before entering the amounts in the Combined Summary on Page 1, complete the following RECAP:

   **BEGINNING BALANCES:**

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   **TOTAL BEGINNING BALANCES** (Enter on Page 1)

   **RECEIPTS:**

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   **TOTAL RECEIPTS** (Enter on Page 1)

   **EXPENDITURES:**

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   **TOTAL EXPENDITURES** (Enter on Page 1)

   **ENDING BALANCES:**

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</table>
   **TOTAL ENDING BALANCES** (Enter on Page 1)
1. **Bank Account Verifications:** The balances in all accounts must be verified. A certificate signed by a bank employee for each account is required unless you provide the court an *original* bank statement for the account showing the account balance on the ending date of the return. The bank statement will be returned to you after being copied by the staff.

2. **Verification of Investments:** All investments held by a broker or financial institution must be verified. A certificate signed by an employee of each brokerage firm or institution is required unless you provide the court an *original* statement of holdings showing the investments held on the ending date of the return. The statement will be returned to you after being copied by the staff.

*Serving as Conservator for another is an important job. It should be taken seriously. As a Conservator, you have taken an oath of office by which you have agreed to perform your duties as a Conservator in compliance with Georgia law. It is YOUR DUTY to file a Return each and every year as long as you serve as Conservator. It is the responsibility of the Court and its staff to assure that EVERY Conservator complies with this requirement.*
IN THE PROBATE COURT OF ______________________ COUNTY, GEORGIA

Conservator(s)

IN THE MATTER OF THE ESTATE OF ) Final - Annual RETURN OF CONSERVATOR )
) ) ) t o ) )
Ward/Minor From To

COMBINED SUMMARY ACCOUNTING OF CASH TRANSACTIONS IN ALL ACCOUNTS

<table>
<thead>
<tr>
<th>Description</th>
<th>Value</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. CASH BALANCES FROM ALL ACCOUNTS FROM LAST ACCOUNTING</td>
<td>$</td>
</tr>
<tr>
<td>B. ADD TOTAL DEPOSITS/RECEIPTS FOR ALL ACCOUNTS</td>
<td>$</td>
</tr>
<tr>
<td>C. SUBTOTAL</td>
<td>$</td>
</tr>
<tr>
<td>D. SUBTRACT TOTAL WITHDRAWALS FROM ALL ACCOUNTS</td>
<td>$</td>
</tr>
<tr>
<td>E. CASH BALANCES IN ALL ACCOUNTS AT END OF REPORTING PERIOD</td>
<td>$</td>
</tr>
</tbody>
</table>

(Check here) I/We have attached hereto an updated Inventory and Asset Management Plan (Required)

VERIFICATION AND CERTIFICATION BY CONSERVATOR(S)

STATE OF GEORGIA
COUNTY OF ____________

I/We, ________________________________, being duly sworn, depose and say that I am/we are the Conservator(s) for the Minor/Ward named above, that I/we now reside at __________________________ and that this is a full and true account of the estate for the period stated, to the best of my/our knowledge and belief. I/We do further certify to the Court: that all bond premiums due have been paid to date; that all income tax returns required have been filed to date; and that all taxes, including ad valorem taxes, have been paid to this date.

For purposes of contacting me/us with regard to this return, my/our daytime telephone number(s) is/are __________________________, my/our evening telephone number(s) is/are __________________________, my/our cell telephone number(s) is/are __________________________, and my/our email address(es) is/are __________________________.

I/We also serve as guardian(s) of the ward/minor, and the Personal Status Report ( ) is filed simultaneously herewith ( ) was previously filed on ____________ ( ) is not due at the same time as this Return.

I/We certify that copies of this Return have been mailed by me/us to the Guardian of the Minor/Ward, if one and if different than the Conservator(s) and to the Surety on the bond of the Conservator(s).

Sworn to and subscribed before me on ____________.

Signatures of Conservator(s)

(Notary or Clerk, Probate Court)

Recorded in Imaged Records

PROBATE COURT OF ______________________ COUNTY

Docket No. ____________________________;

Date Imaged: ____________________________.

RETURN FILED

__________________________.

Filed

__________________________.

(Dep.) CLERK

January, 2010
# TRANSACTION REGISTER

**Bank:**  
**Account No.**  
**Account Type:**  
Checking  Savings  Money Market  Other  
Include all sums deposited into and paid or deducted from the account, including automatic deposits,  
automatic withdrawals and all bank charges.

<table>
<thead>
<tr>
<th>DATE</th>
<th>CHECK NO.</th>
<th>Transaction Description</th>
<th>Deposit, Credit (Additions)</th>
<th>Payment, Fee, Withdrawal (Subtractions)</th>
<th>BALANCE</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Beginning Balance [See Note on Page 2]</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**TOTAL DEPOSITS AND WITHDRAWALS**

**ENDING BALANCE** [See Note on Page 2]

[NOTE: Please copy this page if additional space is needed. Enter the TOTALS on the last page.]
ACCOUNT VERIFICATIONS

NOTE: Use the certificates on this page to verify balances in each account held OR attach an ORIGINAL bank statement for each account showing balances on ending date. The bank statement will be returned to you.
[NOTE: Please copy this page if additional certificates are needed.]

<table>
<thead>
<tr>
<th>CERTIFICATE OF BALANCES ON DEPOSIT</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Name and Address of Bank or Financial Institution)</td>
</tr>
<tr>
<td>I do certify that on __________________<strong><strong><strong>, 20</strong></strong></strong>, there was on deposit in this institution to the credit of the estate managed by this Conservator the following:</td>
</tr>
<tr>
<td>Checking Account Balance: $__________________  Account Nos. ________________________________</td>
</tr>
<tr>
<td>Savings Account Balance: $__________________  Account Nos. ________________________________</td>
</tr>
<tr>
<td>Certificate(s) of Deposit at Face Value: $__________________  Certificate Nos. ________________________________</td>
</tr>
<tr>
<td>Interest paid and credited to the above accounts during period of this Statement of Account totaled $__________________ .</td>
</tr>
<tr>
<td>[Do NOT include accrued but unpaid interest.]</td>
</tr>
<tr>
<td>I further certify that each account is properly titled in the Conservator's fiduciary capacity for the benefit of the ward/minor.</td>
</tr>
<tr>
<td>(Signature of Certifying Official)</td>
</tr>
<tr>
<td>Printed Name and Title of Certifying Official</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CERTIFICATE OF BALANCES ON DEPOSIT</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Name and Address of Bank or Financial Institution)</td>
</tr>
<tr>
<td>I do certify that on __________________<strong><strong><strong>, 20</strong></strong></strong>, there was on deposit in this institution to the credit of the estate managed by this Conservator the following:</td>
</tr>
<tr>
<td>Checking Account Balance: $__________________  Account Nos. ________________________________</td>
</tr>
<tr>
<td>Savings Account Balance: $__________________  Account Nos. ________________________________</td>
</tr>
<tr>
<td>Certificate(s) of Deposit at Face Value: $__________________  Certificate Nos. ________________________________</td>
</tr>
<tr>
<td>Interest paid and credited to the above accounts during period of this Statement of Account totaled $__________________ .</td>
</tr>
<tr>
<td>[Do NOT include accrued but unpaid interest.]</td>
</tr>
<tr>
<td>I further certify that each account is properly titled in the Conservator's fiduciary capacity for the benefit of the ward/minor.</td>
</tr>
<tr>
<td>(Signature of Certifying Official)</td>
</tr>
<tr>
<td>Printed Name and Title of Certifying Official</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CERTIFICATE OF INVESTMENTS HELD</th>
</tr>
</thead>
<tbody>
<tr>
<td>(Name and Address of Institution)</td>
</tr>
<tr>
<td>I do certify that on __________________<strong><strong><strong>, 20</strong></strong></strong>, there were held by this institution to the credit of the estate managed by this Conservator the Investments shown on the Inventory and Asset Management Plan attached to this Return and that the cost or value at acquisition are correct. I further certify that all investments are properly titled in the Conservator's fiduciary capacity for the benefit of the ward/minor.</td>
</tr>
<tr>
<td>(Signature of Certifying Official)</td>
</tr>
<tr>
<td>Printed Name and Title of Certifying Official</td>
</tr>
</tbody>
</table>
Calculation of Bond Sufficiency

<table>
<thead>
<tr>
<th>Description</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Value of Personal and Intangible Property from Updated Inventory and</td>
<td>$</td>
</tr>
<tr>
<td>Asset Management Plan attached to Return</td>
<td></td>
</tr>
<tr>
<td>PLUS: Any Cash Assets Not Shown on Updated Inventory</td>
<td></td>
</tr>
<tr>
<td>TOTAL VALUE TO BE BONDED</td>
<td>$</td>
</tr>
<tr>
<td>CURRENT SURETY BOND AMOUNT</td>
<td></td>
</tr>
<tr>
<td>AMOUNT OF BOND EXCESS/(DEFICIENCY)</td>
<td>$</td>
</tr>
</tbody>
</table>

RETURN AUDITED
Audited and approved on

By: __________________________________________
Fiduciary Compliance Officer/Deputy CLERK

ORDER ADMITTING RETURN TO RECORD

The foregoing Return and its affidavit having been carefully examined and found correct, and having remained on file in office for ___________ days and no objections having been filed thereto, the same is allowed; and it is ordered that said return together with its affidavit be recorded as the law requires.

Filed ____________________________  Judge, Probate Court _____________ County
(Deputy) Clerk

ORDER DIRECTING RECORDING OF RETURN
WITHOUT APPROVAL OR DISAPPROVAL

The within and foregoing return having been filed and examined and having remained on file for more than thirty days and no objection to same having been filed, but it appearing to the Court that the return may evidence waste or mismanagement, it is ordered that the return be recorded without approval or disapproval by the Court and that a copy of same be served upon the surety on the conservator’s bond.

Filed ____________________________  Judge, Probate Court _____________ County
(Deputy) Clerk
IN THE PROBATE COURT OF ____________ COUNTY  
STATE OF GEORGIA

IN RE:  

_______________________________________  
(Decedent/Minor/Incapacitated Adult)  

_______________________________________  
(Personal Representative/Conservator)  

_______________________________________  
Surety

DOCKET NO. ________________

CITATION TO FIDUCIARY AND SURETY TO SHOW CAUSE WHY LETTERS SHOULDN'T BE REVOKED AND WHY ANY SHORTAGE OF FUNDS OR LOSSES SHOULD NOT BE ASSESSED AGAINST SAID FIDUCIARY AND SURETY

Upon information or belief, it appearing to the Court that the above-named fiduciary has either (1) failed to file annual returns, inventory, personal status reports and/or other reports as required by law or Court order, (2) made unauthorized expenditures or otherwise encroached upon corpus without leave of the Court, (3) failed to properly carry out the duties of the fiduciary, and/or (4) otherwise failed to comply with the rules and instructions of this Court, as required by law.

The above named fiduciary is hereby ordered to be and appear before this Court, in Room _____, ____________ County Courthouse, ____________, Georgia, at .M. on ________________, then and there to answer these charges, and to render a full and complete accounting of all money and property coming into your hands and/or all actions taken by you in your fiduciary capacity, and to show cause why you should not be removed from your fiduciary capacity in the above estate.

Notice is further given that if any property or funds are unaccounted for or have been expended improperly, you and your surety may be held jointly and severally liable for same, together with all costs of these proceedings. Notice is further given that Letters heretofore issued to you by the Court may be revoked at such hearing. If you fail to appear after proper notice then the Court will have to assume that you have violated your duties and will proceed with such evidence as may be before the Court.

You are hereby further directed to bring with you and deliver to the Clerk of this Court at or before the time of such hearing all records of your dealings and actions as estate fiduciary since the date of your last filed and accepted return or report, including, but not necessarily limited to: all bank statements; canceled checks; deposit slips; receipts; invoices; statements; and other document(s) in support of your dealings and actions as fiduciary.
SO ORDERED, on ____________.

__________________________________________
JUDGE
PROBATE COURT, ____________ COUNTY

ENTRY OF SERVICE

GEORGIA, ____________ COUNTY

This is to certify that I have this day served ___________________________ personally with a copy of the within Citation.

_________________________         Deputy Sheriff, ____________ County
Date                                                                                     

ENTRY OF SERVICE

GEORGIA, ____________ COUNTY

This is to certify that I have this day served ___________________________, the registered agent for service in Georgia of ____________________________, personally with a copy of the within Citation.

_________________________         Deputy Sheriff, ____________ County
Date                                                                                     

CERTIFICATE OF MAILING

I certify that I have this date, mailed by United States first-class mail, in envelope properly addressed with adequate postage affixed, a copy of the foregoing Citation to:

_________________________
Date

(Dep.) CLERK, Probate Court

SEAL
IN THE PROBATE COURT OF ___________ COUNTY
STATE OF GEORGIA

IN RE: : DOCKET NO. _______________

Ward/Minor : 

PETITION TO ACCEPT INTRA-STATE TRANSFER OF
GUARDIANSHIP AND/OR CONSERVATORSHIP

The petition of __________________________, Guardian and/or Conservator of
the above named (ward)(minor), respectfully shows to the Court the following:

1. Petitioner is the duly qualified and acting Guardian and/or Conservator of
the above named ward/minor, having been duly appointed by the Probate Court of _____ County on ___.

2. Petitioner, whose current residence is in this county at __________________ and
whose mailing address is __________________, desires to have the proceedings removed to this
county.

3. The ward's/minor's current domicile is _____ County, Georgia, and the ward/minor is
presently residing at _____________________________.

4. Petitioner herewith tenders to this court a surety bond in the amount of $__________,
which is the amount of the bond presently posted in the Probate Court of _____________ County.

5. Upon certification by this court of the posting and acceptance of the herewith tendered
bond, petitioner will seek an order from the Probate Court of _____________ County transferring
jurisdiction over the proceedings to this court and will file with this court certified copies of all
records concerning the guardianship/conservatorship from said transferring court.
Wherefore, petitioner prays that this court enter an order certifying to the filing with and acceptance by this court of the said bond and acknowledging this court's willingness to accept a transfer of jurisdiction over the proceedings on the above-named ward/minor; and that this Court grant such other and further relief that it deems just and proper.

__________________________
Signature of first petitioner

__________________________
Signature of second petitioner, if any

__________________________
Printed Name

__________________________
Printed Name

__________________________
Address

__________________________
Address

__________________________
Telephone Number

__________________________
Telephone Number

__________________________
Signature of Attorney:

Typed/printed name of Attorney:

__________________________
Address

__________________________
Address

__________________________
Telephone: State Bar #

VERIFICATION

GEORGIA, ______________ COUNTY

Personally appeared before me the undersigned petitioner(s) who on oath state(s) that the facts set forth in the foregoing petition are true.

Sworn to and subscribed before me
this ___ day of __________, 20__.

__________________________
First Petitioner

NOTARY/CLERK OF PROBATE COURT

__________________________
Printed Name

Sworn to and subscribed before me
this ___ day of __________, 20__.

__________________________
First Petitioner

NOTARY/CLERK OF PROBATE COURT

__________________________
Printed Name
IN THE PROBATE COURT OF ___________ COUNTY
STATE OF GEORGIA

IN RE: : DOCKET NO. _________________

____________________________________
Ward/Minor : 

ORDER CERTIFYING THE POSTING OF BOND AND
ACCEPTING PROPOSED TRANSFER OF
GUARDIANSHIP AND/OR CONSERVATORSHIP

A petition to accept transfer of guardianship/conservatorship having been filed in this
court concerning the above-named ward/minor, and the same having been read and considered,
and

It appearing to the court that the conservator has filed with this court a surety bond in the
amount of $___________, which bond and security are acceptable to this court, and

This court being willing to accept a transfer of jurisdiction over the proceedings from the
Probate Court of __________ County,

IT IS ORDERED that the said bond be filed, that the same is hereby approved by this
court; that a transfer of jurisdiction over the proceedings concerning the above-named
ward/minor to this court from the Probate Court of __________ County is acceptable to
this court; and that a copy of this order shall serve to so certify the same to the Probate Court of
County.

IT IS FURTHER ORDERED that, upon receipt by this court of an order transferring
jurisdiction over the said proceedings to this court entered by the Probate Court of
County, together with certified copies of all records concerning the guardianship/conservatorship
from the said transferring court, this court will assume all jurisdiction over and supervision of the
proceedings concerning the above-named ward/minor.

IT IS FURTHER ORDERED that, upon such a transfer of jurisdiction over the said
proceedings concerning the above-named ward/minor, the sureties on the bond in this court shall
be liable for both past and future misconduct, if any, of the conservator.

SO ORDERED, on ________________.

____________________________________
Judge, Probate Court of County
IN THE PROBATE COURT OF ___________ COUNTY  
STATE OF GEORGIA

IN RE: : DOCKET NO. ____________
:
:
:
:
:
:
:
:
:
Ward/Minor

PETITION TO AUTHORIZE INTRA-STATE TRANSFER OF GUARDIANSHIP AND/OR CONSERVATORSHIP

The petition of _________________, Guardian and/or Conservator of the above-named (ward)(minor), respectfully shows to the Court the following:

1.

Petitioner is the duly qualified and acting Guardian and/or Conservator of the of the above named ward/minor, having been duly appointed by this court on .

2.

Petitioner, whose current residence is in _________________ County at ________________________, and whose mailing address is ________________________________, desires to have the proceedings removed to the Probate Court of said county.

3.

The ward's/Minor's current domicile is _________________ County, Georgia, and the ward/minor is presently residing at ________________________________.

4.

Attached hereto as Exhibit “A” is a copy of an Order from the Probate Court of _________________ County, certifying the fact that Petitioner has filed with said court a surety bond in the amount of $ ____________, which bond has been approved by said court. The said Order further acknowledges the willingness of said court to accept a transfer of jurisdiction over the proceedings concerning the above-named ward/minor upon the entry of an order in this court authorizing same.

5.

There are no matters pending in this court which would prevent the proposed transfer, and the proposed transfer will not work any undue detriment to the ward/minor or the estate.

Wherefore, petitioner prays that this court enter an order transferring jurisdiction over the proceedings concerning the above-named ward/minor to the Probate Court of ____________
County, directing the Clerk of this court to prepare for filing in said court certified copies of all records concerning the proceedings in this court, and relieving the sureties on the bond in this court from liability for any future misconduct, if any, of the conservator, and granting such other and further relief that it deems just and proper.

____________________________________  
Signature of first petitioner  

_______________________________  
Printed Name  

____________________________________  
Address  

____________________________________  
Telephone Number  

Signature of second petitioner, if any  

_______________________________  
Printed Name  

____________________________________  
Address  

____________________________________  
Telephone Number  

Signature of Attorney: _______________________________  

Typed/printed name of Attorney: _______________________________  

Address: _______________________________  

Telephone: ____________ State Bar # _____________  

VERIFICATION

GEORGIA, __________ COUNTY  

Personally appeared before me the undersigned petitioner(s) who on oath state(s) that the facts set forth in the foregoing petition are true.

Sworn to and subscribed before me  
this ___ day of _______, 20___.  

First Petitioner  

NOTARY/CLERK OF PROBATE COURT  

Sworn to and subscribed before me  
this ___ day of _______, 20___.  

First Petitioner  

NOTARY/CLERK OF PROBATE COURT
ORDER APPOINTING GUARDIAN AD LITEM

The within and forgoing petition having been filed, read and considered,

IT IS ORDERED that ____________________________ is hereby appointed as guardian-ad-litem for the ward/minor named in the proceedings.

IT IS ORDERED FURTHER that a copies of the petition, together with all Exhibits, and this Order be served upon the guardian-ad-litem, who shall make answer whether, in the opinion of the guardian ad litem, the proposed transfer of jurisdiction is in the best interest of the ward/minor.

SO ORDERED on ________________.

__________________________________________
______________________________
 Judge, Probate Court of _______
County

ANSWER OF GUARDIAN AD LITEM

I hereby accept the foregoing appointment, acknowledge service and notice of the proceedings as provided by law, and for answer say:

__________________________________________
______________________________
 DATE Signature of Guardian ad Litem

______________________________
 Printed Name of Guardian ad Litem

______________________________
 Address

______________________________
 Telephone
IN THE PROBATE COURT OF ___________ COUNTY
STATE OF GEORGIA

IN RE: _______________ DOCKET NO. _______________

_________________________________
Ward/Minor

ORDER DIRECTING TRANSFER OF
GUARDIANSHIP AND/OR CONSERVATORSHIP

A petition to transfer guardianship/conservatorship having been filed in this court concerning the above-named ward/minor, and the same having been read and considered, and

It appearing to the court that the Petitioner has filed with this court a copy of an order from the Probate Court of ___________ County certifying the fact that the Petitioner has filed with said court a surety bond in the amount of $ ___________, which bond has been approved by said court, which Order further acknowledges the willingness of said court to accept a transfer of jurisdiction over the proceedings concerning the above-named ward/minor upon the entry of an order in this court authorizing same, and

It appearing to the court that there are no matters currently pending in this court which would prevent the proposed transfer, and it further appearing that the proposed transfer is in the best interest of the ward/minor,

IT IS ORDERED that jurisdiction over the proceedings concerning the above-named ward/minor be, and the same are hereby, transferred to the Probate Court of County.

IT IS FURTHER ORDERED that the Clerk of this court shall send a copy of this order, together with authenticated certified copies of all records concerning the proceedings in this court, to the Probate Court of ___________ County, which court has agreed to assume all jurisdiction over and supervision of the said proceedings.

IT IS FURTHER ORDERED that the sureties on the bond posted in this court be, and are hereby, relieved of all liability for future misconduct, if any, of the conservator. Said sureties are not hereby relieved of liability for any past misconduct, if any, of the conservator.

SO ORDERED, on _______________.

_________________________________
Judge, Probate Court of _______ County

FILED: _______________
DATE

CLERK
Appendix A11-6

Re: Petition for Health Care Placement Transfer, Admission or Discharge Order

INSTRUCTIONS

I. Specific Instructions

1. This form is to be used when filing a petition for a health care placement transfer, admission or discharge order pursuant to O.C.G.A. §31-36A-7.

2. This form shall not be used for the purpose of securing involuntary examination or hospitalization for the treatment of mental illness, which is governed by the provisions of Title 37 of the Official Code of Georgia Annotated.

3. This form consists of 9 pages.

II. General Instructions

General instructions applicable to all Georgia probate court standard forms are available in each probate court.
PETITION FOR HEALTH CARE PLACEMENT
TRANSFER, ADMISSION OR DISCHARGE ORDER

GEORGIA, __________ COUNTY

DOCKET NO. __________

To the Honorable Judge of the Probate Court:

The petition of __________________________, whose address is and who is a resident of ____________ County, ____, shows to the Court that:

1.

____________________________________________________________________________________
First                      Middle/Maiden                      Last Name

Street Address              City          County          State          Zip

and who is ____ years of age, is presently located in __________________________, a health treatment facility at

____________________________________________________________________________________
Street address              City          County          State          Zip

2.

(check one:)

___ Petitioner’s relationship to the adult named in paragraph 1. is .

___ Petitioner is an agent of the health treatment facility in which the adult named in paragraph 1. is presently located and is authorized to bring this petition.

3.

An attending physician, treating physician, or other physician licensed according to the laws of the State of Georgia, after having personally examined the adult named in paragraph 1., has certified in said adult’s medical records the following:

a. said adult is unable to consent for himself or herself; and

b. it is the physician's belief that it is in the said adult's best interest to be discharged from the hospital, institution, medical center, or other health care institution providing health or personal care for treatment of any type of physical or mental condition and to be transferred to or admitted to an alternative facility or placement, including, but not limited to, nursing facilities, personal care homes, rehabilitation facilities and home and community based programs.

A copy of said certificate is attached hereto as Exhibit A.

4.

It is recommended that the said adult be discharged from the present treatment facility
and be admitted or transferred to the following alternative facility or placement:
__________________________________________________________________________
(Provide the name, address and type of alternative facility or describe the home or community based program recommended for the adult.)

5.

There is an absence of a person authorized to consent for the said adult.

6.

There are attached hereto as Exhibits B. and C. the affidavits in support of this petition as required by O.C.G.A. §31-36A-7(b) and (c). Such affidavits support the allegations contained herein and further show that the recommended alternative facility or placement will provide the adult with the recommended services to meet the needs of the adult and is the most appropriate, least restrictive level of care available.

Wherefore, petitioner prays that this court enter an instanter order authorizing petitioner (or __________________________) to do all things necessary to accomplish the said adult’s discharge from the facility in which the said adult is presently located and the transfer to or admission to the recommended facility or placement and that, upon issuance of said order, a copy thereof be provided to the Commissioner of the Georgia Department of Human Services.

_________________________________________
Signature of Attorney (or Petitioner if pro se)
Name:
Address:

Telephone:
State Bar #:
VERIFICATION

GEORGIA, _____ COUNTY

Personally appeared before me the undersigned petitioner(s) who on oath state(s) that the facts set forth in the foregoing petition are true.

________________________________
Signature of Petitioner

Name:
Address:

________________________________
Telephone:

Sworn to and subscribed before me,
this date:

____________________________
Clerk of Probate Court or Notary Public
EXHIBIT “A”

PHYSICIAN’S CERTIFICATE
PURSUANT TO O.C.G.A. §31-36A-5

RE: ______________________________________________________

Patient’s Full Name

The undersigned attending physician, treating physician, or other physician licensed under the laws of the State of Georgia hereby certifies as follows:

1. I am a physician licensed to practice medicine under Chapter 34 of Title 43 of the Official Code of Georgia Annotated.

2. I have practice privileges at __________________________ the facility in which the above-named adult patient is presently located.

3. Based upon my personal examination of the above-named patient on ____, I have certified in the medical records of the patient substantially the following:

   a. Said adult patient is unable to consent for himself or herself; and

   b. It is my belief that it is in this patient's best interest to be discharged from this facility and to be transferred to or admitted to an alternative facility or placement, including, but not limited to, nursing facilities, personal care homes, rehabilitation facilities, and home and community based programs.

_________________________________
Signature of Attending, Treating or Other Physician
Name: ___________________________
(type or print name of physician)

NOTE: This certificate is a part of and is required to be filed with a Petition for Health Care Placement Transfer, Admission or Discharge Order pursuant to Chapter 36A of Title 31 of the Official Code of Georgia Annotated. A signed original of this certificate must be filed with the Petition. A copy or duplicate original of this certificate may be made a part of the patient's medical records for purposes of certifying therein the above information, or such information may be otherwise certified in the medical records.
EXHIBIT “B”

AFFIDAVIT OF PHYSICIAN IN SUPPORT OF
PETITION FOR HEALTH CARE PLACEMENT
TRANSFER, ADMISSION OR DISCHARGE ORDER

Georgia, _____ County

Personally before the undersigned attesting officer authorized to administer oaths came_____________________, who, after being first duly sworn, deposes and states:

1. I am a physician, licensed to practice medicine under Chapter 34 of Title 43 of the Official Code of Georgia Annotated.

2. I have practice privileges at ________________, a hospital, institution, medical center, or other health care institution.

3. Based upon my personal examination of ________________, an adult patient presently located in such facility, I am of the professional opinions that:

   a. Said adult patient is unable to consent for himself or herself;

   b. It is in this patient’s best interest to be discharged from this facility and to be transferred to or admitted to:

       Name of facility or program: ________________________________________________
       Address: ________________________________________________________________
       Type of placement: ________________________________________________________
       (nursing facility, personal care home, rehabilitation facility, home or community based program, etc.)

and

   c. The facility or program recommended will provide the patient with the recommended services to meet the needs of the patient and is the most appropriate, least restrictive level of care available for this patient at this time.

_____________________________  ______________________________
Sworn to and subscribed before me, on this date: ____________________________ Signature of Attending, Treating or Other
Physician

________________________________
Notary Public, ____________________________
County, GA
Comm. Exp.: ____________________________

(type or print name of physician)
EXHIBIT “C”

AFFIDAVIT OF FACILITY REPRESENTATIVE IN SUPPORT OF PETITION FOR HEALTH CARE PLACEMENT TRANSFER, ADMISSION OR DISCHARGE ORDER

Georgia, ________ County

Personally before the undersigned attesting officer authorized to administer oaths came, ____________________ who, after being first duly sworn, deposes and states:

1. I am a discharge planner, social worker, or other designated and authorized person employed by ______________, a hospital, institution, medical center, or other health care institution.

2. ______________ is an adult patient presently located in such facility.

3. A member of the medical staff has certified in the medical records of said patient that the adult patient is unable to consent for himself or herself and that the patient should be discharged from this facility and be transferred to or admitted to an alternative facility or placement.

4. There is an absence of a person authorized to consent for said patient in that:

   a. after diligent efforts for a reasonable period of time, no person authorized to consent for said patient under the provisions of Code Section 31-36A-6 has been found; or

   b. all such authorized persons located have affirmatively waived their authority to consent or dissent to admission to or discharge from a health care facility or placement or transfer to an alternative health care facility or placement (dissent by an authorized person to a proposed admission, discharge or transfer shall not be deemed a waiver of authority).

5. I believe it to be in this patient’s best interest to be discharged from this facility and to be transferred to or admitted to:

   Name of facility or program: ______________________________________________________

   Address: _______________________________________________________________________

   Type of placement: _______________________________________________________________

   (nursing facility, personal care home, rehabilitation facility, home or community based program, etc.)

6. Alternative facilities and placements were considered, including home and community
based placements and available placements, if any, that were in reasonable proximity to the adult’s residence.

7. For the following reasons, I believe the facility or program recommended is the most appropriate facility or placement available that provides the least restrictive and most appropriate level of care available for this patient at this time: (Here set forth reasons for the particular placement:

________________________________________________________

____________________________________________________________________

________________________________________________________

Signature of Discharge Planner, Social Worker, or other authorized person
Name: ____________________________________
(type or print name of affiant)

Sworn to and subscribed before me, on this date: ________________

Notary Public, ________________
County, GA
Comm. Exp.: ________________
The petition of __________________________ having been filed in accordance with the provisions of Chapter 36A of Title 31 of the Official Code of Georgia Annotated and having been reviewed and considered by the Court, and

It appearing to the Court that the verified petition and the accompanying affidavits and certificate show that:

1. The above-named adult is unable to consent for himself or herself;
2. There is an absence of any person to consent to a proposed transfer, admission or discharge as authorized in Code Section 31-36A-6;
3. It is in the best interest of the above-named adult that the patient be discharged from the hospital, institution, medical center, or other health care institution or placement presently providing health or personal care for treatment of a physical or mental condition and be admitted to or transferred to an alternative facility or placement;
4. Alternative facilities or placements have been considered (including home and community based placements and available placements, if any, in reasonable proximity to the adult’s residence), and the recommended facility or placement is the most appropriate facility or placement available that provides the least restrictive and most appropriate level of care; and
5. The petition does not involve the involuntary examination or hospitalization for treatment of a mental illness which is governed by Title 37 of the Official Code of Georgia Annotated.

WHEREUPON, IT IS ORDERED that petitioner (or ______________) be, and is hereby, authorized to do all things necessary to accomplish the discharge of the above-named adult from __________________________ and to do all things necessary to accomplish the transfer to or admission to __________________________ of the said adult. This order does not grant the authority to perform any other acts on behalf of the said adult not expressly authorized under O.C.G.A. §31-36A-7.

IT IS FURTHER ORDERED that this Order and the authority granted hereunder shall expire upon the earliest of the following:

a. The completion of the transfer, admission or discharge and such responsibilities associated with such transfer, admission or discharge, including, but not limited to, assisting with the completion of applications for financial coverage and insurance benefits for the health or personal care;
b. Upon a physician's certification that the adult is able to understand and make decisions regarding his or her placement for health or personal care and can communicate such decisions by any means; or

c. Upon the expiration of thirty (30) days from the date hereof or on the following date hereby specified by the Court within such thirty (30) days:

IT IS FURTHER ORDERED that the Clerk mail, by first class mail, a copy of this Order to the Commissioner of the Georgia Department of Human Services.

SO ORDERED, on ______.

_________________________________
JUDGE/HEARING OFFICER
PROBATE COURT

CERTIFICATE OF MAILING

This is to certify that a copy of the within and foregoing order was on this date mailed by first-class, postage prepaid mail, to:

Commissioner
Georgia Department of Human Services
Suite 29.250
2 Peachtree Street, NW
Atlanta, GA 30303-3142

Date mailed: ____________

_______________________________________
(Dep.) CLERK, Probate Court
Affidavits in support of orders by the Judge of the Probate Court, under Code Sections 37-3-41; 37-3-41 and 37-7-42 of The Official Code of Georgia Annotated.

AFFIDAVIT

STATE OF GEORGIA
COUNTY OF BIBB

COMES NOW, ______________________________________________, who resides at ____________________________________, and who states that I am resident of ________ County, and the State of ________. Over a period of ________ (mos.)(yrs.), I have known ____________________________, age _____, who resides at ______________ ____________________________, to/with whom I have the following relationship: ___________. I have had an opportunity to observe his/her demeanor and conduct BY ACTUALLY SEEING HIM/HER WITHIN THE PRECEDING 48 HOURS.

Predicated on what I HAVE ACTUALLY OBSERVED HIM/HER DO OR HEARD HIM/HER SAY, it is my confirmed lay opinion that he/she is:

1. ( ) A MENTALLY ILL PERSON requiring involuntary treatment AND
   ( ) (a) who presents a substantial risk of imminent harm to himself or others as manifested by either recent overt acts or recently expressed threats of violence which present a possibility of physical injury to himself or to others persons,
   OR
   ( ) (b) who is so unable to care for his/her own physical health and safety as to create an imminently life-endangering crisis.

2. ( ) AN ALCOHOLIC requiring involuntary treatment AND
   ( ) (a) who presents a substantial risk of imminent harm to himself or others as manifested by either recent overt acts or recent expressed threats of violence which present a probability of physical injury to himself or to other persons,
OR

( ) (b) who is incapacitated by alcohol on a recurring basis.
3. ( ) A DRUG DEPENDENT individual or DRUG ABUSER requiring involuntary
AND

( ) (a) who presents a substantial risk of imminent harm to himself or others
as manifested by either recent overt acts or recent expressed threats of violence which
present a probability of physical injury to himself or to other persons,
OR

( ) (b) who is incapacitated by drug use on a recurring basis.

More particularly, the aforesaid _________________ has ACTUALLY DONE OR
SAID the following things which form the basis for this declaration, to wit:
The condition is so serious that he/she should be examined forthwith at an Emergency Receiving Facility according to law.

I have offered myself as a witness for examination before the Probate Court of this County, so that the truth and particular facts of these allegations may be more fully explored by said Court.

I understand that this document is a sworn statement and I further understand that Section 16-5-43 of the Official Code of Georgia Annotated provides that a person who maliciously causes the confinement of a sane person, knowing such person to be sane, in any asylum, public or private, shall, upon conviction, be punished by imprisonment for not less than one nor more than ten years.

Signature of Affiant

Sworn to and subscribed before me on _________________

___________________________

Clerk of the Probate Court

REFERRAL made to the Probate Court by _________________________________ of (agency) _______________________ after having made/not made a home visit.

Other information concerning referral:

___________________________________________________________________________

—

—
ORDER TO APPREHEND AND TRANSPORT
TO EMERGENCY RECEIVING FACILITY

IN RE: ______________________________________________________(Patient’s Name)

(Address/Location at which to apprehend)
Sex _____ Race _____ Age _____ S.S.N.
Physical Desc. or Remarks

TO: Any Peace Officer in Said County

YOU ARE HEREBY COMMANDED, pursuant to my authority under Title 37 of O.C.G.A., to apprehend the person of the patient named above, who is alleged, upon affidavits on file in this office, to be

( ) a MENTALLY ILL PERSON requiring involuntary treatment AND

( ) who presents a substantial risk of imminent harm to himself or others as manifested by either recent overt acts or recently expressed threats of violence which present a probability of physical injury to himself or others,
OR
( ) who is so unable to care for his own physical health and safety as to create an imminently life-endangering crisis: AND/OR

( ) an ALCOHOLIC, a DRUG DEPENDENT INDIVIDUAL, or a DRUG ABUSER requiring involuntary treatment AND

( ) who presents a substantial risk of imminent harm to himself or others as manifested by either recent overt acts or recently expressed threats of violence which present a probability of physical injury to himself or others,
OR
( ) who is incapacitated by alcohol or other drug(s) on a recurring basics:

and to transport the said patient forthwith to ________________, an Emergency Receiving Facility, for examination and assessment as prescribed by law. If, for any cause, the patient cannot be assessed and evaluated as such facility, the patient shall be transported forthwith to the next nearest available Emergency Receiving Facility.

This Order EXPIRES at _________ ___. M. seven days after this date.

SO ORDERED, this ___ day of ________________ , 20__.

_____________________________________________
JUDGE, PROBATE COURT OF BIBB COUNTY

Patient Representatives: __________________________________________
Address: _________________________________________________________
ENTRY OF SERVICE ON
ORDER TO APPREHEND AND TRANSPORT
TO EMERGENCY RECEIVING FACILITY

I have executed the foregoing Order to Apprehend __________________________
and to transport him/her to an Emergency Receiving Facility. The subject was transported to
______________________________ as designated in the foregoing Order.

Date: ____________, at ______  .M., being within seven days of the date of said
Order.

Deputy Sheriff, ____________ County, Georgia

(THIS MUST BE RETURNED TO PROBATE COURT)
Appendix A13-1

FIREARMS PERMITS 03/08/08
GUIDELINES FOR APPLICATION REVIEW
(For Assistance of Court Personnel)

Question 1: Are you currently a United States Citizen?
___ If you have ever renounced your U.S. citizenship, attach a copy of the reversal of such renunciation.
___ If you are not a U.S. Citizen, you must show proof of name, address, date of birth, INS number with a photo ID, identify all countries of citizenship and attach: (a) documentation of your lawful presence in the United States, and (b) proof of residency in the State of Georgia for at least 90 days.

Review of Response:
A "Yes" answer does not require further inquiry. This is the only question for which a "Yes" answer does not call for further inquiry. With the remaining questions a "No" answer is the response generally not requiring further review.

An alien (non-citizen) who is in the United States illegally is automatically DISQUALIFIED.

You must check the specified identifying information on everyone who is not a U.S. citizen, and keep a copy of their visa, green card, or other proof of immigrant status in addition to proof that the person has resided in Georgia for 90 days or more. (Note: All such documents must be government-issued in order to document lawful entry into the U.S.)

Question 2: Are you a non-immigrant or non-resident alien?
___ If yes, attach proof that you fall within a valid exemption establishing your eligibility.

Review of Response:

a. Non-immigrant/non-resident aliens are Disqualified from receiving a permit unless they fall into a specific exemption. All non-immigrant/non-resident aliens must provide proof of their claimed exemption. Valid exemptions are:

b. Applicant is an official representative of a foreign government, accredited to the United States or an international organization with headquarters in the U.S.

c. Applicant has a waiver issued by the Attorney General of the U.S.

d. Applicant is a foreign law enforcement officer of a friendly foreign government in the United States on official law enforcement business.

e. Applicant has a valid hunting license or permit lawfully issued in the United States.

Question 3: Have you ever been convicted of, pled guilty or nolo contendere to, or received first offender treatment for, any offense arising out of the unlawful
manufacture, distribution, possession or use of a dangerous drug or other controlled substance?

**Review of Response:**
For purposes of this question only, a plea of nolo contendere and first offender treatment are each deemed to be a conviction, no matter what state the proceedings took place in, even if the defendant has been successfully discharged by the court which afforded first offender treatment. (Note 1: See Foss v. Probate Court of Chatham County, 232 Ga.App. 612, 502 S.E.2d 278 (1998).)

Anyone convicted of any violation of the Georgia Controlled Substances Act or any offense in any court in any country arising out of the unlawful manufacture, distribution, possession, or use of a substance defined as a dangerous drug or other controlled substance in O.C.G.A. §16-13-21 or §16-13-71 is automatically Disqualified from obtaining a permit. According to Ga. Op. Atty. Gen. No. 05-3, 2005, even a full pardon will not enable us to issue a license to such an applicant.

**Question 4: Have you ever been convicted of, pled guilty or nobo contendere to, or received first offender treatment for any crime involving domestic violence, violence toward a family member, child or significant other?**

___If discharged, pardoned or rights restored, specify date(s) and attach proof.

**Review of Response:** If yes:

First determine whether the plea constituted a conviction under the law of the state in which it occurred. (Note 1: For example, under Georgia law a nolo contendere plea is not considered a conviction, whereas in some states a nolo plea may be deemed a conviction.) If in doubt, call the legal research office at the AOC, the court in which the proceedings were held, or visit the statutory research section of the LEO website. (Note 2: An individual on first offender probation is treated as having a conviction until satisfactory completion of the probationary period and a formal discharge by the court. Successful completion of first offender treatment and subsequent discharge by the court without adjudication of guilt is not a disqualifier, but this information is requested so that the Court may have more complete information regarding any history of this type of charge.)

If so, then determine whether the type of offense and category of victim constitutes an automatic disqualification under the law, and if it does, whether the defendant was afforded certain due process protections when the plea was entered. (Note 3: The phrasing of this question is a simplified version of the technical language set forth in federal law. Even if the applicant has a conviction as described, you must look further to assess the applicant's eligibility.)

Convictions of misdemeanors involving force or the threat of force or violence against a person unrelated to (and not involved with) the defendant generally only disqualifies an applicant from receiving a firearms license until the 5 year waiting
period for forcible misdemeanors under Georgia law has run. BUT if it is a "Misdemeanor Crime of Domestic Violence," as defined in federal law, that is, an offense which "has as an element the use or attempted use of physical force or the threatened use of a deadly weapon against a victim who is a current or former spouse, child, ward, person with whom the applicant has had a child, has cohabitated with, or one similarly situated to a current or former spouse, child, ward, or someone the person has lived with in an intimate relationship," there is a federal prohibition against firearms possession. (Note 4: As to types of offenses which might be disqualifying, due to a 1997 opinion by the Department of Justice Office of Legal Counsel, we must now determine whether the statute or particular subsection of a statute the applicant was convicted of violating has this element of force or threat of force. The NICS section of the FBI has information on its handouts and also on the LEO website to enable us to make this determination more readily. It is not enough to just read the police report since this opinion came down. For example, simple battery and battery, among others, are misdemeanor crimes of domestic violence if the crime was committed against the type of victim listed, but the crime of assault, may or may not include an element of force or threat of force, depending on state law where the crime occurred. In many states whether or not an assault conviction is a disqualifying event will depend on what subsection the applicant has been convicted of violating. As to finding the requisite relationships, bond conditions often reveal the name of the victim and a requirement that the defendant have no contact with him or her. You may have to obtain a copy of the bond order or the police report to determine their relationship to each other, if any. Who qualifies as a person "similarly situated" to a spouse, child, ward or guardian is to be determined on a case-by-case basis. For example, such a crime against a sibling, grandchild, or even roommate would probably not qualify as a misdemeanor crime of domestic violence unless the sibling had custody, the grandparent was raising the grandchild or the “roommate” was or had been involved in an intimate relationship with the defendant. It would include stepparents and foster parents or children Provided however, federal law does not prohibit the person from receiving a license unless the person was either represented by counsel or waived the right to counsel, and unless, if a right to trial by jury attached, the person knowingly waived the right to a jury trial.

Except as noted in the preceding subparagraphs, persons convicted of Domestic Violence are Disqualified from obtaining a license unless they have a sufficient expungement or pardon, i.e. one which expressly restores the right to bear firearms. The pardon, expungement, restoration of rights, or discharge without adjudication of guilt must be attached. (Note 5: The federal prohibitor is permanent if a person convicted of such a crime has not received a discharge, pardon, expungement or restoration of civil rights.)

**Question 5:** Have you ever been convicted of, pled guilty or nolo contendere to, or received first offender treatment for any felony offense or any offense punishable by a term of imprisonment/probation over one year, or to a felony or court-martial charge punishable by imprisonment over one year?
Review of Response: If yes:

First determine whether the plea constituted a conviction under the law of the state in which it occurred. (Note 1: For example, under Georgia law a nolo contendere plea is not considered a conviction, whereas in some states a nolo plea is deemed a conviction.) If in doubt, call the legal research office at the AOC or the court in which the proceedings were held, or visit the statutory research section of the NICS area of the LEO website. (Note 2: An individual on first offender probation is treated as having a conviction until satisfactory completion of the probationary period and a formal discharge by the court. Also, although successful completion of first offender treatment and subsequent discharge by the court without adjudication of guilt is not an automatic disqualifier as are convictions in this category of offenses, this information is requested so that the Court may have more complete information regarding any history of this type of charge).

If so, then determine whether any criminal offense was a felony or misdemeanor under the law of the state where it occurred, and whether any felony, misdemeanor or court-martial was of a type that disqualifies the applicant. (Note 3: The phrasing of this question is a simplified/expanded version of the technical language set forth in federal law. Even if the applicant has a conviction as described, you must look further to assess the applicant's eligibility.)

For purposes of this question, a conviction of: (a) an offense pertaining to antitrust violations, unfair trade practices, restraints of trade, or a similar offense relating to the regulation of business (even if a felony), or (b) any crime classified by the state of occurrence as a misdemeanor which is punishable by imprisonment for 2 years or less (unless it is a crime of domestic violence) does not disqualify a person from receiving a firearms license, although it may delay eligibility to receive a permit (if a forcible misdemeanor or a weapons charge).

Except as noted in the preceding review comments, convicted felons, persons convicted of crimes defined as misdemeanors in the state where the crime occurred but which was punishable by imprisonment or probation for over two years, and persons convicted in a court-martial of charges punishable by imprisonment for over one year are Disqualified from obtaining a license unless they have a sufficient expungement or pardon, i.e one which expressly restores the right to bear firearms. The pardon, expungement, restoration of rights, or discharge without adjudication of guilt must be attached as proof. (Note 4: The federal prohibitor is permanent if a person convicted of such a crime has not received a pardon, expungement or restoration of civil rights.)

(Note 5: Although rarely done, a convicted felon may also apply to the Georgia Board of Public Safety for relief from disabilities imposed by O.C.G.A. § 16-11-131. Under Georgia law, if such relief is granted and the individual has been free from supervision for 10 years (if a forcible felony) or 5 years (if a non-forcible felony), then the DPS Board’s grant of relief may be treated as a pardon, permitting the
applicant to obtain a permit. It is believed that this could constitute a "restoration of civil rights" allowable under federal law unless the right to possess a firearm is specifically prohibited in the relief from disabilities.)

**Question 6: Have you ever been convicted of, pled guilty or nobo contendere to, or received first offender treatment for a forcible misdemeanor?**

___ If yes, has it been at least five years since your release from jail and/or probation?

**Review of Response: If yes:**

First determine whether the plea constituted a conviction under the law of the state in which it occurred. (Note 1: For example, under Georgia law a nolo contendere plea is not considered a conviction, whereas in Florida a nolo plea is deemed a conviction.) If in doubt, call the legal research office at the AOC or the court in which the proceedings were held. (Note 2: An individual on first offender probation is treated as having a conviction until satisfactory completion of the probationary period and a formal discharge by the court. Also, although successful completion of first offender treatment and subsequent discharge by the court without adjudication of guilt is not an automatic disqualifier as are convictions in this category of offenses, this information is requested so that the Court may have more complete information regarding any history of this type of charge.)

If so, then determine whether the offense was a forcible misdemeanor, and if it was, whether the waiting period required by state law has expired. (Note 3: Generally, a forcible misdemeanor is any misdemeanor offense involving the use or threat, or reasonably perceived use or threat, of force, violence or a deadly weapon towards any individual. See O.C.G.A. §16-1-3(7).)

If the record establishes a forcible misdemeanor conviction and the offense does not involve domestic violence, the person is Disqualified from obtaining a permit until the applicant has been free from all supervision (including probation) in connection with the offense for the past five years. (State definitions follow.)

(O.C.G.A. § 16-1-3 Definitions:

**Forcible misdemeanor** means any misdemeanor which involves the use or threat of physical force or violence against any person.

**Misdemeanor** and **misdemeanor of a high and aggravated nature** mean any crime other than a felony.)

**Question 7: Have you ever been convicted of, or pled guilty or nobo contendere to, or received first offender treatment for carrying a concealed weapon, having a deadly weapon at a public gathering, or carrying a pistol without a license?**

___ If yes, has it been at least three years since your release from jail and/or probation?

**Review of Response: If yes:**

You must first determine whether the plea constituted a conviction under O.C.G.A.
Sections 16-11-126, 16-11-127 or 16-11-128. (Note 1: Technically, Georgia law does not prohibit the issuance of a firearms license to persons convicted of similar offenses in another state; however, because federal law requires that we apply whichever law is most restrictive, state or federal, it would be within the Court's discretion to interpret federal law to require that such a waiting period be imposed on persons convicted of this type of offense in another state, thus, denying the application if the waiting period has not expired.) If so, you must then determine whether the waiting period has run. The beginning date of the waiting period is the first day the defendant was free of all restraint (imprisonment/probation—including unsupervised). (Note 2: An individual on first offender probation is treated as having a conviction until satisfactory completion of the probationary period and a formal discharge by the court. Also, although successful completion of first offender treatment and subsequent discharge by the court without adjudication of guilt is not an automatic disqualifier as are convictions in this category of offenses, this information is requested so that the Court may have more complete information regarding any history of this type of charge.)

A person convicted of one of the foregoing offenses is Disqualified from obtaining a permit until the applicant has been free from all restraint (including unsupervised probation) in connection with the offense for the past three years.

Question 8: Are you subject to pending charges (including matters under indictment or accusation, on appeal, or uncompleted first offender treatment) or other court order?  
___ If yes, do the pending charges involve or arise out of any felony, any crime that is possibly punishable by imprisonment for over one year, any misdemeanor involving force or violence, any offense or conduct involving a weapon, or any offense involving a controlled substance or other dangerous drug?

Review of Response: If yes:

If the pending charges include formal indictment or accusation following arrest, and are offenses which are punishable by imprisonment for a term exceeding one year, the applicant is Disqualified under federal law from obtaining a permit at least until the adjudication of any such pending charge and under state law as to the other categories of offenses listed, except for any pending drug charges. (Note 1: Although pending drug charges are not an automatic disqualifier pending satisfactory disposition of the charge, the Court might wish to delay issuance of the license on these as well, given the fact that any disposition other than dismissal or acquittal would disqualify the applicant. Whether to withhold issuance of a license until disposition of other pending charges not listed would also be in the court’s discretion, even though they do not automatically disqualify the applicant, unless the charges are pending in another state or country, in which case the applicant may be considered a “fugitive from justice,” a federal prohibitor examined in Question 9.). The disposition of such charge(s) will determine subsequent action on the application. The length of time, if any, to hold the application open for consideration would be in the Court's discretion. (Note 2: Arrest alone is not sufficient to meet the “under indictment” prohibitor.)
Question 9: Have you left any state, or any foreign state, to avoid criminal prosecution, to avoid giving testimony in any criminal proceeding, or knowing that charges are pending against you?

**Review of Response:** If yes:

As a fugitive from justice, the applicant is Disqualified from obtaining a permit. State law disqualification exists until adjudication of the charge. (Note 1: A person is not a "fugitive from justice" merely because he or she has an outstanding civil traffic citation.)

Question 10: Have you been the subject of any proceedings (including arrests, matters on appeal, under indictment or accusation, or cases which were nolle prossed) within the past five years for any offense arising out of the unlawful possession or use of a controlled substance or other dangerous drug, or found through a drug test to have used such a substance or drug unlawfully within the past year?

**Review of Response:** If yes:

All of the listed circumstances are used as examples of the types of incidents which might disqualify a person, according to various interpretations of a person "who is an unlawful user of or addicted to any controlled substance" as defined in §102 of the federal Controlled Substances Act (21 U.S.C. §802). In essence, the Court could find on the basis of such information that the person falls within a prohibited category. The Court has the right to inquire into illicit drug use whether or not the applicant has been convicted. The extent of such abuse or illegal conduct must be evaluated by the Court on a case-by-case basis. Inquiry should be made as to whether the individual has a recent history of use or a pattern of use. “Controlled substance” includes, but is not limited to: marijuana, depressants, stimulants, and narcotic drugs—but not alcohol or tobacco.

For further information regarding inferences of “recent use" or “pattern of use” which may be drawn from the applicant's history, see FBI NICS handouts on prohibited persons.

Question 11: Do you use any controlled substance or illegal drug other than as prescribed by a licensed physician, or have you done so within the past year, or had a pattern of using within the past five years?

**Review of Response:** If yes to question 10 or 11:

All of the listed circumstances are used as examples of the types of incidents which might disqualify a person, according to various interpretations of a person "who is an unlawful user of or addicted to any controlled substance" as defined in §102 of the federal Controlled Substances Act (21 U.S.C. §802). In essence, the Court could find
on the basis of such information that the person falls within a prohibited category. The Court has the right to inquire into illicit drug use whether or not an applicant has been convicted. The extent of such abuse or illegal conduct must be evaluated by the Court on a case-by-case basis. Inquiry should be made as to whether the individual has a recent history of use or a pattern of use. “Controlled substance” under federal law includes, but is not limited to: marijuana, depressants, stimulants, and narcotic drugs—but not alcohol or tobacco.

For further information regarding inferences of “recent use” or “pattern of use” which may be drawn from the applicant's history, see the most recent FBI NICS handout describing categories of prohibited persons.

**Question 12: Are you addicted to or have you lost the power of self-control over any controlled substance or drug?**

**Review of Response:** If yes:

The applicant is automatically DISQUALIFIED from receiving a firearms license. “Controlled substance” under federal law includes, but is not limited to: marijuana, depressants, stimulants, and narcotic drugs—but not alcohol or tobacco.

**Question 13: Are you, or have you ever been, subject to any order (including but not limited to restraining orders, protective orders, peace bonds & good behavior bonds) restraining you from harassing, stalking, threatening, engaging in communication with, or refraining in any manner from contact with or coming in proximity to any person, individual, spouse, parent, child or former or current intimate partner or their property, residence or other location frequented by such person?**

___ If yes, attach a copy of the order and any order terminating the same.

**Review of Response:** If yes:

(Note 1: The phrasing of this question is a simplified version of the technical language set forth in federal law. Even if the applicant is subject to a protective order as described in the question, you must look further to assess the applicant's eligibility.)

Any individual subject to an order prohibiting the person from harassing, stalking, threatening or engaging in any conduct that would reasonably cause fear of bodily injury to a current or former intimate partner, partner’s child, or the subject's child or parent; or prohibiting the use, attempted use or threatened use of physical force that would reasonably be expected to cause bodily injury to such a person is DISQUALIFIED from obtaining a permit, provided that the order was entered following a hearing after actual notice to the subject and an opportunity to participate, and the order either (a) includes a finding that the individual represents a credible threat to the safety of the intimate or formerly intimate partner thereof, or to such a person's child or the individual's child or parent; or (b) by its terms explicitly
prohibits the use, attempted use, or threatened use of physical force against such current or former partner, child or parent that would reasonably be expected to cause bodily injury. (Note 2: The reason for asking if a person has ever been subject to such an order is that the applicant may not realize the order has remained in effect. This approach also enables the court to discover possible prohibitors which might not be on the protective order registry yet. In any case, a copy should be obtained so that the court can judge whether the order is in fact a disqualifier, which depends on whether all the required elements are present. Also, although criminal background checks now include a check of the Protective Order Registry in Georgia, the registry only goes back a few years.) This prohibitor does not apply to persons subject to a protective order involving an intimate partner who the person is dating or has dated but with whom the person has not cohabitated or had a child in common, nor family members other than those specified; for example, a protective order aimed at protecting a grandchild, grandparent or sibling would not necessarily prohibit issuance of a license, but would have to be examined on a case-by-case basis.

For further information, see the ATF "Protection Orders and Federal Firearms Prohibition" card.

**Question 14: Have you ever been dishonorably discharged from the U.S. Armed Forces, or separated from the U.S. Armed Forces under a dismissal adjudicated by a general court-martial?**

**Review of Response:** If yes:

The applicant is **DISQUALIFIED** from obtaining a license.

**Question 15: Have you ever been found by a civil or criminal court, board, commission or other lawful authority, as a result of subnormal intelligence, incompetency, mental illness, condition or disease, to be a danger to yourself or others, to lack the mental capacity to manage your own affairs, or to be incompetent to stand trial, insane, guilty but mentally ill, or not guilty for lack of mental responsibility?**

**Review of Response:** If yes:

Questions **14 and 15** apply to any criminal proceedings in which charges were dropped or treatment was ordered as either (a) a condition of release, probation, or parole, (b) the basis of the entry of a “nolle prosequi” order due to the receipt of a psychiatric or psychological evaluation, or (c) the result of a finding of insanity, not guilty by reason of lack of mental responsibility, guilty but insane, or a finding that the applicant was incompetent to stand trial. In such event, the person is **DISQUALIFIED** from receiving a permit. You may require the applicant to submit a copy of the order or decision if he or she is in doubt as to the answer. The foregoing circumstances are all examples of persons deemed to be "adjudicated as a mental defective," a federal prohibitor against issuance, whenever or wherever it occurred, even though the person's rights or capacity may have later been restored. If so
adjudged at any time, the person is permanently DISQUALIFIED from receiving a permit. (Note 1: For example, if a veteran has received benefits on the basis of post-traumatic stress syndrome, such applicant is DISQUALIFIED.)

(Note 2: Also, see notes following Question 16.) Federal instructions regarding this “mental defective” prohibitor is being significantly reworked.

Question 16: Have you ever been ordered to receive inpatient or outpatient treatment at any treatment facility, mental health center, hospital, sanitarium, clinic or program for a mental condition, drug abuse, or alcohol abuse, by any court, board, or other authority in any civil, criminal or administrative proceeding?

___ If yes, attach a copy of the order.

Review of Response: If yes:

Originally this disqualifier was interpreted to apply to any order to undergo treatment in civil commitment proceedings, whether inpatient or outpatient, according to ATF’s first set of FAQ’s. The questions and answers (on ATF’s current website FAQ’s section) respecting the effect of mandated outpatient treatment have since been deleted. The latest verbal instruction from ATF is that only inpatient treatment is an automatic disqualifier and that outpatient treatment is not an automatic disqualifier. However, FBI and the ATF counsel are currently reviewing this issue respecting whether or not outpatient commitment renders a person ineligible for a license. Judges are advised to use their own discretion. (Note 1: For example, if a person is ordered to complete alcohol or drug or mental health treatment as a condition of probation, if coupled with an adjudication that the person suffers from a mental illness or addictive disease, they could be DISQUALIFIED.) (Note 2: An order to be evaluated or observed only, as opposed to an order to receive or to comply with treatment, does not disqualify a person from obtaining a license.) (Note 3: The DHR database only includes treatment in state-funded hospitals or other facilities in Georgia, and includes voluntary as well as involuntary admissions. A person is not disqualified by a voluntary admission.)

(This form is an investigative tool retained for the purpose of maintaining and preserving public order. Therefore, this document is not subject to public disclosure.)
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In anticipation of the expiration of the federal estate and generation-skipping transfer tax provisions on January 1, 2010 and recognizing the uncertainty of whether new tax provisions would be passed by Congress before January 1, 2011 and how any such provisions might affect the construction of wills drafted pursuant to the former tax laws, new Code Section 53-4-75 was passed in 2010. This new Code Section provides that, in construing wills of decedents who die after December 31, 2009 and before the effective date of any new federal estate and generation-skipping transfer tax provisions, the will provisions will be deemed to refer to the tax laws as they applied on or before December 31, 2009.

The Supreme Court has held that the phrase “only the lawful blood descendents” used as part of the definition in a will of “children” did not include an out-of-wedlock child of the testator, thereby ruling that such illegitimate child did not inherit under the will of the decedent. The Supreme Court affirmed the grant of summary judgment to that effect in the trial court. A dissenting opinion criticizes the very narrow interpretation of the phrase by the majority and would hold that the issue remains one of fact as to the testator’s intent, which should have been tried before a finder of fact. Interestingly, both the majority and the dissenters recognized that, had the decedent died intestate, the child likely could have inherited as an heir, given evidence of the decedent’s acknowledgment of the appellant as his daughter.

In a recent case, the Supreme Court reaffirmed precedent that the declaratory judgment statute should be liberally construed when adjudging the right of an interested party to seek the direction of a court. Although the case involved the interpretation of an inter vivos trust, the Court addressed the construction issue analogous to a will construction.
The testator’s will declared that his estate be bequeathed: “to my eight (8) children, per stirpes, to be distributed among my children as and in the manner my Executor, in his or her sole discretion, determines to be fair and reasonable … In the event that any person to whom a particular item of personal property is to be left should predecease me, or does not desire to receive such item, such item shall either become a part of my residuary estate or shall be distributed as my Executrix determines using her best judgment, which shall be binding on all my heirs and beneficiaries.” Executor had instructed annuity payee to make all future annuity payments due to her personally to the exclusion of the other seven children. Article 6 Probate Court construed the will to mean testator’s intent was to have his 8 children share equally and that the discretionary language referred to selecting the items to make up a child’s share. The Supreme Court affirmed, concluding (as did the probate court) that the testator’s will clearly indicates that the children (all 8) are the primary legatees to receive an equal share “by the stirps.” .......................................................... 57

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THE PROBATE COURTS, PROBATE JUDGES,
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1. PROBATE COURTS

1.3 Article 6 Probate Courts with Expanded Jurisdiction

The population at which probate courts must become Article 6 Probate Courts\(^1\) was lowered in the 2012 Session of the General Assembly from 96,000 to 90,000, and the referenced census was changed to the census of 2010 or any future such census.\(^2\)

2. PROBATE JUDGES

2.10 Minimum Compensation Schedule

The minimum salary schedule for probate judges is set forth in O.C.G.A. §15-9-63. The supplement for serving as magistrate or chief magistrate is set forth in O.C.G.A. §15-9-63.1. The language in Section 63 and 63.1 applying cost of living increases was modified slightly in the 2012 Session, to read as follows:

“Whenever the state employees subject to compensation plans authorized and approved in accordance with Code Section 45-20-4” receive a cost-of-living increase (a “COLA”), the minimum salaries of probate judge shall be likewise increased.\(^3\)

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\(^1\) O.C.G.A. §15-9-120(2).
\(^2\) H.B. 534 2012 Session.
\(^3\) H.B. 642 2012 Session.
CHAPTER 2
JURISDICTION, VENUE, PROCEDURES AND APPEALS

[NOTE: Article 4 of Chapter 2 of the Revised Handbook of 2010 is divided in this Supplement replaced in its entirety by Section 4 in this Chapter should be retained until January 1, 2013 for the purposes of the case citations and any notes that may have been made in the Handbook. However, former Chapter 4 should no longer be looked to for the current statutory law on Evidence after December 31, 2012.]

1.0 JURISDICTION

1.5 Expanded Jurisdiction in Certain Probate Courts

The concurrent jurisdiction with the superior courts of Article 6 Probate Courts to grant declaratory judgment applies not just with regard to estates but also concerning rights under a trust.

3.0 PROCEDURES IN PROBATE COURTS

3.1 Petitions, Standard Forms and Uniform Rules

[NOTE: GPCSFs 3, 5, and 10 were amended in 2012, becoming effective July, 2012.]

Effective August 5, 2010, the Uniform Rules for the Probate Courts were revised in its entirety, and a new set of Uniform Rules was approved and implemented. Rule 5.5 dealing with background checks on fiduciaries was amended in 2012. A copy of the Rules, amended through July 1, 2012, is appended to this Chapter as Appendix A2-3. The references in Chapter 2, Section 3.1 to the Uniform Probate Court Rules [“UPCR”] are no longer accurate. In the few places in Chapter 2, and in all other Chapters, where references are made to the former Rules, the references should be changed to refer, instead, to the appropriate Rule in the new.

The URPC no longer allow for “Internal Operating Procedures,” and, as noted in Chapter 2, Section 3.1, all such “Internal Operating Procedures” expired on December 31, 2010. The Rule applying to Georgia Probate Court Standard Forms [“GPCSF”] is now Rule

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5.9. The Rule no longer requires the approval of the Fiduciary Law Section of the State Bar of Georgia of new standard forms or for changes to existing forms. However, the Rules and Forms Committee of the Georgia Council of Probate Court Judges continues to provide courtesy draft copies to the Chair of the Forms Committee of the Fiduciary Law Section.

The definition of “attorney,” as used in the URPC, applies to any person proceeding pro se in any probate court of this State, and “attorney” and “counsel” are considered synonymous in the Rules.5

The new Rules incorporate provisions applying to Article 6 Probate Courts within the Rules, instead of as an Appendix, and the new Rules include uniform rules applicable to Criminal Proceedings in those probate courts hearing criminal cases.

4.0 HEARINGS AND TRIALS
4.1 Uncontested Matters
4.1.1 Decedents’ Estates

Unless and until a caveat has been timely filed by a party with standing to contest the proceeding, the proceeding is uncontested, and the order granting requested relief may be entered at any time following the expiration of the time for filing objections.6

The judge of the probate court may decide that, as a routine practice or for any particular types of proceeding or for any specific proceeding, a hearing will be held by the court even if the matter is uncontested. This is permissible since the granting of an order in a proceeding is within the discretion of the court,7 with one exception: the judge of the probate court is required to grant a petition for year’s support if no objection is filed.8

There is no provision under Chapter 9 of Title 15 which requires the judge of the probate court to grant a petition without a hearing or which entitles a petitioner to an order granting the relief requested in a proceeding without a hearing.

The primary benefit of a hearing in uncontested matters is the opportunity for the court to assure that all notice requirements have been met. The court can determine, from the testimony, whether a diligent effort has been made by the petitioner or the petitioner’s attorney to locate those heirs, beneficiaries, or other interested parties about whom it is

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5 URPC 2.4.
6 O.C.G.A. §15-9-86(d).
7 O.C.G.A. §53-11-9(a), “the petition may be granted without a hearing.”
8 O.C.G.A. §53-3-7(a).
alleged that their whereabouts are unknown. The court can determine further whether all heirs have, indeed, been listed and that heirs of equal standing have not been inadvertently omitted. The court can, when appropriate, ascertain the correctness of the estimated value on an intestate estate and set the bond in an appropriate amount. Lastly, the court can determine by testimony that there is no reason why the petition should not be granted (such as in cases of a later will or codicil).

Alternatively, the judge of the probate court may decide that routine and uncontested petitions may be granted without a hearing. Attorneys should ascertain from the particular court the requirements of a hearing and the necessity of attendance of the attorney at a hearing. The judge of the probate court may also decide that, when a petition is filed, a clerk of the court may administer the oath of office to the nominated personal representative and accept the petition for filing, to be reviewed and granted, if appropriate, by the judge at a later time.

Whether a hearing is held by the court, or the court permits clerks to accept a petition for filing and administer the oath of office to the nominated personal representative(s), a determination should be made, preferably by sworn testimony of a petitioner before the judge or clerk that:

1. The decedent died domiciled in the county or was domiciled outside Georgia but owns property in the county;
2. All heirs (and, if applicable, all beneficiaries under any other will offered for probate anywhere in Georgia) have been properly named and that a diligent effort has been made to locate each such heir (beneficiary);
3. Proper service has been perfected on all heirs (and, if applicable, beneficiaries); and
4. If intestacy is alleged:
   a. The petitioner has no knowledge of the existence of a purported will of the deceased, and
   b. The estimated values of the estate set forth in the petition are correct, if bond will be required.
5. If testacy is alleged:
   a. The purported will and any codicil(s) was/were duly executed and witnessed in accordance with Georgia law and that proper proof(s) has/have been filed;
   b. The purported will, with any codicil(s), is the last known document purporting to be a will or codicil of the decedent;
c. The purported will and/or any codicil(s) was/were not revoked, expressly or impliedly, during the lifetime of the decedent;

d. If a copy of the will and/or any codicil(s) is/are being offered for probate, the original(s) has/have not been located and that there is no reason to believe that the document(s) was/were destroyed by the decedent with an intent to revoke;

6. The nominated personal representative(s) are prepared to qualify as such or, if applicable, that proper cause is shown why any nominated executor(s) of a higher priority has/have not or cannot serve (such as a declination to serve, proof of death of the first nominated executor(s), etc.).

The attorney representing the petitioner at an uncontested probate hearing should have the petitioner testify under oath, before the court or a clerk, to all facts which make out the prima facie case for entitlement to an order granting the petition. If the petitioner is appearing pro se, the judge of the probate court or the clerk should elicit sworn testimony from the petitioner which will make out the prima facie case.

At the uncontested hearing, if appropriate under the evidence, the judge may sign the final order granting the petition and administer the oath of office to the nominated personal representative(s) ready to qualify. Appropriate Letters (Testamentary, of Administration, etc.) may then be issued by the judge if all personal representatives(s) have qualified, including the posting of any bond required. Letters should never be issued until the bond, when required, has been posted.

If the testimony is taken by a clerk, the clerk may administer the oath to the nominated personal representatives(s) ready to qualify and advise him/her/them that appropriate Letters will be issued only after the final order has been signed by the judge.

In either such case, the judge or the clerk may want to provide to the qualifying personal representatives(s) a copy of the Handbook to Guide Personal Representatives, especially if the personal representatives(s) is/are not represented by an attorney. If the personal representatives(s) has/have not been relieved of the reporting requirements, the reporting requirements should be explained to the personal representatives(s) and the forms for the Inventory and Returns should be given to the personal representative(s). If the personal representatives(s) has/have been relieved of reporting, it should be made clear that the service of the personal representative(s) is still governed by Georgia law and that heirs,
beneficiaries or other interested parties may still call upon the personal representatives(s) to account for the manner in which the estate is being or has been administered.

4.1.2 Guardian/Conservatorship Cases

It is interesting to note that Title 29 contains confusingly different requirements as to the holding of a hearing in the various proceedings covered by the Title. Hearings are required, that is, the Code states that a hearing shall be held: in permanent guardianships of minors\(^9\) and in guardianship and conservatorship cases involving adults.\(^10\) A hearing is also required in a temporary guardianship of a minor if a natural guardian files an objection to the proposed temporary guardian or if a parent who is not the natural guardian files an objection to the granting of the guardianship or to the proposed temporary guardian.\(^11\) However, a hearing is discretionary, that is, the Code states that a hearing may be held, on a petition for the appointment of a conservator for a minor.\(^12\)

Therefore, even though a proceeding under Title 29 may be “uncontested,” in that no one is objecting to the granting of the petition, a hearing is required in certain cases, and the court must make certain findings, sometimes by clear and convincing evidence, before granting the petition. Furthermore, in adult guardianship and conservatorship cases, the Code requires that the hearing be held in a courtroom, unless not practical under the circumstances, and that the hearing be recorded in some manner.\(^13\) If the hearing is held somewhere other than a courtroom, the hearing still must be recorded. Therefore, even an uncontested proceeding where a hearing is required will (and should) be conducted with some formality.

Given the significant responsibilities incumbent upon a conservator for a minor and the statutory requirement that the court appoint as conservator the person who will serve the best interest of the minor,\(^14\) it would seem contrary to good practice to appoint and qualify a conservator for a minor without a hearing. Blanket authority is given to the judge of the probate court, on the court’s own motion, to order a hearing “on any matter related to a conservatorship or guardianship even if no objection is filed.”\(^15\) However, the Code does not mandate a hearing, and a court may decide not to hold a hearing.

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\(^10\) O.C.G.A. §§29-4-12(c) and 29-5-12(c).
\(^11\) O.C.G.A. §29-2-6(e).
\(^12\) O.C.G.A. §29-3-9.
\(^13\) O.C.G.A. §§29-4-12(d) and 29-5-12(d).
\(^14\) O.C.G.A. §29-3-7(a).
\(^15\) O.C.G.A. §29-9-14.
With regard to temporary guardianships of minors, the Code mandates that the petition be granted under certain circumstances “without further notice or hearing.” Those are: when both parents or the sole living parent consent(s) in writing to the appointment; or, when no parent who is entitled to and has been given notice files an objection to the petition.\textsuperscript{16} It is unclear whether the blanket authority of Code Section 29-9-14 overrides the mandate of these sections.

Nonetheless, a judge of the probate court may have questions about the accuracy and completeness of the information stated in the petition, most particularly with regard to the identity and location of the parents of the minor. Given that the matter involves the physical custody of and powers over a minor child equivalent to that of a parent, even if the blanket authority of Code Section 29-9-14 does not apply, it would seem within the inherent power of the judge of the probate court to order the holding of a hearing in any particular case or as a routine in all such cases. If such a hearing is held in an uncontested matter, the attorney for the petitioner or the judge of the probate court if the petitioner does not have an attorney should elicit from the petitioner sworn testimony proving all facts which the Code requires be included in the petition.\textsuperscript{17}

Notwithstanding the foregoing about the possibility of a hearing in the probate court, in both circumstances, the judge of the probate court may refer the petition to the juvenile court, which shall, after notice and a hearing, determine whether the temporary guardianship is in the best interest of the minor.\textsuperscript{18} This might certainly be the better practice in any case in which the judge of the probate court has concerns that the best interests of the minor have not been fully considered or may not be adequately protected.

4.2 Contested Matters

In conducting a contested hearing on any petition, application or motion, the judge of the probate court is exercising a judicial function.

At the hearing, the attorney representing the petitioner or the petitioner, if \textit{pro se}, should make a brief introduction by stating: (1) the type of proceeding before the court (2) the essential facts of the verified petition, including those facts which give the court jurisdiction; and (3) the type of notice given, the recipients of notice, and the caveator’s name or names. All witnesses who will testify in person should be properly sworn by a bailiff, the

\textsuperscript{16} O.C.G.A. §29-2-6(a) and (c).
\textsuperscript{17} O.C.G.A. §29-2-5(c).
\textsuperscript{18} O.C.G.A. §29-2-6(f).
judge of the probate court, or the clerk.\textsuperscript{19} Although an attorney is an officer of the court and may administer the oath to witnesses,\textsuperscript{20} if all witnesses are given the oath at the same time, in order to avoid any appearance of favoritism, it would be the better practice for the judge, clerk or bailiff to administer the oath to all. Conversely, each witness or any witness who might not have been present when an oath was administered to all witnesses may take the oath at the time of testifying, in which case, it would be proper for the attorney who first questions the witness to administer the oath. If any party is self-represented (\textit{pro se}) and a witness called by that party was not earlier administered the oath, the judge should administer the oath to the witness.

The judge should inquire whether either party requests sequestration of the witnesses.\textsuperscript{21} Application of the rule of sequestration is within the sound discretion of the court.\textsuperscript{22}

4.2.1 Continuances

The subject of motions for continuance is covered in Article 7, Chapter 10 of Title 9 of the Georgia Code Annotated\textsuperscript{23} and by Rule 10.6 of the Uniform Probate Court Rules. In general, continuances are left to the sound legal discretion of the trial judge.\textsuperscript{24} The Code provides that, if either party is providentially prevented from attending the trial of a case, and the counsel of the absent party will state in his place that he cannot go safely to trial without the presence of the absent party, the case shall be continued, provided the continuances of the party have not been exhausted.\textsuperscript{25} However, the Court of Appeals has recently reaffirmed an earlier decision by the Court that a “statement by counsel of the absent party … that [the party] was ill and could not attend court was not a sufficient showing in support of the motion” for continuance; the movant must provide some “evidence under oath that the party was in fact providentially prevented from attending the trial” or some documentary evidence of same.\textsuperscript{26}

\begin{footnotes}
\item[19] O.C.G.A. §24-9-60.
\item[21] O.C.G.A. §24-9-61.
\item[23] O.C.G.A. §9-10-150 \textit{et seq.}
\item[26] Bocker v. Crisp, 313 Ga. App. 585 (2012). The movant also sought the continuance for lack of notice of the hearing. However, the moving attorney had prepared an earlier Order of Continuance in which the date and time of the hearing were included.
\end{footnotes}
4.2.2 Jury Trials in Article 6 Probate Courts

In Article 6 Probate Courts, parties to "civil cases" have the right to a jury trial. A party must demand a jury trial in writing within 30 days after the filing of the first pleading of the party or within 15 days after the filing of the first pleading of an opposing party, whichever is later. Failure to assert the right to a jury trial is deemed a waiver of that right. In cases in which there is a jury, factual issues are determined by the jury as in cases in the superior court. A party to a "civil case" in such probate courts also has a right of appeal to either the Supreme Court or the Court of Appeals, whichever is appropriate. The general rules of appellate practice applicable to cases appealed from the superior court govern appeals from such probate courts.

The above Code provisions allowing jury trials in certain probate courts and direct appeals from such probate courts apply to all "cases" filed on or after July 1, 1986. The Georgia Supreme Court has held that if any pleading was filed concerning a decedent's estate prior to the effective date, any appeal relating to that estate would be de novo to the superior court, whether or not the appeal relates to a pleading filed prior to the effective date. In effect, the Supreme Court construed "case" to mean the entire estate in this context.

4.3 Burdens of Proof

In general, the petitioner has the burden of establishing a prima facie case, that is, to prove all of the essential elements necessary to show entitlement to the relief requested.

The caveator also has the burden of proving affirmatively all matters raised by him which are not matters for which the petitioner is required to make out a prima facie case.

Unless otherwise provided, a party that has the burden of proof in a civil case must prove the facts necessary by a preponderance of the evidence. However, there are certain proceedings in which a petitioner is required to prove the facts supporting the granting of the petition by clear and convincing evidence. Unless the caveator has admitted a prima facie case prior to trial, the petitioner has the right to make the first opening statement and, after opening statements, to first present evidence to make out the prima facie case. If a prima

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27 O.C.G.A. §15-9-121(a).
28 O.C.G.A. §15-9-121(b).
29 O.C.G.A. §15-9-123(a).
30 O.C.G.A. §15-9-123(b).
32 O.C.G.A. §24-14-1 (Effective January 1, 2013)
33 O.C.G.A. §24-14-2 (Effective January 1, 2013)
34 O.C.G.A. §24-14-4 (Effective January 1, 2013)
35 For example, in adult guardianship/conservatorship cases.
facie case is made by the petitioner, the caveator then presents evidence to make out the allegations of the caveat or to rebut the evidence presented by the petitioner. After the caveator presents all the evidence for that side, the petitioner has the opportunity to present rebuttal evidence. The general rules of evidence apply.\textsuperscript{36}

Ordinarily, the petitioner is entitled to open and close the arguments. However, if the caveator has admitted the prima facie case or introduces no evidence, the caveator is entitled to open and conclude the arguments.\textsuperscript{37}

\[\textbf{NOTE: In order to separate the new Title 24 (Evidence Code), I have added new Article 5.0. Therefore, “Judgments” is Article 6.0 (Article 5.0 in the Handbook), “Contempt” is Article 7.0 (Article 6.0 in the Handbook), and “Appeals” is Article 8.0 (Article 7.0 in the Handbook) in this Supplement}\]

5.0 EVIDENCE UNDER NEW TITLE 24

Evidence is the subject of an entire Title under our Code, Title 24. The subject is much too broad for any comprehensive discussion in this Handbook. Professor Paul S. Milich of the Georgia State University School of Law has written an article entitled Georgia’s New Evidence Code – An Overview\textsuperscript{38} that covers the history of the Evidence Code in Georgia and its evolution to the new Code. The article also discusses the lack of significant impact of the new Code upon a large number of topics, as well as the major changes having significance. Its reading is recommended by this author. New treatises will be written about the new Code, as well as new desk/bench reference materials. Every judge of the probate court should purchase and rely on such a resource that will complement the Code on the subject of evidence. The discussion which follows simply highlights the major evidentiary rules and issues which regularly arise in trials in the probate courts, with citations to new Title 24. Most of the provisions of Chapter 8 on hearsay have been included here, as well as in the Benchbook Supplement. [\textbf{NOTE: The provisions contained in the current Title 24 remain effective until January 1, 2013.}]

5.1 DEFINITIONS

(1) "Competent evidence" means evidence which is admissible.

(2) "Cumulative evidence" means evidence which is additional to other evidence

\textsuperscript{36} O.C.G.A. §9-10-186.
\textsuperscript{37} Id.; Skelton v. Skelton, 251 Ga. 632 (1983).
already obtained.

(3) "Direct evidence" means evidence which immediately points to the question at issue.

(4) "Indirect evidence" or "circumstantial evidence" means evidence which only tends to establish the issue by proof of various facts, sustaining by their consistency the hypothesis claimed.

(5) "Preponderance of evidence" means that superior weight of evidence upon the issues involved, which, while not enough to free the mind wholly from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the issue rather than to the other.

(6) "Presumptive evidence" means evidence which consists of inferences drawn by human experience from the connection of cause and effect and from observations of human conduct.

(7) "Sufficient evidence" means evidence which is satisfactory for the purpose.\(^{39}\)

5.1 Purpose and Applicability of Rules of Evidence

5.1.1 Purpose and construction of the rules of evidence.

The object of every trial in a civil matter is the discovery of the truth, and the rules of evidence are designed for that purpose.

5.1.2 Applicability of the rules of evidence.

(a) The rules of evidence shall apply in all trials by jury in any court in this state.

(b) The rules of evidence shall apply generally to all nonjury trials and other fact-finding proceedings of any court in this state subject to the limitations set forth in subsections (c) and (d) below.

(c) The rules of evidence, except those with respect to privileges, shall not apply in the following situations:

(1) The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Code Section 24-1-104;

(2) Criminal proceedings before grand juries;

(3) Proceedings for extradition or rendition;

(4) Proceedings for revoking parole;

\(^{39}\) O.C.G.A. §24-4-1 (Effective January 1, 2013)
(5) Proceedings for the issuance of warrants for arrest and search warrants except as provided by subsection (b) of Code Section 17-4-40;
(6) Proceedings with respect to release on bond;
(7) Dispositional hearings and custody hearings in juvenile court; or
(8) Contempt proceedings in which the court, pursuant to subsection (a) of Code Section 15-1-4, may act summarily.

(d) (1) In criminal commitment or preliminary hearings in any court, the rules of evidence shall apply except that hearsay shall be admissible.
(2) In in rem forfeiture proceedings, the rules of evidence shall apply except that hearsay shall be admissible in determining probable cause or reasonable cause.
(3) In presentence hearings, the rules of evidence shall apply except that hearsay and character evidence shall be admissible.
(4) In administrative hearings, the rules of evidence as applied in the trial of nonjury civil actions shall be followed, subject to special statutory rules or agency rules as authorized by law.

(e) Except as modified by statute, the common law as expounded by Georgia courts shall continue to be applied to the admission and exclusion of evidence and to procedures at trial. 40

5.2 RULINGS ON EVIDENCE

(a) Error shall not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected and:

(1) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
(2) In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by an offer of proof or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding any evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve such claim of error for appeal.

40 O.C.G.A. §24-4-2 Effective January 1, 2013

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(b) The court shall accord the parties adequate opportunity to state grounds for objections and present offers of proof. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The court may direct the making of an offer of proof in question and answer form.

(c) Jury proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, including, but not limited to, making statements or offers of proof or asking questions in the hearing of the jury.

(d) Nothing in this Code section shall preclude a court from taking notice of plain errors affecting substantial rights although such errors were not brought to the attention of the court. 41

5.2.1 Preliminary questions.

(a) Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subsection (b) of this Code section. In making its determination, the court shall not be bound by the rules of evidence except those with respect to privileges. Preliminary questions shall be resolved by a preponderance of the evidence standard.

(b) When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be conducted out of the hearing of the jury when the interests of justice require or when an accused is a witness and requests a hearing outside the presence of the jury. 42

(d) The accused shall not, by testifying upon a preliminary matter, become subject to cross-examination as to other issues in the proceeding.

(e) This Code section shall not limit the right of a party to introduce before the jury evidence relevant to weight or credibility. 43

41 O.C.G.A. §24-4-103 (Effective January 1, 2013)
42 O.C.G.A. §24-4-104 (Effective January 1, 2013)
43 O.C.G.A. §24-4-104 (Effective January 1, 2013)
5.2.2  **Limited admissibility**

When evidence which is admissible as to one party or for one purpose but which is not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.\(^{44}\)

5.2.3  **Introduction of remaining portions of writings or recorded statements.**

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which, in fairness, should be considered contemporaneously with the writing or recorded statement.\(^{45}\)

5.3  **JUDICIAL NOTICE**

5.3.1  **Judicial notice of adjudicative facts:**

(a) This Code section governs only judicial notice of adjudicative facts.

(b) A judicially noticed fact shall be a fact which is not subject to reasonable dispute in that it is either:

   (1) Generally known within the territorial jurisdiction of the court; or
   (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) A court may take judicial notice, whether or not requested by a party.

(d) A court shall take judicial notice if requested by a party and provided with the necessary information.

(e) A party shall be entitled, upon timely request, to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, such request may be made after judicial notice has been taken.

(f) Judicial notice may be taken at any stage of the proceeding.

(g)(1) In a civil proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed.

   (2) In a criminal proceeding, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.\(^{46}\)

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\(^{44}\) O.C.G.A. § 24-1-105 (Effective January 1, 2013)

\(^{45}\) O.C.G.A. §24-1-106 (Effective January 1, 2013)

\(^{46}\) O.C.G.A. §24-2-201 (Effective January 1, 2013)
5.3.2 **Legislative facts**

(a) The existence and territorial extent of states and their forms of government;
(b) All symbols of nationality;
(c) The laws of nations;
(d) All laws and resolutions of the General Assembly and the journals of each branch thereof as published by authority;
(e) The laws of the United States and of the several states thereof as published by authority;
(f) The uniform rules of the courts;
(g) The administrative rules and regulations filed with the Secretary of State pursuant to Code Section 50-13-6;
(h) The general customs of merchants;
(i) The admiralty and maritime courts of the world and their seals;
(j) The political makeup and history of this state and the federal government as well as the local divisions of this state;
(k) The seals of the several departments of the government of the United States and of the several states of the union; and
(l) All similar matters of legislative fact shall be judicially recognized without the introduction of proof. Judicial notice of adjudicative facts shall be governed by Code Section 24-2-201.

5.3.3 **Ordinances and Resolutions**

When certified by a public officer, clerk, or keeper of county or municipal records in this state in a manner as specified for county records in Code Section 24-9-920 or in a manner as specified for municipal records in paragraph (1) or (2) of Code Section 24-9-902 and in the absence of contrary evidence, judicial notice may be taken of a certified copy of any ordinance or resolution included within a general codification required by paragraph (1) of subsection (b) of Code Section 36-80-19 as representing an ordinance or resolution duly approved by the governing authority and currently in force as presented. Any such certified copy shall be self-authenticating and shall be admissible as prima-facie proof of any such ordinance or resolution before any court or administrative body.

Case law under current Title holds that the party wishing the court to take judicial

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47 O.C.G.A. §24-2-220 (Effective January 1, 2013)
48 O.C.G.A. §24-2-221 (Effective January 1, 2013)
notice must make a request for it.\textsuperscript{49} This might be made in a pleading, when it relates to a matter being pled, or might be raised at trial, especially if the issue is first raised at trial. If a judge intends to take judicial notice of a fact, the judge must announce the intention and afford the parties an opportunity to show why it should not be taken.\textsuperscript{50}

5.4 PAROL EVIDENCE

5.4.1 Parol evidence contradicting writing inadmissible generally

Parol contemporaneous evidence shall be generally inadmissible to contradict or vary the terms of a valid written instrument.\textsuperscript{51}

5.4.2 Proof of unwritten portions of contract admissible where not inconsistent

If the writing does not purport to contain all the stipulations of the contract, parol evidence shall be admissible to prove other portions thereof not inconsistent with the writing; so collateral undertakings between parties of the same part among themselves would not properly be looked for in the writing.\textsuperscript{52}

5.4.3 Contemporaneous writings explaining each other; parol evidence explaining ambiguities

(a) All contemporaneous writings shall be admissible to explain each other.

(b) Parol evidence shall be admissible to explain all ambiguities, both latent and patent.\textsuperscript{53}

5.4.4 Circumstances surrounding execution of contracts

The surrounding circumstances are always proper subjects of proof to aid in the construction of contracts.\textsuperscript{54}

5.4.5 Known usage.

Evidence of known and established usage shall be admissible to aid in the construction of contracts as well as to annex incidents.\textsuperscript{55}

5.4.6 Rebuttal of equity; discharge of contract; proof of subsequent agreement; change of time or place of performance

\textsuperscript{51} O.C.G.A. §24-3-1 (Effective January 1, 2013)
\textsuperscript{52} O.C.G.A. §24-3-2 (Effective January 1, 2013)
\textsuperscript{53} O.C.G.A. §24-3-3 (Effective January 1, 2013)
\textsuperscript{54} O.C.G.A. §24-3-4 (Effective January 1, 2013)
\textsuperscript{55} O.C.G.A. §24-3-5 (Effective January 1, 2013)
Parol evidence shall be admissible to rebut an equity, to discharge an entire contract, to prove a new and distinct subsequent agreement, to enlarge the time of performance, or to change the place of performance.\(^\text{56}\)

**5.4.7 Proof of mistake in deed or written contract**

Parol evidence is admissible to prove a mistake in a deed or any other contract required by law to be in writing.\(^\text{57}\)

**5.4.8 Original or subsequent voidness of writing.**

Parol evidence shall be admissible to show that a writing either was originally void or subsequently became so.\(^\text{58}\)

**5.4.9 Explanation or denial of receipts.**

Receipts for money are always only prima-facie evidence of payment and may be denied or explained by parol.\(^\text{59}\)

**5.5 AUTHENTICATION**

**5.5.1 Requirement of authentication or identification.**

(a) The requirement of authentication or identification as a condition precedent to admissibility shall be satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Code section:

(1) Testimony of a witness with knowledge that a matter is what it is claimed to be;

(2) Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation;

(3) Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated. Such specimens shall be furnished to the opposite party no later than ten days prior to trial;

(4) Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances;

\(^{56}\) O.C.G.A. §24-3-6 (Effective January 1, 2013)

\(^{57}\) O.C.G.A. §24-3-7 (Effective January 1, 2013)

\(^{58}\) O.C.G.A. §24-3-8 (Effective January 1, 2013)

\(^{59}\) O.C.G.A. §24-3-9 (Effective January 1, 2013)
(5) Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker;

(6) Telephone conversations, by evidence that a call was made to the number assigned at the time by a telephone service provider to a particular person or business, if:

   (A) In the case of a person, circumstances, including self-identification, show the person answering to be the one called; or
   (B) In the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone;

(7) Evidence that a document authorized by law to be recorded or filed and in fact recorded or filed in a public office or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept;

(8) Evidence that a document or data compilation, in any form:

   (A) Is in such condition as to create no suspicion concerning its authenticity;
   (B) Was in a place where it, if authentic, would likely be; and
   (C) Has been in existence 20 years or more at the time it is offered;

(9) Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result; or

(10) Any method of authentication or identification provided by law.

5.5.2 Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility shall not be required with respect to the following:

(1) A document bearing a seal purporting to be that of the United States or of any state, district, commonwealth, territory, or insular possession thereof or the Panama Canal Zone or the Trust Territory of the Pacific Islands or of a political subdivision, department, officer, or agency thereof or of a municipal corporation of this state and bearing a signature purporting to be an attestation or execution;
(2) A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) of this Code section having no

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60 O.C.G.A. §24-9-901 (Effective January 1, 2013)
seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine;

(3) A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make such execution or attestation and accompanied by a final certification as to the genuineness of the signature, official position of the executing or attesting person, or of any foreign official whose certificate of genuineness of signature and official position relates to such execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to such execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that such documents be treated as presumptively authentic without final certification or permit such documents to be evidenced by an attested summary with or without final certification;

(4) A duplicate of an official record or report or entry therein or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification by certificate complying with paragraph (1), (2), or (3) of this Code section or complying with any law of the United States or of this state, including Code Section 24-9-920;

(5) Books, pamphlets, or other publications purporting to be issued by a public office;

(6) Printed materials purporting to be newspapers or periodicals;

(7) Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin;

(8) Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments;

(9) Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law;

(10) Any signature, document, or other matter declared by any law of the United States.
States or of this state to be presumptively or prima facie genuine or authentic;

(11) The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under paragraph (6) of Code Section 24-8-803 if accompanied by a written declaration of its custodian or other qualified person certifying that the record:

(A) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of such matters;
(B) Was kept in the course of the regularly conducted activity; and
(C) Was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph shall provide written notice of such intention to all adverse parties and shall make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge such record and declaration; or

(12) In a civil proceeding, the original or a duplicate of a foreign record of regularly conducted activity that would be admissible under paragraph (6) of Code Section 24-8-803 if accompanied by a written declaration by its custodian or other qualified person certifying that the record:

(A) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;
(B) Was kept in the course of the regularly conducted activity; and
(C) Was made by the regularly conducted activity as a regular practice.

The declaration shall be signed in a manner that, if falsely made, would subject the maker to criminal penalty under the laws of the country where the declaration is signed. A party intending to offer a record into evidence under this paragraph shall provide written notice of such intention to all adverse parties and shall make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge such record and declaration.\[^{61}\]

5.5.3 **Subscribing witness's testimony.**

The testimony of a subscribing witness shall not be necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the

\[^{61}\text{O.C.G.A. §24-9-902 (Effective January 1, 2013)}\]
5.5.4 **Definitions.**

As used in this article, the term:

1. "Public office" shall have the same meaning as set forth in Code Section 24-8-801.
2. "Public officer" means any person appointed or elected to be the head of any entity included in paragraph (1) of Code Section 24-9-902.
3. "Telephone service provider" shall have the same meaning as "voice service provider" as set forth in Code Section 46-5-231.

5.5.4.1 **Specific types of records and evidence**

5.5.5 **Authentication of Georgia state and county records**

The certificate or attestation of any public officer either of this state or any county thereof or any clerk or keeper of county, consolidated government, or municipal records in this state shall give sufficient validity or authenticity to any copy or transcript of any record, document, paper or file, or other matter or thing in such public officer's respective office, or pertaining thereto, to admit the same in evidence.

5.5.5 **Identification of medical bills; expert witness unnecessary.**

(a) Upon the trial of any civil proceeding involving injury or disease, the patient or the member of his or her family or other person responsible for the care of the patient shall be a competent witness to identify bills for expenses incurred in the treatment of the patient upon a showing by such a witness that the expenses were incurred in connection with the treatment of the injury, disease, or disability involved in the subject of litigation at trial and that the bills were received from:

1. A hospital;
2. An ambulance service;
3. A pharmacy, drugstore, or supplier of therapeutic or orthopedic devices; or
4. A licensed practicing physician, dentist, orthodontist, podiatrist, physical or occupational therapist, doctor of chiropractic, psychologist, advanced practice registered nurse, social worker, professional counselor, or marriage and family therapist.

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62 O.C.G.A. §24-9-903 (Effective January 1, 2013)
63 O.C.G.A. §24-9-904 (Effective January 1, 2013)
64 O.C.G.A. §24-9-920 (Effective January 1, 2013)
(b) Such items of evidence need not be identified by the one who submits the bill, and it shall not be necessary for an expert witness to testify that the charges were reasonable and necessary. However, nothing in this Code section shall be construed to limit the right of a thorough and sifting cross-examination as to such items of evidence.\textsuperscript{65}

\textbf{5.5.6 Proof of laws, records, nonjudicial records, or books of other states, territories, or possessions; full faith and credit.}

The acts of the legislature of any other state, territory, or possession of the United States, the records and judicial proceedings of any court of any such state, territory, or possession, and the nonjudicial records or books kept in the public offices in any such state, territory, or possession, if properly authenticated, shall have the same full faith and credit in every court within this state as they have by law or usage in the courts of such state, territory, or possession from which they are taken.\textsuperscript{66}

\textbf{5.5.7 Authentication of photographs, motion pictures, video recordings, and audio recordings when witness unavailable}

(a) As used in this Code section, the term "unavailability of a witness" includes situations in which the authenticating witness:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the authentication;

(2) Persists in refusing to testify concerning the subject matter of the authentication despite an order of the court to do so;

(3) Testifies to a lack of memory of the subject matter of the authentication;

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of the authentication has been unable to procure the attendance of the authenticating witness by process or other reasonable means.

An authenticating witness shall not be deemed unavailable as a witness if his or her exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of an authentication for the purpose of preventing the witness from attending or testifying.

(b) Subject to any other valid objection, photographs, motion pictures, video recordings, and audio recordings when witness unavailable.

\textsuperscript{65} O.C.G.A. §24-9-921 (Effective January 1, 2013)

\textsuperscript{66} O.C.G.A. §24-9-922 (Effective January 1, 2013)
recordings, and audio recordings shall be admissible in evidence when necessitated by the unavailability of a witness who can provide personal authentication and when the court determines, based on competent evidence presented to the court, that such items tend to show reliably the fact or facts for which the items are offered.

(c) Subject to any other valid objection, photographs, motion pictures, video recordings, and audio recordings produced at a time when the device producing the items was not being operated by an individual person or was not under the personal control or in the presence of an individual operator shall be admissible in evidence when the court determines, based on competent evidence presented to the court, that such items tend to show reliably the fact or facts for which the items are offered, provided that, prior to the admission of such evidence, the date and time of such photograph, motion picture, or video recording shall be contained on such evidence, and such date and time shall be shown to have been made contemporaneously with the events depicted in such photograph, motion picture, or video recording.

(d) This Code section shall not be the exclusive method of introduction into evidence of photographs, motion pictures, video recordings, and audio recordings but shall be supplementary to any other law and lawful methods existing in this state.\(^67\)

5.5.8 Admissibility of records of Department of Driver Services; admissibility of computer transmitted records.

(a) Any court may receive and use as evidence in any proceeding information otherwise admissible from the records of the Department of Public Safety or the Department of Driver Services obtained from any terminal lawfully connected to the Georgia Crime Information Center without the need for additional certification of such records.

(b) Any court may receive and use as evidence for the purpose of imposing a sentence in any criminal proceeding information otherwise admissible from the records of the Department of Driver Services obtained from a request made in accordance with a contract with the Georgia Technology Authority for immediate on-line electronic furnishing of information.\(^68\)

5.6 BEST EVIDENCE RULE

5.6.1 Definitions

As used in this Chapter 10 of Title 24, the term:

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\(^{67}\) O.C.G.A. §29-9-923 (Effective January 1, 2013)

\(^{68}\) O.C.G.A. §29-9-924 (Effective January 1, 2013)
(1) "Writing" or "recording" means letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, magnetic impulse, or mechanical or electronic recording or other form of data compilation.

(2) "Photograph" includes still photographs, X-ray films, video recordings, and motion pictures.

(3) "Original" means the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An original of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original.

(4) "Duplicate" means a counterpart produced by the same impression as the original or from the same matrix or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, chemical reproduction, or other equivalent techniques which accurately reproduce the original.

(5) "Public record" shall have the same meaning as set forth in Code Section 24-8-801.

5.6.2 Requirement of Original (The Rule)

To prove the contents of a writing, recording, or photograph, the original writing, recording, or photograph shall be required.

5.6.2.1 Admissibility of Duplicates

A duplicate shall be admissible to the same extent as an original unless:

(1) A genuine question is raised as to the authenticity of the original; or

(2) A circumstance exists where it would be unfair to admit the duplicate in lieu of the original.

5.6.2.2 Best Evidence Rule.

The original shall not be required and other evidence of the contents of a writing, recording, or photograph shall be admissible if:

(1) All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;

(2) No original can be obtained by any available judicial process or procedure;

69 O.C.G.A. §24-10-1001 (Effective January 1, 2013)
70 O.C.G.A. §24-10-1002 (Effective January 1, 2013)
71 O.C.G.A. §24-10-1003 (Effective January 1, 2013)
(3) At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or

(4) The writing, recording, or photograph is not closely related to a controlling issue.72

5.6.2.3 Public Records

The contents of a public record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by duplicate, certified as correct in accordance with Code Section 24-9-902 or Code Section 24-9-920 or testified to be correct by a witness who has compared it with the original. If a duplicate which complies with this Code section cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.73

5.6.2.4 Summaries

The contents of otherwise admissible voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that the contents of such writings, recordings, or photographs be produced in court.74

5.6.2.5 Testimony or written admission of party

The contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.75

5.6.3 Functions of court and jury

[Note: In non-Article 6 Probate Courts, the judge is the “trier of facts.”]

When the admissibility of other evidence of the contents of writings, recordings, or photographs under the rules of evidence depends upon the fulfillment of a condition of fact, the question of whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Code Section 24-1-104;
provided, however, that when an issue is raised as to:

(1) Whether the asserted writing, recording, or photograph ever existed;
(2) Whether another writing, recording, or photograph produced at the trial is the original; or
(3) Whether other evidence of the contents correctly reflects the contents,
the issue is for the trier of fact to determine as in the case of other issues of fact.\textsuperscript{76}

5.6.4 Georgia’s "Uniform Electronic Transactions Act."\textsuperscript{77}
The UETA provides that electronic records are to be treated as “writings” for purposes of the rules of evidence. Therefore, a witness may not testify to the contents of an electronic record, such as an email, without producing the “original,” that is a printed copy of the original record/message.\textsuperscript{78}

5.7 RELEVANT EVIDENCE AND ITS LIMITS

5.7.1 "Relevant evidence" defined

As used in this chapter, the term "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.\textsuperscript{79}

5.7.2 Relevant evidence generally admissible; irrelevant evidence not admissible.

All relevant evidence shall be admissible, except as limited by constitutional requirements or as otherwise provided by law or by other rules, as prescribed pursuant to constitutional or statutory authority, applicable in the court in which the matter is pending. Evidence which is not relevant shall not be admissible.\textsuperscript{80}

5.7.3 Exclusion of relevant evidence on the grounds of prejudice, confusion, or waste of time.

Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.\textsuperscript{81}

5.7.4 Methods of proving character.

(a) In all proceedings in which evidence of character or a trait of character of a

\textsuperscript{76} O.C.G.A. §24-10-1008 (Effective January 1, 2013)
\textsuperscript{77} O.C.G.A. §10-12-1
\textsuperscript{78} O.C.G.A. §10-12-7.
\textsuperscript{79} O.C.G.A. §24-4-401 (Effective January 1, 2013)
\textsuperscript{80} O.C.G.A. §24-4-402 (Effective January 1, 2013)
\textsuperscript{81} O.C.G.A. §24-4-403 (Effective January 1, 2013)
person is admissible, proof shall be made by testimony as to reputation or by testimony in the form of an opinion.

(b) In proceedings in which character or a trait of character of a person is an essential element of a charge, claim, or defense or when an accused testifies to his or her own character, proof may also be made of specific instances of that person's conduct. The character of the accused, including specific instances of the accused's conduct, shall also be admissible in a presentencing hearing subject to the provisions of Code Section 17-10-2.

(c) On cross-examination, inquiry shall be allowable into relevant specific instances of conduct. 82

5.7.5 Habit; routine practice.

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with such habit or routine practice. 83

5.7.6 Compromises and offers to compromise.

(a) Except as provided in Code Section 9-11-68, evidence of:

(1) Furnishing, offering, or promising to furnish; or

(2) Accepting, offering, or promising to accept

a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount shall not be admissible to prove liability for or invalidity of any claim or its amount.

(b) Evidence of conduct or statements made in compromise negotiations or mediation shall not be admissible.

(c) This Code section shall not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations or mediation. This Code section shall not require exclusion of evidence offered for another purpose, including, but not limited to, proving bias or prejudice of a witness, negating a contention of undue delay or abuse of process, or proving an effort to obstruct a criminal investigation or prosecution. 84

82 O.C.G.A. §24-4-405 (Effective January 1, 2013)
83 O.C.G.A. §24-4-406 (Effective January 1, 2013)
84 O.C.G.A. §24-4-408 (Effective January 1, 2013)
5.8 HEARSAY

[NOTE: Hearsay has always proved problematic to courts and attorneys. Prof. Milich’s article\textsuperscript{85} states \textit{Definition of Hearsay}—Georgia’s current definition of hearsay\textsuperscript{86} and the federal definition\textsuperscript{87} (adopted by the new rules) serve much the same function. The main difference is that Georgia’s current definition does not include the out-of-court statements of a testifying witness. This makes more sense than the federal approach. The primary problem with hearsay is the inability to cross examine the hearsay declarant, to raise questions that could help the trier of fact determine if the declarant was lying or mistaken when the statement was made.\textsuperscript{88} If the hearsay declarant is on the stand and available for cross-examination, these problems are not present and the witness’s prior out-of-court statements should be admissible if they are relevant and not merely cumulative of the witness’s in-court testimony. Such statements are relevant when they are prior inconsistent statements of the witness or prior consistent statements that rebut an attack on the witness’s credibility.\textsuperscript{89} Georgia’s new rules retain Georgia’s current approach to a testifying witness’s prior out-of-court statements. Such statements are not hearsay.\textsuperscript{90} Normally, such statements are inadmissible, not because they are hearsay, but because they are cumulative and improper bolstering of the witness’s in-court testimony.\textsuperscript{91} If the witness’s prior out-of-court statements are admissible as prior inconsistent statements to impeach him or as prior consistent statements to rehabilitate his credibility after attack, then they are admissible on that basis without regard to the hearsay rule.]

\textsuperscript{85} F.N. 31.
\textsuperscript{86} Hearsay evidence is that which does not derive its value solely from the credit of the witness but rests mainly on the veracity and competency of other persons. O.C.G.A. §24-3-1 (2010).
\textsuperscript{87} Fed. R. Evid. 801(c) Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.
\textsuperscript{88} MILICH, \textit{supra} note 31.
\textsuperscript{89} MILICH, \textit{supra} note 31.
\textsuperscript{90} An out-of-court statement shall not be hearsay if the declarant testifies at the trial or hearing, is subject to cross-examination concerning the statement, and the statement is admissible as a prior inconsistent statement or a prior consistent statement under Code Section 24-6-613 or is otherwise admissible under this chapter. GA. CODE ANN. § 24-8-801(d)(1)(A) (effective Jan. 1, 2013).
\textsuperscript{91} Parker v. \textit{State}, 162 Ga. App. 271 (2012). “In Georgia, as well as most other jurisdictions, the general rule is that a witness’ testimony cannot be fortified or corroborated by his own prior consistent statements. . . . ‘It can scarcely be satisfactory to any mind to say that, if a witness testifies to a statement today under oath, it strengthens the statement to prove that he said the same thing yesterday when not under oath. . . . [.] The idea that the mere repetition of a story gives it any force or proves its truth is contrary to common observation and experience that a falsehood may be repeated as often as the truth.”’ (quoting 4 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1124, at 258 (James H. Chadbourn ed., 1976); \textit{Boyt v. State}, 286 Ga. App. 460 (2007).
5.8.1 Definitions

Under the new Title 24, hearsay is the subject of an entire chapter (Chapter 8). In Chapter 8, the following terms are defined:

(a) "Statement" means:
   (1) An oral or written assertion; or
   (2) Nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) "Declarant" means a person who makes a statement.

(c) "Hearsay" means a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) "Hearsay" shall be subject to the following exclusions and conditions:
   
   (1) Prior statement by witness.
      
      (A) An out-of-court statement shall not be hearsay if the declarant testifies at the trial or hearing, is subject to cross-examination concerning the statement, and the statement is admissible as a prior inconsistent statement or a prior consistent statement under Code Section 24-6-613 or is otherwise admissible under this chapter.
      
      (B) If a hearsay statement is admitted and the declarant does not testify at the trial or hearing, other out-of-court statements of the declarant shall be admissible for the limited use of impeaching or rehabilitating the credibility of the declarant, and not as substantive evidence, if the other statements qualify as prior inconsistent statements or prior consistent statements under Code Section 24-6-613.
      
      (C) A statement shall not be hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is one of identification of a person made after perceiving the person; and

   (2) Admissions by party-opponent.
      
      Admissions shall not be excluded by the hearsay rule. An admission is a statement offered against a party which is:
      
      (A) The party's own statement, in either an individual or representative capacity;
(B) A statement of which the party has manifested an adoption or belief in its truth;

(C) A statement by a person authorized by the party to make a statement concerning the subject;

(D) A statement by the party's agent or employee, but not including any agent of the state in a criminal proceeding, concerning a matter within the scope of the agency or employment, made during the existence of the relationship; or

(E) A statement by a coconspirator of a party during the course and in furtherance of the conspiracy, including a statement made during the concealment phase of a conspiracy. A conspiracy need not be charged in order to make a statement admissible under this subparagraph.

The contents of the statement shall be considered but shall not alone be sufficient to establish the declarant's authority under subparagraph (C) of this paragraph, the agency or employment relationship and scope thereof under subparagraph (D) of this paragraph, or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subparagraph (E) of this paragraph.

(e) "Public office" means:

(1) Every state department, agency, board, bureau, commission, division, public corporation, and authority;

(2) Every county, municipal corporation, school district, or other political subdivision of this state;

(3) Every department, agency, board, bureau, commission, authority, or similar body of each such county, municipal corporation, or other political subdivision of this state; and

(4) Every city, county, regional, or other authority established pursuant to the laws of this state.

(f) "Public official" means an elected or appointed official.

(g) "Public record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in
5.8.2 Hearsay Rule

Hearsay shall not be admissible except as provided by this article; provided, however, that if a party does not properly object to hearsay, the objection shall be deemed waived, and the hearsay evidence shall be legal evidence and admissible.\textsuperscript{93}

5.8.3 Hearsay Rule Exceptions; availability of declarant immaterial.

As with the old hearsay rule, there are exceptions under the new rule as well. There are now 23 defined exceptions.

The following shall not be excluded by the hearsay rule, even though the declarant is available as a witness,

(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition or immediately thereafter;

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition;

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition, such as intent, plan, motive, design, mental feeling, pain, and bodily health, but not including a statement of memory or belief to prove the fact remembered or believed unless such statements relate to the execution, revocation, identification, or terms of the declarant's will and not including a statement of belief as to the intent of another person;

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment;

(5) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the

\textsuperscript{92} O.C.G.A. §24-8-801 (Effective January 1, 2013)

\textsuperscript{93} O.C.G.A. §24-8-802 (Effective January 1, 2013)
witness to testify fully and accurately shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but shall not itself be received as an exhibit unless offered by an adverse party;

(6) Records of regularly conducted activity. Unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness and subject to the provisions of Chapter 7 of this title, a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, if (A) made at or near the time of the described acts, events, conditions, opinions, or diagnoses; (B) made by, or from information transmitted by, a person with personal knowledge and a business duty to report; (C) kept in the course of a regularly conducted business activity; and (D) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or by certification that complies with paragraph (11) or (12) of Code Section 24-9-902 or by any other statute permitting certification. The term "business" as used in this paragraph includes any business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. Public records and reports shall be admissible under paragraph (8) of this Code section and shall not be admissible under this paragraph;

(7) Absence of entry in records kept in accordance with paragraph (6) of this Code section. Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6) of this Code section, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness;

(8) Public records and reports. Except as otherwise provided by law, public records, reports, statements, or data compilations, in any form, of public offices, setting forth:

(A) The activities of the public office;

(B) Matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, against the accused in criminal proceedings,
matters observed by police officers and other law enforcement personnel in connection with an investigation; or

(C) In civil proceedings and against the state in criminal proceedings, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness;

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law;

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office, evidence in the form of a certification in accordance with Code Section 24-9-902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry;

(11) Records of religious organizations. Statements of birth, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization;

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified and purporting to have been issued at the time of the act or within a reasonable time thereafter;

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like;

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable law authorizes the recording of documents of that kind in such office;
(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document;

(16) Statements in ancient documents. Statements in a document in existence 20 years or more the authenticity of which is established;

(17) Market reports and commercial publications. Market quotations, tabulations, lists, directories, or other published compilations generally used and relied upon by the public or by persons in the witness's particular occupation;

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination, statements contained in published treatises, periodicals, or pamphlets, whether published electronically or in print, on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice. If admitted, the statements may be used for cross-examination of an expert witness and read into evidence but shall not be received as exhibits;

(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage or among a person's associates or in the community concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of the person's personal or family history;

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community and reputation as to events of general history important to the community or state or nation in which such lands are located;

(21) Reputation as to character. Reputation of a person's character among associates or in the community;

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty but not upon a plea of nolo contendere, adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year to prove any fact essential to sustain the judgment, but not including, when offered by the state in a criminal prosecution for purposes other than impeachment, judgments
against persons other than the accused. The pendency of an appeal may be shown but shall not affect admissibility; or

(23) Judgment as to personal, family, or general history or boundaries. Judgments as proof of matters of personal, family, or general history or boundaries essential to the judgment, if the same would be provable by evidence of reputation.  

5.8.4 Hearsay Rule Exceptions; declarant unavailable.

As used in this Code section, the term "unavailable as a witness" includes situations in which the declarant:

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;
(2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;
(3) Testifies to a lack of memory of the subject matter of the declarant's statement;
(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
(5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance or, in the case of exceptions under paragraph (2), (3), or (4) of subsection (b) of this Code section, the declarant's attendance or testimony, by process or other reasonable means.

A declarant shall not be deemed unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

The following shall not be excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. If deposition testimony is admissible under either the rules stated in Code Section 9-11-32 or this

94 O.C.G.A. §24-8-803 Effective January 1, 2013)
Code section, it shall be admissible at trial in accordance with the rules under which it was offered;

(2) In a prosecution for homicide or in a civil proceeding, a statement made by a declarant while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death;

(3) A statement against interest. A statement against interest is a statement:
   
   (A) Which a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate a claim by the declarant against another or to expose the declarant to civil or criminal liability; and
   
   (B) Supported by corroborating circumstances that clearly indicate the trustworthiness of the statement if it is offered in a criminal case as a statement that tends to expose the declarant to criminal liability;

(4) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated or a statement concerning the foregoing matters and death also of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared; or

(5) A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.⁹⁵

5.8.5 Hearsay within hearsay

Hearsay included within hearsay shall not be excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule.⁹⁶

5.8.6 Attacking and supporting credibility of a declarant

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked and, if attacked, may be supported by any evidence which would

⁹⁵ O.C.G.A. §24-8-804 (Effective January 1, 2013)
⁹⁶ O.C.G.A. §24-8-805 (Effective January 1, 2013)
be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, shall not be subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party shall be entitled to examine the declarant on the statement as if under cross-examination.\(^{97}\)

5.8.7 Residual exception

A statement not specifically covered by any law but having equivalent circumstantial guarantees of trustworthiness shall not be excluded by the hearsay rule, if the court determines that:

1. The statement is offered as evidence of a material fact;
2. The statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and
3. The general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.

However, a statement may not be admitted under this Code section unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent’s intention to offer the statement and the particulars of it, including the name and address of the declarant.\(^ {98}\)

5.9 MEDICAL AND OTHER CONFIDENTIAL INFORMATION

5.9.1 Release of Medical Information and Confidentiality of Raw Research Data

5.9.2 When medical information may be released by physician, hospital, health care facility, or pharmacist; immunity from liability; waiver of privilege; psychiatrists and hospitals excepted

(a) No physician licensed under Chapter 34 of Title 43 and no hospital or health care facility, including those operated by an agency or bureau of this state or other governmental unit, shall be required to release any medical information concerning a patient except to the Department of Community Health, its divisions, agents, or successors when required in the administration of public health programs pursuant to Code Section 31-12-2 and where

\(^{97}\) O.C.G.A. §24-8-806 (Effective January 1, 2013)

\(^{98}\) O.C.G.A. §24-8-807 (Effective January 1, 2013)
authorized or required by law, statute, or lawful regulation; or on written authorization or other waiver by the patient, or by his or her parents or duly appointed guardian ad litem in the case of a minor, or on appropriate court order or subpoena; provided, however, that any physician, hospital, or health care facility releasing information under written authorization or other waiver by the patient, or by his or her parents or guardian ad litem in the case of a minor, or pursuant to law, statute, or lawful regulation, or under court order or subpoena shall not be liable to the patient or any other person; provided, further, that the privilege shall be waived to the extent that the patient places his or her care and treatment or the nature and extent of his or her injuries at issue in any judicial proceeding. This Code section shall not apply to psychiatrists or to hospitals in which the patient is being or has been treated solely for mental illness.

(b) No pharmacist licensed under Chapter 4 of Title 26 shall be required to release any medical information concerning a patient except on written authorization or other waiver by the patient, or by his or her parents or duly appointed guardian ad litem in the case of a minor, or upon appropriate court order or subpoena; provided, however, that any pharmacist releasing information under written authorization or other waiver by the patient, or by his or her parents or duly appointed guardian ad litem in the case of a minor, or upon appropriate court order or subpoena shall not be liable to the patient or any other person; provided, further, that the privilege shall be waived to the extent that the patient places his or her care and treatment or the nature and extent of his or her injuries at issue in any judicial proceeding.99

5.9.3 Confidentiality of raw research data

(a) The General Assembly finds and declares that protecting the confidentiality of research data from disclosure in judicial and administrative proceedings is essential to safeguarding the integrity of research in this state, guaranteeing the privacy of individuals who participate in research projects, and ensuring the continuation of research in science, medicine, and other fields that benefits the citizens and institutions of Georgia and other states. The protection of such research data has more than local significance, is of equal importance to all citizens of this state, is of state-wide concern, and consequently is properly a matter for regulation under the police power of this state.

(b) As used in this Code section, the term "confidential raw research data" means

99 O.C.G.A. §24-12-1 (Effective January 1, 2013)
medical information, interview responses, reports, statements, memoranda, or other data relating to the condition, treatment, or characteristics of any person which are gathered by or provided to a researcher:

(1) In support of a research study approved by an appropriate research oversight committee of a hospital, health care facility, or educational institution; and

(2) With the objective to develop, study, or report aggregate or anonymous information not intended to be used in any way in which the identity of an individual is material to the results.

The term shall not include published compilations of the raw research data created by the researcher or the researcher's published summaries, findings, analyses, or conclusions related to the research study.

(c) Confidential raw research data in a researcher's possession shall not be subject to subpoena, otherwise discoverable, or deemed admissible as evidence in any judicial or administrative proceeding in any court except as otherwise provided in subsection (d) of this Code section.

(d) Confidential raw research data may be released, disclosed, subject to subpoena, otherwise discoverable, or deemed admissible as evidence in a judicial or administrative proceeding as follows:

(1) Confidential raw research data related to a person may be disclosed to that person or to another person on such person's behalf where the authority is otherwise specifically provided by law;

(2) Confidential raw research data related to a person may be disclosed to any person or legal entity designated to receive that information when that designation is made in writing by the research participant or where a designation is made in writing by a person authorized by law to act for the participant;

(3) Confidential raw research data related to a person may be disclosed to any agency or department of the federal government, this state, or any political subdivision of this state if such data are required by law or regulation to be reported to such agency or department;

(4) Confidential raw research data may be disclosed in any proceeding in which a party was a participant, researcher, or sponsor in the underlying research study, including, but not limited to, any judicial or administrative proceeding in which a research participant places his or her care, treatment, injuries, insurance coverage, or
benefit plan coverage at issue; provided, however, that the identity of any research participant other than the party to the judicial or administrative proceeding shall not be disclosed, unless the researcher or sponsor is a defendant in such proceeding;

(5) Confidential raw research data may be disclosed in any judicial or administrative proceeding in which the researcher has either volunteered to testify or has been hired to testify as an expert by one of the parties to such proceeding; and

(6) In a criminal proceeding, the court shall order the production of confidential raw research data if the data are relevant to any issue in the proceeding, impose appropriate safeguards against unauthorized disclosure of the data, and admit confidential raw research data into evidence if the data are material to the defense or prosecution.

(e) Nothing in this Code section shall be construed to permit, require, or prohibit the disclosure of confidential raw research data in any setting other than a judicial or administrative proceeding that is governed by the requirements of this title.

(f) Any disclosure of confidential raw research data authorized or required by this Code section or any other law shall in no way destroy the confidential nature of that data except for the purpose for which the authorized or required disclosure is made.100

5.9.4 Confidentiality of medical information

5.9.4.1 Definitions.

As used in this article, the term:

(1) "Confidential or privileged" means the protection afforded by law from unauthorized disclosure, whether the protection is afforded by law as developed and applied by the courts, by statute or lawful regulations, or by the requirements of the Constitutions of the State of Georgia or the United States. The term "confidential or privileged" also includes protection afforded by law from compulsory process or testimony.

(2) "Disclosure" means the act of transmitting or communicating medical matter to a person who would not otherwise have access thereto.

(3) "Health care facility" means any institution or place in which health care is rendered to persons, which health care includes, but is not limited to, medical, psychiatric, acute, intermediate, rehabilitative, and long-term care.

(4) "Laws requiring disclosure" means laws and statutes of the State of Georgia and of the United States and lawful regulations issued by any department or agency of the State

100 O.C.G.A. §24-12-2 (Effective January 1, 2013)
of Georgia or of the United States which require the review, analysis, or use of medical matter by persons not originally having authorized access thereto. The term "laws requiring disclosure" also includes any authorized practice of disclosure for purposes of evaluating claims for reimbursement for charges or expenses under any public or private reimbursement or insurance program.

(5) "Limited consent to disclosure" means proper authorization given by or on behalf of a person entitled to protection from disclosure of medical matter and given for a specific purpose related to such person's health or related to such person's application for insurance or like benefits.

(6) "Medical matter" means information respecting the medical or psychiatric condition, including without limitation the physical and the mental condition, of a natural person or persons, however recorded, obtained, or communicated.

(7) "Nurse" means a person authorized by license issued under Chapter 26 of Title 43 as a registered professional nurse or licensed practical nurse to practice nursing.

(8) "Physician" means any person lawfully licensed in this state to practice medicine and surgery pursuant to Chapter 34 of Title 43.  

5.9.4.2 Disclosure of medical records - Effect on confidential or privileged character thereof.

The disclosure of confidential or privileged medical matter constituting all or part of a record kept by a health care facility, a nurse, or a physician, pursuant to laws requiring disclosure or pursuant to limited consent to disclosure, shall not serve to destroy or in any way abridge the confidential or privileged character thereof, except for the purpose for which such disclosure is made.

5.9.4.3 Disclosure of medical records - Use of medical matter so disclosed

Persons to whom confidential or privileged medical matter is disclosed in the circumstances described in Code Section 24-12-11 shall utilize such matter only in connection with the purpose or purposes of such disclosure and thereafter shall keep such matter in confidence. However, nothing in this article shall prohibit the use of such matter where otherwise authorized by law.
5.9.4.4 Disclosure of medical records - Immunity from liability.

Any person, corporation, authority, or other legal entity acting in good faith shall be immune from liability for the transmission, receipt, or use of medical matter disclosed pursuant to laws requiring disclosure or pursuant to limited consent to disclosure.\(^{104}\)

5.9.4.5 AIDS INFORMATION

5.9.4.5.1 Confidential nature of AIDS information.

AIDS confidential information as defined in Code Section 31-22-9.1 and disclosed or discovered within the patient-physician relationship shall be confidential and shall not be disclosed except as otherwise provided in Code Section 24-12-21.\(^{105}\)

5.9.4.5.2 Disclosure of AIDS confidential information

5.10 Opinions

5.10.1 Lay Opinions

(a) If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences shall be limited to those opinions or inferences which are:

(1) Rationally based on the perception of the witness;

(2) Helpful to a clear understanding of the witness's testimony or the determination of a fact in issue; and

(3) Not based on scientific, technical, or other specialized knowledge within the scope of Code Section 24-7-702.

(b) Direct testimony as to market value is in the nature of opinion evidence. A witness need not be an expert or dealer in an article or property to testify as to its value if he or she has had an opportunity to form a reasoned opinion.\(^{106}\)

5.10.2 Expert opinion testimony in civil actions; medical experts; pretrial hearings; precedential value of federal law

(a) Except as provided in Code Section 22-1-14 and in subsection (g) of Code Section 24-7-702, the following provisions shall apply in all civil proceedings. The opinion of a witness qualified as an expert under this Code section may be given on the facts as proved by other witnesses.

(b) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an

\(^{104}\) O.C.G.A. §24-12-13 (Effective January 1, 2013)

\(^{105}\) O.C.G.A. §24-12-20 (Effective January 1, 2013)

\(^{106}\) O.C.G.A. §24-7-701 (Effective January 1, 2013)
expert by knowledge, skill, experience, training, or education may testify thereto in
the form of an opinion or otherwise, if:

(1) The testimony is based upon sufficient facts or data;
(2) The testimony is the product of reliable principles and methods; and
(3) The witness has applied the principles and methods reliably to the facts of
the case which have been or will be admitted into evidence before the trier of
fact.

(c) Notwithstanding the provisions of subsection (b) above and any other provision
of law which might be construed to the contrary, in professional malpractice actions,
the opinions of an expert, who is otherwise qualified as to the acceptable standard of
conduct of the professional whose conduct is at issue, shall be admissible only if, at
the time the act or omission is alleged to have occurred, such expert:

(1) Was licensed by an appropriate regulatory agency to practice his or her
profession in the state in which such expert was practicing or teaching in the
profession at such time; and
(2) In the case of a medical malpractice action, had actual professional
knowledge and experience in the area of practice or specialty in which the
opinion is to be given as the result of having been regularly engaged in:

(A) The active practice of such area of specialty of his or her
profession for at least three of the last five years, with sufficient
frequency to establish an appropriate level of knowledge, as
determined by the judge, in performing the procedure, diagnosing the
condition, or rendering the treatment which is alleged to have been
performed or rendered negligently by the defendant whose conduct is
at issue; or
(B) The teaching of his or her profession for at least three of the last
five years as an employed member of the faculty of an educational
institution accredited in the teaching of such profession, with sufficient
frequency to establish an appropriate level of knowledge, as
determined by the judge, in teaching others how to perform the
procedure, diagnose the condition, or render the treatment which is
alleged to have been performed or rendered negligently by the
defendant whose conduct is at issue; and
(C) Except as provided in subparagraph (D) of this paragraph:
   (i) Is a member of the same profession;
   (ii) Is a medical doctor testifying as to the standard of care of a defendant who is a doctor of osteopathy; or
   (iii) Is a doctor of osteopathy testifying as to the standard of care of a defendant who is a medical doctor; and

(D) Notwithstanding any other provision of this Code section, an expert who is a physician and, as a result of having, during at least three of the last five years immediately preceding the time the act or omission is alleged to have occurred, supervised, taught, or instructed nurses, nurse practitioners, certified registered nurse anesthetists, nurse midwives, physician assistants, physical therapists, occupational therapists, or medical support staff, has knowledge of the standard of care of that health care provider under the circumstances at issue shall be competent to testify as to the standard of that health care provider. However, a nurse, nurse practitioner, certified registered nurse anesthetist, nurse midwife, physician assistant, physical therapist, occupational therapist, or medical support staff shall not be competent to testify as to the standard of care of a physician.

(d) Upon motion of a party, the court may hold a pretrial hearing to determine whether the witness qualifies as an expert and whether the expert's testimony satisfies the requirements of subsections (a) and (b) above. Such hearing and ruling shall be completed no later than the final pretrial conference contemplated under Code Section 9-11-16.

(e) An affiant shall meet the requirements of this Code section in order to be deemed qualified to testify as an expert by means of the affidavit required under Code Section 9-11-9.1.

(f) It is the intent of the legislature that, in all civil proceedings, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states. Therefore, in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme
(g) This Code section shall not be strictly applied in proceedings conducted pursuant to Chapter 9 of Title 34 or in administrative proceedings conducted pursuant to Chapter 13 of Title 50.

6.0 JUDGMENTS

6.1 Judgments

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

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

(c) Relief granted.

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

(2) As used in this subsection, the term "action for medical malpractice"

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107 Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); General Electric Co. v. Joiner, 522 U.S. 136 (1997); Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.

108 O.C.G.A. §24-7-702 (Effective January 1, 2013)
means any claim for damages resulting from the death of or injury to any person arising out of:

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

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

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

(d) Costs.

Except where express provision therefor is made in a statute, costs shall be allowed as a matter of course to the prevailing party unless the court otherwise directs; but costs against this state and its officers, agencies, and political subdivisions shall be imposed only to the extent permitted by the law.\(^{109}\)

### 6.1.1 Enforceability and Judgments nunc pro tunc

Until an order is signed by the judge and is filed, it is ineffective for any purpose. But an exception to this general rule “may be made when an order is entered nunc pro tunc to the date of the court’s oral ruling.”\(^{110}\)

“A nunc pro tunc entry is an entry made now of something actually previously done to have effect of former date; office being not to supply omitted action, but to supply omission in the record of action really had but omitted through inadvertence or mistake.” A judgment entered nunc pro tunc is one written, signed and filed after an oral pronouncement.
of judgment intended to take effect immediately.\textsuperscript{111}

6.2 Default judgment.

(a) \textit{When case in default; opening as matter of right; judgment.} If in any case an answer has not been filed within the time required by this chapter, the case shall automatically become in default unless the time for filing the answer has been extended as provided by law. The default may be opened as a matter of right by the filing of such defenses within 15 days of the day of default, upon the payment of costs. If the case is still in default after the expiration of the period of 15 days, the plaintiff at any time thereafter shall be entitled to verdict and judgment by default, in open court or in chambers, as if every item and paragraph of the complaint or other original pleading were supported by proper evidence, without the intervention of a jury, unless the action is one ex delicto or involves unliquidated damages, in which event the plaintiff shall be required to introduce evidence and establish the amount of damages before the court without a jury, with the right of the defendant to introduce evidence as to damages and the right of either to move for a new trial in respect of such damages; provided, however, in the event a defendant, though in default, has placed damages in issue by filing a pleading raising such issue, either party shall be entitled, upon demand, to a jury trial of the issue as to damages. An action based upon open account shall not be considered one for unliquidated damages within the meaning of this Code section.

(b) \textit{Opening default.} At any time before final judgment, the court, in its discretion, upon payment of costs, may allow the default to be opened for providential cause preventing the filing of required pleadings or for excusable neglect or where the judge, from all the facts, shall determine that a proper case has been made for the default to be opened, on terms to be fixed by the court. In order to allow the default to be thus opened, the showing shall be made under oath, shall set up a meritorious defense, shall offer to plead instanter, and shall announce ready to proceed with the trial.\textsuperscript{112}

6.3 Summary judgment.

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


\textsuperscript{112} O.C.G.A. §8-11-55
(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and proceedings thereon. The motion shall be served at least 30 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law; but nothing in this Code section shall be construed as denying to any party the right to trial by jury where there are substantial issues of fact to be determined. A summary judgment may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damage.

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

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

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

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

(h) Appeal. An order granting summary judgment on any issue or as to any party shall be subject to review by appeal. An order denying summary judgment shall be subject to review by direct appeal in accordance with subsection (b) of Code Section 5-6-34.113

6.4 Recording of Judgments

6.4.1 Signing.

Except when otherwise specifically provided by statute, all judgments shall be signed by the judge and filed with the clerk. The signature of the judge shall be followed by the spelling of the judge's name and title legibly typed, printed, or stamped. The failure of the judgment to have the typed, printed, or stamped name of the judge shall not invalidate the judgment.114

6.4.2 When judgment entered.

The filing with the clerk of a judgment, signed by the judge, with the fully completed civil case disposition form constitutes the entry of the judgment, and, unless the court otherwise directs, no judgment shall be effective for any purpose until the entry of the same.115

7.0 CONTEMPT PROCEEDINGS

8.0 APPEALS

113 O.C.G.A. §9-11-56
114 O.C.G.A. §9-11-58(a).
115 O.C.G.A. §9-11-58(b).
CHAPTER 3
PROBATE OF WILLS

2.0 BASIC REQUIREMENTS FOR VALID WILL

2.1 Will Drafting Basics

Knowledge of the contents of the will by the testator is required, although if the testator can read, the signature of the testator will be presumed to show such knowledge. The Supreme Court has held that the fact that only portions of the will were read out loud to the testator did not remove the presumption of knowledge of the contents of the will by the signing of same; a caveator must overcome that presumption with evidence to the contrary other than the fact that only portions were read at the time of execution.

A will may be constituted by more than one document, provided the documents were together at the time of signing and were presented together to the witnesses as a will. The law does not require that a will be in one single document or in continuous pages or even be bound together.

2.3 Joint and Mutual Wills; Contract to Make a Will

2.3.1 Definitions.

(a) A joint will is one will signed by two or more testators that deals with the distribution of the property of each testator.

(b) Mutual wills are separate wills of two or more testators that make reciprocal dispositions of each testator's property.

2.3.2 Probate of Joint and Mutual Wills

(a) A joint will may be probated as each testator's will.

(b) O.C.G.A. Sec. 53-5-5 requires that a will remain on file in the probate court once it is probated. In the case of a joint will, a certified copy of the joint will would be used upon the death of the second testator to die.

(c) Subsection (b) changes the definition of mutual wills to refer only to the separate wills of two or more testators that contain reciprocal dispositions of property.

117 Strong v. Holden, 287 Ga. 482 (2010). Compare Burchard v. Corrington, 287 Ga. 786 (2010), in which the Supreme Court upheld a ruling that denied probate of a will for lack of testamentary capacity; the propounder had earlier been appointed guardian of the decedent in another state, and there was evidence of ongoing disorientation and confusion.
The wills would be probated separately.

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

2.3.4 Contracts to make wills
(a) After December 31, 1997, any contract that obligates an individual to make a will or a testamentary disposition, not to revoke a will or testamentary disposition, or to die intestate must be expressed clearly and must be in a writing that is signed by that person.

Notwithstanding the foregoing, the Court of Appeals has upheld an oral contract to make a will involving a decedent who died in 2004. Without mentioning the change in the statute or the Hodges case, the Court of Appeals affirmed a jury verdict on a specific performance action finding that the decedent had entered into a valid and enforceable oral contract to make a will. Without specifically stating that the oral contract predated December 31, 1997, the court found that the decedent had reaffirmed an earlier oral contract from 1984 until 1993, that the decedent’s son in whose favor the jury ruled had performed his part of the oral contract, and that the oral contract was sufficient in terms of value and specificity.

2.4 Testamentary Capacity
In the Stone case, the Supreme Court also upheld the grant of summary judgment admitting a will signed by testator just two days before death while she was in intensive care. The witnesses were two lawyers and a paralegal, all of whom offered affidavits in support of testamentary capacity and validity of will. The Court held that mere speculation that the decedent might have experienced side effects from drugs is insufficient even to overcome a summary judgment motion. The Court found that reasonableness of disposition bolstered the claim of testamentary capacity.\footnote{Strong v. Holden, 287 Ga. 482 (2010).}

2.6 Self-Proved Wills
Although it is the better practice, the failure to include witnesses' names in the notary's certificate contained in a self-proving affidavit does not invalidate the affidavit, since the affidavit substantially complies in form and content with statutory example of self-
proving affidavit.\textsuperscript{120} In \textit{Auito}, the Supreme Court said that by signing and sealing the certificate, the notary had attested that the “witnesses” had sworn and subscribed to the statement of facts before notary, and the unnamed witnesses to whom notary’s certificate referred were easily identifiable, they having signed the lines designated “witness” appearing below the statement of facts and just above the notary’s certificate.\textsuperscript{121}

4.0 FILING OF WILL IN PROBATE COURT

4.1 Obligation of Person in Possession of Will to File with the Court

4.1.1 Citation to produce Will

There is no standard form for the Citation or Rule Nisi to be issued by the court to a person alleged to be in possession of a decedent’s Will. A Motion must be filed by someone alleging that another is in possession of the Will of a decedent. The court will then issue a Citation or Rule Nisi to such person, requiring him/her to show cause why s/he will not or cannot produce the Will of the Decedent. A suggested form is appended hereto as \textbf{APPENDIX A3-5}.

5.0 PROBATE PROCESS AND PROCEDURE

5.1 Probate Process Generally

The Supreme Court recently affirmed that the sole question in a proceeding to probate a will in solemn form is whether the document propounded is, or is not, the last will and testament of the deceased. The result turns on three issues: (1) whether the document was properly executed, (2) whether the testator had the mental capacity to execute a will, and (3) whether the document was the result of undue influence, fraud, duress, or mistake.\textsuperscript{122}

5.2 Proof of the Will

5.2.1 Proof by Witnesses

The Supreme Court has held that a propounder failed to meet his burden to prove the Will, when, with regard to the three witnesses, propounder proved death of one, alleged that the second could not be located, and produced only one to testify. The testifying witness stated that he had seen the testator a couple of times, did not remember witnessing the will, and did not think the signature was that of testator. The probate court had ruled that the propounder “failed to meet the requirements to produce the testimony of all subscribing

\begin{footnotesize}
\textsuperscript{120} \textit{Auito v. Auito}, 288 Ga. 443 (2011).
\textsuperscript{121} Id.
\end{footnotesize}
witnesses and the one subscribing witness’ testimony did not prove proper execution and attestation of the will.” The Supreme Court affirmed the ruling of the probate court in that propounder failed to prove the signatures of the missing witnesses (O.C.G.A. §53-5-21) and failed to prove the signature of testator through two credible, disinterested witnesses identifying testator’s signature (O.C.G.A. §53-5-24.). The Supreme Court held further that the record shows that propounder failed to prove by a preponderance of the evidence that the signature to the will was in the testator’s handwriting.  

**5.3 Offering a Copy of a Will for Probate**

Even if a caveat does not specifically allege that probate should be denied because only a copy is propounded, and not the original, or even if no objection is filed, it is always the burden of the propounder to rebut the presumption of revocation arising from the inability to locate the original will.  

**5.7 Caveats and Objections**

An heir or other interested party having standing may file an objection to the probate of a document offered as the purported will of a decedent. Other “interested parties” could include beneficiaries and/or nominated executors under another purported will of the decedent and any person who will be adversely affected by the probate of the will. Nonetheless, the caveator must have “standing” to contest the probate of an alleged will. The question of who has standing to contest a will may be determined on a case-by-case basis. A person who would be injured by the probate of the will or who would benefit by its not being probated has standing. In *Gober*, the father of a minor, contingent beneficiary under the will of the decedent filed a caveat to the proffered will. The Supreme Court affirmed the dismissal of the caveat by the probate court, which found that the minor would actually be harmed by the denial of probate, since, through intestacy, the minor would not be an heir and would inherit nothing, while, through the will, the minor has an a potential benefit as a contingent beneficiary.  

The Supreme Court has affirmed the granting of a summary judgment in the trial (superior court on appeal *de novo*), wherein the caveators had alleged that the proffered will was the subject of undue influence. The Motion and Response referred to depositions and

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125 See Section 5.7 in the Handbook.
127 Id.
attached affidavits, to which the Supreme Court looked in deciding that there was no genuine issue of fact on issue of undue influence. The proffered will was dated May 13, 2008, at which time a Power of Attorney and a Durable Power of Attorney for Health Care was given by testator to one son (the alleged influencer). On May 27, 2008, the agent changed POD beneficiaries on the testator’s CDs from all four of testator’s children to himself only. Using the DPOHC, the son/agent moved testator from south Georgia to north Georgia, where son/agent lived. The Supreme Court held: “However, even assuming that such evidence would support a finding of undue influence after the will was executed, they (sic) do not support a finding that the son/agent exercised undue influence regarding testator’s making of the May 27, 2008, will.”

After the Supreme Court had affirmed a judgment that the testator’s will was not the subject of undue influence or lack of testamentary capacity, a caveator filed suit in superior court seeking to enforce an alleged contract to make a will. The Court of Appeals affirmed the trial court’s denial of the claim for want of proof of a valid and enforceable contract and for want of a written contract as required under O.C.G.A. §53-4-30 of the 1998 Probate Code.

6.0 EXECUTORS AND ADMINISTRATORS WITH WILL ANNEXED

6.12 Powers Incorporated by Reference to Statute

In 2010, the General Assembly passed S.B. 131 which completely re-wrote and revised Chapter 12 of Title 53, creating “The Revised Georgia Trust Code of 2010.” The new Trust Code applies to all trusts regardless of the date such trusts were created, “except to the extent it would impair vested rights and except as otherwise provided by law.” Former Chapter 12 of Title 53 was repealed entirely.

The powers which were formerly listed in Code Section 53-12-232 are now listed in Code Section 53-12-261, and the authority to incorporate any or all such powers in a will are

128 Simmons et al v. Norton et al, 290 Ga. 223 (2011). This author does not fully agree with this decision. I would find it hard to grant a summary judgment in an “undue influence” case. Prior case law has held that evidence of undue influence is almost always circumstantial. [A malpractice case was filed against the losing attorney by his clients, and I should disclose that I served as a consultant to the attorney for the malpractice insurer. This gave me the benefit of having read all of the depositions and affidavits. Admittedly, the caveators had a heavy burden in proving the alleged undue influence, and the will certainly may have been upheld by a jury.]
131 O.C.G.A. §53-12-1(a).
132 O.C.G.A. §53-12-1(b).
now in Code Section 53-12-263. However, the new Trust Code provides that wills which contain a reference to former Code Section 53-12-232 or earlier statutory provisions shall remain effective notwithstanding the repeal of the former Trust Code.

6.20 Distributions under the Will

6.20.1 In General

All property which a testator acquires after having made a will also passes under the will if the provisions of the will are sufficiently broad to include the property. Presumably, a well written residuary clause which makes a broad reference to any property not otherwise disposed of by the will would be sufficiently broad to cover after-acquired property. Nonetheless, if the testator’s intent to dispose of the residue can be determined from the context of the will, it will be given effect.

6.20.2 Specific devise or bequest

A specific devise or bequest must describe the property sufficiently to be clearly identified. The Supreme Court affirmed a summary judgment by the trial court holding that a description of a parcel of real estate devised must be to the required degree of certainty. The will involved devised a tract of land, excepting “one acre of land upon which my residence is located,” which was devised to another person. The Court held that the will fails to furnish a key by which the excepted portion may be sufficiently identified with the aid of extrinsic evidence; when there is no such “key,” the devise fails as a matter of law and extrinsic evidence may not be used to aid the identification. The Court said that the excepted parcel could be a square, rectangle, or even a circle; the will fails to tell something about the configuration of the land described. Since the one-acre tract was not sufficiently identified, the Court held that the entire devise of the property fails.

6.23 Will Interpretation and Construction

6.23.1 Trial of Construction Issues by Article 6 Probate Courts

In anticipation of the expiration of the federal estate and generation-skipping transfer tax provisions on January 1, 2010 and recognizing the uncertainty of whether new tax provisions would be passed by Congress before January 1, 2011 and how any such provisions might affect the construction of wills drafted pursuant to the former tax law, the Supreme Court affirmed a summary judgment by the trial court holding that a description of a parcel of real estate devised must be to the required degree of certainty.

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133 O.C.G.A. §53-12-263.
134 O.C.G.A. §53-12-263(d).
135 See Section 6.20.1 in the Handbook.
138 Id.
laws, new Code Section 53-4-75 was passed in 2010. This new Code Section provides that, in construing wills of decedents who die after December 31, 2009 and before the effective date of any new federal estate and generation-skipping transfer tax provisions, the will provisions will be deemed to refer to the tax laws as they applied on or before December 31, 2009.\(^{139}\)

The Supreme Court has held that the phrase “only the lawful blood descendents” used as part of the definition in a will of “children” did not include an out-of-wedlock child of the testator, thereby ruling that such illegitimate child did not inherit under the will of the decedent. The Supreme Court affirmed the grant of summary judgment to that effect in the trial court. A dissenting opinion criticizes the very narrow interpretation of the phrase by the majority and would hold that the issue remains one of fact as to the testator’s intent, which should have been tried before a finder of fact. Interestingly, both the majority and the dissenters recognized that, had the decedent died intestate, the child likely could have inherited as an heir, given evidence of the decedent’s acknowledgment of the appellant as his daughter.\(^{140}\)

In a recent case, the Supreme Court reaffirmed precedent that the declaratory judgment statute should be liberally construed when adjudging the right of an interested party to seek the direction of a court. Although the case involved the interpretation of an \textit{inter vivos} trust, the Court addressed the construction issue analogous to a will construction.\(^{141}\)

The testator’s will declared that his estate be bequeathed: “to my eight (8) children, per stirpes, to be distributed among my children as and in the manner my Executor, in his or her sole discretion, determines to be fair and reasonable … In the event that any person to whom a particular item of personal property is to be left should predecease me, or does not desire to receive such item, such item shall either become a part of my residuary estate or shall be distributed as my Executrix determines using her best judgment, which shall be binding on all my heirs and beneficiaries.” Executor had

\(^{139}\) O.C.G.A. §53-4-75.
instructed annuity payee to make all future annuity payments due to her personally to the exclusion of the other seven children. Article 6 Probate Court construed the will to mean testator’s intent was to have his 8 children share equally and that the discretionary language referred to selecting the items to make up a child’s share. The Supreme Court affirmed, concluding (as did the probate court) that the testator’s will clearly indicates that the children (all 8) are the primary legatees to receive an equal share “by the stirps.”

See also the Georgia Probate Court Benchbook.

CHAPTER 4
APPOINTMENT OF ADMINISTRATORS, TEMPORARY ADMINISTRATORS,
AND COUNTY ADMINISTRATORS

2.0 PETITION FOR LETTERS OF ADMINISTRATION [GPCSF 3]

2.3 Waiver of Bond and Returns and Grant of Certain Powers by Consent of Heirs

In 2010, the General Assembly passed S.B. 131 which completely re-wrote and revised Chapter 12 of Title 53, creating “The Revised Georgia Trust Code of 2010.” The new Trust Code applies to all trusts regardless of the date such trusts were created, “except to the extent it would impair vested rights and except as otherwise provided by law.” Former Chapter 12 of Title 53 was repealed entirely.

The powers which were formerly listed in Code Section 53-12-232 are now listed in Code Section 53-12-261, and granting of any or all such powers to an administrator should refer to the new Code Section. The requirements of unanimous consent and publication have not been changed.

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143 O.C.G.A. §53-12-1(a).
144 O.C.G.A. §53-12-1(b).
145 O.C.G.A. §53-7-1(b).
CHAPTER 5
POWERS AND DUTIES OF PERSONAL REPRESENTATIVES AND TEMPORARY ADMINISTRATORS

1.0 DUTIES OF PERSONAL REPRESENTATIVES

1.5 Payment of Debts; Suits against Personal Representatives/Six Month Exemption

An “estate” is not a legal entity which can be a party to legal proceedings. The right to bring or defend an action resides in the estate’s personal representative(s). The probate court where the appointment is made retains jurisdiction over the personal representative until the accounting and settlement is completed. Venue for actions against the personal representative must be brought in the county of the personal representative’s domicile; except, however, that venue in actions for accounting, settlement, and/or removal remains in the appointing probate court.

5.0 RETURNS AND REPORTS BY PERSONAL REPRESENTATIVES

5.1 Inventory

5.1.1 Relief from Filing Inventory

In 2010, the General Assembly passed S.B. 131 which completely re-wrote and revised Chapter 12 of Title 53, creating “The Revised Georgia Trust Code of 2010.” The new Trust Code applies to all trusts regardless of the date such trusts were created, “except to the extent it would impair vested rights and except as otherwise provided by law.” Former Chapter 12 of Title 53 was repealed entirely.

The powers which were formerly listed in Code Section 53-12-232 are now listed in Code Section 53-12-261, and granting of any or all such powers to an administrator should refer to the new Code Section. The requirements of unanimous consent and publication have not been changed.

147 O.C.G.A. §53-7-61.
149 O.C.G.A. §53-12-1(a).
150 O.C.G.A. §53-12-1(b).
151 O.C.G.A. §53-7-1(b).
5.2 Returns

5.2.1 Relief from Filing Returns

See Section 5.1.1 above.

While heirs, beneficiaries, and persons with a then present interest in the estate or the court may enforce the requirement of the filing of an Inventory, the Court of Appeals has ruled that a creditor that shows only a potential for injury and not an actual injury may not enforce the filing of an inventory by (a) personal representative(s) relieved from filing.152

5.7 Settlement, Removal, Resignation and Discharge

5.7.1 Final Settlement of Accounts before Judge of the Probate Court

While confirming that when, in the course of proceedings for final settlement, a question of construction of a will arises, the issue must be transferred to superior court (except in Article 6 Probate Courts), the Court of Appeals continues to bolster (and, perhaps, broaden) the authority of probate courts to “resolve all issues” in such proceedings.153 In Long, the will of the decedent gave instructions about the use of retirement account proceeds; however, the decedent had named a former executor as the sole beneficiary of the retirement account through his employer. In ruling on the petition for final settlement, the probate court found that the retirement proceeds were not part of the estate, and that, notwithstanding the language in the will, the funds belonged to the beneficiary. In upholding the probate court’s decision, the Court of Appeals held that this determination was not one of construction of the will; further, the Court held that the decision also was not an impermissible determining of title to real or personal property, because the resolution of the issue was a part of the final settlement.154

5.8 Breach of Fiduciary Duty by and Removal of Personal Representatives

The Supreme Court upheld in part and reversed in part grants of summary judgment to trustee of testamentary trust and temporary administrator serving after resignation of executor. Trial court had found executor guilty of breach of fiduciary duty, holding that he can be held liable for damages and for attorneys’ fees and litigation expenses. The Supreme Court held that whether action of an estate’s personal representative constitutes a breach of fiduciary duty can be decided as a matter of law; however, the question whether fees and

154 Id.
expenses could be awarded is a question of fact. 155

CHAPTER 7
NO ADMINISTRATION NECESSARY
(DISPENSING WITH ADMINISTRATION)

1.0  NO ADMINISTRATION, GENERALLY

1.1  Petition for Order Declaring No Administration Necessary  [GPCSF 9]

A question has arisen concerning the legality of an Agreement in a No Administration Necessary which distributes property to non-heirs. The Code provides that “the heirs have agreed upon a division of the estate among themselves. The agreement signed by all the heirs of the decedent is necessary."\(^{156}\)

The author finds no Georgia case law addressing the issue of distribution to others than heirs. However, unanimous consent to the agreement is required,\(^ {157}\) and, presumably, if all of the heirs consent to an agreement under which property of the decedent is distributed to non-heirs or to entities, the right to object to such an agreement lies only with the heirs and any unpaid creditors.\(^ {158}\) Hence, if there are no unpaid creditors, there should be no reason for the court to object to the distribution unanimously agreed upon.

\(^{156}\) O.C.G.A. §53-2-40(b).

\(^{157}\) Id.

\(^{158}\) O.C.G.A. §53-2-41(b).
CHAPTER 8
RULES OF INHERITANCE AND JUDICIAL DETERMINATION OF HEIRS;
DISPOSITION OF REMAINS

3.0 Special Rules of Interpretation

3.7 Common Law Marriage

There are no statutes or cases setting a minimum time period before an alleged “common law marriage” takes effect. In order for a common law marriage to come into existence, the parties must be able to contract, must agree to live together as man and wife, and must consummate the agreement. All three of these elements as set forth in OCGA § 19-3-1 must be met simultaneously.” Further, a legal marital relationship cannot be partial or periodic.  

6.0 DISPOSITION OF REMAINS

6.1 Directions by person prior to death

By entering into a preneed funeral contract, a person 18 years of age or older, may direct the location, manner, and conditions of the disposition of his/her remains, as well as the arrangement for funeral goods and services. The disposition directions and funeral prearrangements cannot be cancelled or substantially revised by anyone except a person designated in the preneed contract as a person with such authority, unless the resources set aside to fund the preneed contract are insufficient under the terms of the contract to carry out the direction and arrangements.

6.2 Person(s) holding right to direct disposition

In the absence of a preneed contract, and except as provided below, the right to control the disposition of the remains of a deceased person; the location, manner, and conditions of disposition; and arrangements for funeral goods and services to be provided vests in the following, in the order named, provided that such person is 18 years or older and is of sound mind:

(1) The health care agent, as defined in Code Section 31-32-2;

(1.1) If the deceased person died while serving in any branch of the United States Armed Forces as defined in 10 U.S.C. Section 148, the person, if any, designated by the deceased person as authorized to direct disposition as listed on the deceased

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160 O.C.G.A. §31-21-7(a).
person's United States Department of Defense Record of Emergency Data, DD Form 93, or any similar successor form adopted by the Department of Defense;

(2) (A) A person designated by the decedent as the person with the right to control the disposition in an affidavit executed in accordance with subparagraph (B) of this paragraph.

(B) A person who is 18 years of age or older and of sound mind wishing to authorize another person to control the disposition of his or her remains may execute an affidavit before a notary public in substantially the following form:

"State of Georgia
County of ______________

I, ______________, do hereby designate ______________ with the right to control the disposition of my remains upon my death. I ____ have ____ have not attached specific directions concerning the disposition of my remains with which the designee shall substantially comply, provided that such directions are lawful and there are sufficient resources in my estate to carry out the directions.

Subscribed and sworn to before me this ___ day of the month of __________ of the year __.

________________________ (signature of affiant)

________________________ (signature of notary public)"

(3) The surviving spouse of the decedent;

(4) The sole surviving child of the decedent or, if there is more than one child of the decedent, the majority of the surviving children; provided, however, that less than one-half of the surviving children shall be vested with the rights under this Code section if they have used reasonable efforts to notify all other surviving children of their instructions and are not aware of any opposition to those instructions on the part of more than one-half of all surviving children;

(5) The surviving parent or parents of the decedent. If one of the surviving parents is absent, the remaining parent shall be vested with the rights and duties under this Code section after reasonable efforts have been unsuccessful in locating the absent surviving parent;

(6) The surviving brother or sister of the decedent or, if there is more than one sibling of the decedent, the majority of the surviving siblings; provided, however, that less
than the majority of surviving siblings shall be vested with the rights and duties under this Code section if they have used reasonable efforts to notify all other surviving siblings of their instructions and are not aware of any opposition to those instructions on the part of more than one-half of all surviving siblings;

(7) The surviving grandparent of the decedent or, if there is more than one surviving grandparent, the majority of the grandparents; provided, however, that less than the majority of the surviving grandparents shall be vested with the rights and duties under this Code section if they have used reasonable efforts to notify all other surviving grandparents of their instructions and are not aware of any opposition to those instructions on the part of more than one-half of all surviving grandparents;

(8) The guardian of the person of the decedent at the time of the decedent's death if one had been appointed;

(9) The personal representative of the estate of the decedent;

(10) The person in the classes of the next degree of kinship, in descending order, under the laws of descent and distribution entitled to inherit the estate of the decedent. If there is more than one person of the same degree, any person of that degree may exercise the right of disposition;

(11) If the disposition of the remains of the decedent is the responsibility of the state or a political subdivision of the state, the public officer, administrator, or employee responsible for arranging the final disposition of decedent's remains; or

(12) In the absence of any person under paragraphs (1) through (11), any other person willing to assume the responsibilities to act and arrange the final disposition of the decedent's remains, including the funeral director with custody of the body, after attesting in writing that a good faith effort has been made to no avail to contact the individuals under paragraphs (1) through (11).\footnote{O.C.G.A. §31-21-7(b).}

### 6.2.1 Forfeiture of right to direct disposition

A person entitled under law to the right of disposition shall forfeit that right, and the right is passed on to the next qualifying person as listed above, in the following circumstances:

(1) Any person charged with murder or voluntary manslaughter in connection with the decedent's death and whose charges are known to the funeral director; provided,
however, that, if the charges against such person are dismissed or if such person is acquitted of the charges, the right of disposition is returned to the person;

(2) Any person who does not exercise his or her right of disposition within two days of notification of the death of decedent or within three days of decedent's death, whichever is earlier;

(3) If the person and the decedent are spouses and a petition to dissolve the marriage was pending at the time of decedent's death; or

(4) Where the probate court pursuant to subsection (d) of this Code section determines that the person entitled to the right of disposition and the decedent were estranged at the time of death. For purposes of this Code section, the term "estranged" means a physical and emotional separation from the decedent at the time of death which has existed for a period of time that clearly demonstrates an absence of due affection, trust, and regard for the decedent.\footnote{O.C.G.A. §31-21-7(c).}

### 6.3 Probate Court proceedings

The probate court for the county where the decedent resided may award the right of disposition to the person determined by the court to be the most fit and appropriate to carry out the right of disposition and may make decisions regarding the decedent's remains if those sharing the right of disposition cannot agree. The following provisions shall apply to the court's determination under this subsection:

(1) If the persons holding the right of disposition are two or more persons with the same relationship to the decedent and they cannot, by majority vote, make a decision regarding the disposition of the decedent's remains, any of such persons or a funeral home with custody of the remains may file a petition asking the probate court to make a determination in the matter;

(2) In making a determination under this subsection, the probate court shall consider the following:

   (A) The reasonableness and practicality of the proposed funeral arrangements and disposition;

   (B) The degree of the personal relationship between the decedent and each of the persons claiming the right of disposition;

   (C) The desires of the person or persons who are ready, able, and willing to

\footnote{O.C.G.A. §31-21-7(c).}
pay the cost of the funeral arrangements and disposition;
(D) The convenience and needs of other families and friends wishing to pay respects;
(E) The desires of the decedent; and
(F) The degree to which the funeral arrangements would allow maximum participation by all wishing to pay respect.

NOTE: The Code Section contains no provisions about notice. However, due process would require notice in some manner to the parties involved. Notice should be given to each of the following who is/are not the petitioner(s): the funeral home director; the personal representative(s) of the decedent’s estate, if any; and the persons believed to hold the right of disposition of equal priority who have been unable to make a majority decision. Given the 2 – 3 day loss of priority for inaction, the Section seems to contemplate prompt action by the court. If practical, the matter should be heard within 10 days or less; notice should be made by direct contact by telephone if possible, and the contact information should be sought from the petitioner(s). If actual notice cannot be accomplished by telephone, the petitioner should be required to hand deliver written notice to the above persons not less than 3 days prior to a hearing.

Except to the degree it may be considered by the probate court, the fact that a person has paid or agreed to pay for all or part of the funeral arrangements and final disposition shall not give that person a greater claim to the right of disposition than the person would otherwise have. The personal representative of the estate of the decedent shall not, by virtue of being the personal representative, have a greater claim to the right of disposition than the person would otherwise have.

In the event of a dispute regarding the right of disposition, a funeral home shall not be liable for refusing to accept the remains or to inter or otherwise dispose of the remains of the decedent or complete the arrangements for the final disposition of the remains until the funeral home receives a court order or other written agreement signed by the parties in the disagreement that decides the final disposition of the remains. If the funeral home retains the remains for final disposition while the parties are in disagreement, the funeral home may embalm or refrigerate and shelter the body, or both, in order to preserve it while awaiting the
final decision of the probate court and may add the cost of embalming and/or refrigeration and sheltering to the final disposition costs. If a funeral home brings an action under this subsection, the funeral home may add the legal fees and court costs associated with a petition under this provision to the cost of final disposition. This may not be construed to require or to impose a duty upon a funeral home to bring such an action, and a funeral home and its employees shall not be held criminally or civilly liable for choosing not to bring such an action.\textsuperscript{163}

\section*{6.4 Liability of funeral home}

Any person signing a funeral service agreement, cremation authorization form, or any other authorization for disposition shall be deemed to warrant the truthfulness of any facts set forth therein, including the identity of the decedent whose remains are to be buried, cremated, or otherwise disposed of, and the party's authority to order such disposition. A funeral home shall have the right to rely on such funeral service agreement or authorization and shall have the authority to carry out the instructions of the person or persons the funeral home reasonably believes holds the right of disposition. The funeral home shall have no responsibility to contact or to independently investigate the existence of any next of kin or relative of the decedent. If there is more than one person in a class who are equal in priority and the funeral home has no knowledge of any objection by other members of such class, the funeral home shall be entitled to rely on and act according to the instructions of the first such person in the class to make funeral and disposition arrangements, provided that no other person in such class provides written notice of his or her objections to the funeral home.\textsuperscript{164}

If a funeral establishment or funeral director relies in good faith upon the instructions of an individual claiming the right of disposition pursuant the above and such individual is later determined to have falsely or fraudulently represented himself or herself as having such a right, the funeral establishment or funeral director shall not be subject to criminal or civil liability or subject to disciplinary action for carrying out the disposition of the remains in accordance with such instructions.\textsuperscript{165}

\textsuperscript{163} O.C.G.A. §31-21-7(d).
\textsuperscript{164} O.C.G.A. §31-21-7(e).
\textsuperscript{165} O.C.G.A. §31-21-7(f).
CHAPTER 10
GUARDIANS AND CONSERVATORS OF MINORS; PROBATE JUDGES AS CUSTODIANS OF CERTAIN FUNDS; VA GUARDIANS; TRANSFERS TO MINORS; AND EMANCIPATION OF MINORS
PART I. GUARDIANS AND CONSERVATORS OF MINORS

3.0 TESTAMENTARY GUARDIANS AND CONSERVATORS

3.1 Testamentary Guardians

Every parent, by will, may nominate a testamentary guardian for that parent’s minor child. The Court of Appeals has confirmed that language directing the issuance of Letters of Testamentary Guardianship without notice or hearing is valid and mandatory as being within the constitutional rights of parents. The Court also ruled that an attempt to remove a testamentary guardian by the filing of a custody petition in superior court was beyond the subject matter jurisdiction of the superior court, as exclusive jurisdiction lies in probate court. Additionally, the Court ruled that the probate court is not required to consider the best interest of the child(ren) prior to issuing Letters of Testamentary Guardianship.

3.1.1 Oath

There is no specific oath set forth in the Code to apply to Testamentary Guardians. It may be a good idea (best practice) to administer an oath to the Testamentary Guardian, in which case the oath required of guardians for minors should be used.

3.2 Testamentary Conservators

3.2.1 Oath

There is no specific oath set forth in the Code to apply to Testamentary Conservators. It may be a good idea (best practice) to administer an oath to the Testamentary Conservator, in which case the oath required of conservators for minors should be used.

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166 See Section 3.1 in the Handbook.
169 Id.
8.0 APPOINTMENT OF TEMPORARY GUARDIANS

8.5 Termination of Temporary Guardianship or Referral

If no objection to a petition to terminate a temporary guardianship is filed by the temporary guardian within ten days of notice, the judge of the probate court must order the termination of the temporary guardianship. If an objection is filed within ten days, the judge has the option to hear the objection or to transfer the records relating to the temporary guardianship to the juvenile court, which must determine, after notice and hearing, whether a continuation or termination of the temporary guardianship is in the best interest of the minor and issue an order accordingly. The Supreme Court recently held that, when trying the issue of termination of a temporary guardianship on a petition filed by a biological parent, the temporary guardian must prove (in juvenile court or probate court) by clear and convincing evidence that the child will suffer physical or emotional harm if the guardianship is terminated and that continuation of the guardianship is in the child’s “best interest.” The Court stated that, “by harm, we mean either physical harm or significant, long-term emotional harm; we do not mean merely social or economic disadvantages.”

8.6 Oath of Temporary Guardians

There is no specific oath for a temporary guardian of a minor, nor does there appear a specific requirement that an oath be given. However, the administering of an oath should help impress upon the temporary guardian the seriousness of the undertaking. Hence, the Rules and Forms Committee has included an appropriate and sufficient oath.

15.0 GUARDIANS APPOINTED BY OTHER COURTS OR AGENCIES

Senate Bill 134, which became effective upon the Governor’s signature on May 12, 2011, made changes to Chapter 9 of Title 34, correcting the references therein from “guardian” to “conservator” to correlate to the changes in terminology in Title 29.

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170 O.C.G.A. §29-2-8(b).
17. POWERS AND DUTIES OF A GUARDIAN OF A MINOR; RIGHTS OF MINOR

17.2 Powers and Authority of a Guardian of a Minor

17.2.1 Employment of Attorney by Guardian

It seems implicit that a guardian has the authority to employ an attorney to represent the guardian, in that capacity. The Code grants to a guardian the authority to “bring, defend, or participate in legal, equitable, or administrative proceedings, including alternative dispute resolution, as are appropriate for the support, care, education, health, or welfare of the minor in the name of or on behalf of the minor,” implying that a guardian may employ an attorney to do so.

18. POWERS AND DUTIES OF A CONSERVATOR OF A MINOR; RIGHTS OF MINOR

18.2 Powers and Authority of a Conservator of a Minor

18.2.1 Employment of Attorney by Conservator

It seems implicit that a conservator has the authority to employ an attorney to represent the conservator, in that capacity. The Code grants to a conservator the authority to:

“Enter into contracts for labor or services upon such terms as the conservator may deem best, but only to the extent that the annual compensation payable under such contracts when combined with other anticipated disbursements does not exceed the amount of the annual income or, if applicable, the annual budget amount which has been approved by the court pursuant to Code Section 29-3-30; and

“Bring, defend, or participate in legal, equitable, or administrative proceedings, including alternative dispute resolution, as are appropriate for the support, care, education, health, or welfare of the minor in the name of or on behalf of the minor,” implying that a conservator may employ an attorney to do so.

18.9 Investments

Subsection (12) of O.C.G.A. §29-3-32 relating to Bonds issued by the Georgia Building Authority (Penal), pursuant to Chapter 3 of Title 42, as authorized by Code Section 42-3-21 was repealed in the 2012 Session.
CHAPTER 11
GUARDIANS AND CONSERVATORS OF ADULT WARDS; PROBATE JUDGES AS CUSTODIANS OF CERTAIN FUNDS; GUARDIANS OF VETERANS; PROTECTION OF DISABLED ADULTS AND ELDER PERSONS; TEMPORARY HEALTH CARE PLACEMENT OF ADULTS; AND TEMPORARY MEDICAL CONSENT GUARDIANS FOR ADULTS

PART I. GUARDIANS AND CONSERVATORS OF ADULT WARDS
13. POWERS AND DUTIES OF A GUARDIAN OF A WARD; RIGHTS OF WARD; REVIEW AND MODIFICATION OF GUARDIANSHIPS

13.2 Rights and Privileges Removed by Guardianship

13.2.1 Effect on Powers of Attorneys

The appointment of a guardian or conservator does not terminate the authority of an agent under an advanced directive for health care unless the court provides otherwise (orders it revoked for cause).\textsuperscript{175}

On the other hand, the appointment of a conservator does terminate the authority of an agent under a non-health-care power of attorney unless the court provides otherwise (orders that it shall remain in effect).\textsuperscript{176}

So, your final order must specifically set forth the continuation or termination other than as provided by law.

13.3 Powers and Authority of a Guardian of a Ward

13.3.1 Employment of Attorney by Guardian

It seems implicit that a guardian has the authority to employ an attorney to represent the guardian, in that capacity. The Code grants to a guardian the authority to “bring, defend, or participate in legal, equitable, or administrative proceedings, including alternative dispute resolution, as are appropriate for the support, care, education, health, or welfare of the minor

\textsuperscript{175} O.C.G.A. §29-4-21, O.C.G.A. §31-32-(6).

\textsuperscript{176} O.C.G.A. §29-5-21, See also O.C.G.A. §10-6-36 and O.C.G.A. §31-32-6(c).
in the name of or on behalf of the minor,”^\textsuperscript{177} implying that a guardian may employ an attorney to do so.

14. **POWERS AND DUTIES OF A CONSERVATOR OF A WARD; RIGHTS OF WARD; MODIFICATIONS OF CONSERVATORSHIP**

14.3.1 **Employment of Attorney by Conservator**

It seems implicit that a conservator has the authority to employ an attorney to represent the conservator, in that capacity. The Code grants to a conservator the authority to:

“Enter into contracts for labor or services upon such terms as the conservator may deem best, but only to the extent that the annual compensation payable under such contracts when combined with other anticipated disbursements does not exceed the amount of the annual income or, if applicable, the annual budget amount which has been approved by the court pursuant to Code Section 29-3-30; and

“Bring, defend, or participate in legal, equitable, or administrative proceedings, including alternative dispute resolution, as are appropriate for the support, care, education, health, or welfare of the minor in the name of or on behalf of the minor,”^\textsuperscript{178} implying that a conservator may employ an attorney to do so.

14.10 **Investments**

Subsection (12) of O.C.G.A. §29-3-32 relating to Bonds issued by the Georgia Building Authority (Penal), pursuant to Chapter 3 of Title 42, as authorized by Code Section 42-3-21 was repealed in the 2012 Session.^\textsuperscript{179} It does not appear that a similar repeal was specifically made as to O.C.G.A. §29-5-32. However if the law authorizing the issuance of such bonds was repealed, it would likewise apply to the same provision concerning investments by conservators of wards.

16.0 **RETURNS AND REPORTS OF GUARDIANS AND CONSERVATORS; SANCTIONS**

16.5 **Interim and Final Settlements of the Accounts of Conservators; Discharge**

16.5.2 **Final Settlement and Discharge from Office and Liability [GPCSF 34]**

The Supreme Court has held that the provision requiring the appointment of a guardian-ad-litem when the conservator petitioning for discharge is also the personal

^\textsuperscript{177} O.C.G.A. §29-4-23(a)(3).

^\textsuperscript{178} O.C.G.A. §29-5-23(a)(3) and O.C.G.A. §29-5-23(a)(6).

^\textsuperscript{179} H.B. 942 2012 Session.
representative of a deceased former ward\textsuperscript{180} sufficiently protects the former ward and any who might be interested in the estate. Therefore, the Court ruled that a beneficiary under a purported will of the deceased former ward is not constitutionally entitled to actual notice of the former conservator’s petition for final settlement and discharge.\textsuperscript{181}

\textbf{PART VI. TEMPORARY MEDICAL CONSENT GUARDIAN FOR ADULTS}

\textbf{24.0 INTRODUCTION}

In 2010, the General Assembly passed S.B.367, which expanded the list of persons who may give medical consent for an adult not capable of giving informed consent. Further, the Act established a summary procedure for the temporary appointment of a person to give the consent on behalf of the adult when there are no persons within the expanded list available, able, and willing to act on behalf of the adult.

\textbf{24.1 Persons Authorized to Give Medical Consent}

In addition to such other persons as may be authorized and empowered, any one of the following persons is authorized and empowered to consent, either orally or otherwise, to any surgical or medical treatment or procedures not prohibited by law which may be suggested, recommended, prescribed, or directed by a duly licensed physician:

1. Any adult, for himself or herself, whether by living will, advance directive for health care, or otherwise;
2. Any person authorized to give such consent for the adult under an advance directive for health care or durable power of attorney for health care under Chapter 32 of this title;
3. In the absence or unavailability of a person authorized pursuant to paragraph (1.1) of this subsection, any married person for his or her spouse;
4. In the absence or unavailability of a living spouse, any parent, whether an adult or a minor, for his or her minor child;
5. Any person temporarily standing in loco parentis, whether formally serving or not, for the minor under his or her care; and any guardian, for his or her ward;
6. Any female, regardless of age or marital status, for herself when given in

\textsuperscript{180} O.C.G.A. §29-5-81(b).
connection with pregnancy, or the prevention thereof, or childbirth;
(6) Upon the inability of any adult to consent for himself or herself and in the absence of any person to consent under paragraphs (1.1) through (5) of this subsection, the following persons in the following order of priority:
   (A) Any adult child for his or her parents;
   (B) Any parent for his or her adult child;
   (C) Any adult for his or her brother or sister;
   (D) Any grandparent for his or her grandchild;
   (E) Any adult grandchild for his or her grandparent; or
   (F) Any adult niece, nephew, aunt, or uncle of the patient who is related to the patient in the first degree; or
(7) Upon the inability of any adult to consent for himself or herself and in the absence of any person to consent under paragraphs (1.1) through (6) of this subsection, an adult friend of the patient. For purposes of this paragraph, “adult friend” means an adult who has exhibited special care and concern for the patient, who is generally familiar with the patient's health care views and desires, and who is willing and able to become involved in the patient's health care decisions and to act in the patient's best interest. The adult friend shall sign and date an acknowledgment form provided by the hospital or other health care facility in which the patient is located for placement in the patient's records certifying that he or she meets such criteria.\textsuperscript{182}

Any person authorized and empowered to consent under the above provisions shall, after being informed of the provisions of the Code section, act in good faith to consent to surgical or medical treatment or procedures which the patient would have wanted had the patient understood the circumstances under which such treatment or procedures are provided. The person who consents on behalf of the patient in accordance with these provisions shall have the right to visit the patient in accordance with the hospital or health care facility's visitation policy.\textsuperscript{183}

For purposes of these provisions, the term “inability of any adult to consent for himself or herself” means a determination in the medical record by a licensed physician after the physician has personally examined the adult that the adult “lacks sufficient understanding

\textsuperscript{182} \textit{O.C.G.A. §31-9-2(a).}
\textsuperscript{183} \textit{O.C.G.A. §31-9-2(b).}
or capacity to make significant responsible decisions” regarding his or her medical treatment or the ability to communicate by any means such decisions.\textsuperscript{184}

No hospital or other health care facility, health care provider, or other person or entity shall be subject to civil or criminal liability or discipline for unprofessional conduct solely for relying in good faith on any direction or decision by any person reasonably believed to be authorized and empowered to consent under the foregoing provisions even if death or injury to the patient ensues. Each hospital or other health care facility, health care provider, and any other person or entity who acts in good faith reliance on any such direction or decision shall be protected and released to the same extent as though such person had interacted directly with the patient as a fully competent person. Further, no person authorized and empowered to consent under the foregoing provisions who, in good faith, acts with due care for the benefit of the patient, or who fails to act, shall be subject to civil or criminal liability for such action or inaction.\textsuperscript{185}

24.2 Implied Consent for Emergencies

In addition to any instances in which medical consent is excused or implied at law, consent to surgical or medical treatment or procedures suggested, recommended, prescribed, or directed by a duly licensed physician will be implied where an “emergency” exists. As used in the Code for these purposes, the term “emergency” means a situation wherein (1) according to competent medical judgment, the proposed surgical or medical treatment or procedures are reasonably necessary and (2) a person authorized to consent under Section 24.1 above is not readily available and any delay in treatment could reasonably be expected to jeopardize the life or health of the person affected or could reasonably result in disfigurement or impaired faculties.\textsuperscript{186}

24.3 Special Applicability Provisions

NOTE: For definitions of the requirements for “informed consent,” refer further to the specific provisions of Chapter 9 of Title 31.

The medical consent provisions above are applicable to the care and treatment of patients in facilities for the mentally ill as defined in paragraph (7) of Code Section 37-3-1.\textsuperscript{187} However, they do not apply in any manner whatsoever to abortion and sterilization procedures, which continue to be governed by existing law independently of the provisions.

\textsuperscript{184} O.C.G.A. §31-9-2(c).
\textsuperscript{185} O.C.G.A. §31-9-2(d).
\textsuperscript{186} O.C.G.A. §31-9-3.
\textsuperscript{187} O.C.G.A. §31-9-4.
The medical consent provisions above are to be liberally construed, and all relationships set forth above shall include the adoptive, foster, and step relations as well as blood relations and the relationship by common-law marriage as well as ceremonial marriage.

A consent by one person authorized and empowered to consent to surgical or medical treatment shall be sufficient.

Any person acting in good faith shall be justified in relying on the representations of any person purporting to give consent, including, but not limited to, his identity, his age, his marital status, his emancipation, and his relationship to any other person for whom the consent is purportedly given.

A consent to surgical or medical treatment which discloses in general terms the treatment or course of treatment in connection with which it is given and which is duly evidenced in writing and signed by the patient or other person or persons authorized to consent pursuant to the terms of Chapter 9 of Title 31 shall be conclusively presumed to be a valid consent in the absence of fraudulent misrepresentations of material facts in obtaining the same.\(^{189}\)

If a medical consent to a surgical or diagnostic procedure is required to be obtained and such consent is not obtained in writing in accordance with the requirements of Chapter 9 of Title 31, then no presumption shall arise as to the validity of such consent.\(^{190}\)

If a consent to a diagnostic or surgical procedure is required to be obtained under Chapter 9 of Title 31 and such consent discloses in general terms the information required in subsection 6.1(a) this Code section, is duly evidenced in writing, and is signed by the patient or other person or persons authorized to consent pursuant to the terms of Chapter 9, then such consent shall be rebuttably presumed to be a valid consent.\(^{191}\)

24.4  Proceedings for Appointment of a Medical Consent Guardian  [GPCSF 36]

24.4.1  Terminology

As used in Code section 29-4-18, the term:

(1) “Adult unable to consent” means a person 18 years of age or older who has been determined in his or her medical records by a licensed physician after the physician

\(^{188}\) O.C.G.A. §31-9-5.
\(^{189}\) O.C.G.A. §31-9-6.
\(^{190}\) O.C.G.A. §31-9-6.1(b)(1).
\(^{191}\) O.C.G.A. §31-9-6.1(b)(2).
has personally examined the adult that he or she lacks sufficient understanding or capacity to make significant responsible decisions regarding his or her medical treatment or the ability to communicate by any means such decisions.

(2) “Life-sustaining procedures” means medications, machines, or other medical procedures or interventions which, when applied to a medical consent ward in a terminal condition or in a state of permanent unconsciousness, could in reasonable medical judgment keep such medical consent ward alive but cannot cure the medical consent ward and where, in the judgment of the medical consent ward's primary treating physician and a second physician, death will occur without such procedures or interventions.

(3) “Medical consent ward” means a ward for whom the court has appointed a temporary medical consent guardian pursuant to Code section 29-4-18 for a limited time and only for the purposes of consenting to surgical or medical treatment or procedures not prohibited by law.

(4) “Proposed medical consent ward” means an adult unable to consent who is or has been a patient in a health care institution or of a health care provider.

(5) “State of permanent unconsciousness” means an incurable or irreversible condition in which the medical consent ward is not aware of himself or herself or his or her environment and in which such medical consent ward is showing no behavioral response to his or her environment.

(6) “Temporary medical consent guardian” means an individual appointed pursuant to the provisions of Code section 29-4-18 for a limited time and only for the purposes of consenting to surgical or medical treatment or procedures not prohibited by law.

(7) “Terminal condition” means an incurable or irreversible condition which would result in the medical consent ward's death in a relatively short period of time.\textsuperscript{192}

\textbf{24.4.2 Court Proceedings; the Petition}

In the absence, after reasonable inquiry, of a person authorized or willing to consent for the proposed medical consent ward under Section 24.1 above, any interested person, including the proposed medical consent ward, may file a petition for the appointment of a temporary medical consent guardian. The petition shall be filed in the probate court of the

\textsuperscript{192} O.C.G.A. §29-4-18(a).
county in which the proposed medical consent ward is domiciled or is found. The petition for appointment of a temporary medical consent guardian shall set forth:

1. A statement of the facts upon which the court's jurisdiction is based;
2. The name, address, and county of domicile of the proposed medical consent ward, if known;
3. The name, address, and county of domicile of the petitioner and the petitioner's relationship to the proposed medical consent ward;
4. A statement of the reasons the temporary medical consent guardian is sought, including:
   A. Facts that support the need for such guardian including facts that establish what medical decisions are needed and why those decisions are needed without undue delay;
   B. Facts that support the determination that the proposed medical consent ward lacks sufficient capacity to make or communicate medical treatment decisions; and
   C. The anticipated duration of the temporary medical consent guardianship;
5. The fact that no other person appears to have authority and willingness to act in the circumstances, whether under a power of attorney, trust, or otherwise;
6. The reason for any omission in the petition for an appointment of a temporary medical consent guardian in the event full particulars are lacking; and
7. Whether a petition for the appointment of a guardian or conservator has been filed or is being filed in conjunction with the petition for the appointment of the temporary medical consent guardian.

Upon the filing of a petition for a temporary medical consent guardian, the court shall review the petition to determine whether there is probable cause to believe that the proposed medical consent ward lacks decision-making capacity and is in need of a temporary medical consent guardian. If not, the court must dismiss the petition and provide the proposed medical consent ward with the order dismissing the petition.

If the court determines that there is probable cause to believe that the proposed medical consent ward is in need of a temporary medical consent guardian, the court shall
immediately:

(A) Appoint legal counsel to represent the proposed medical consent ward, which
counsel may be the same counsel who is appointed to represent such adult in the
hearing on the petition for guardianship, if any such petition has been filed, and the
court shall inform counsel of the appointment;

(B) Order a preliminary hearing to be conducted within 72 hours after the filing of the
petition; and

(C) Notify any proposed medical consent ward of any proceedings by service of all
pleadings on such proposed medical consent ward, which notice shall be served
personally on the proposed medical consent ward by a person specially appointed by
the court for such purpose and shall not be served by mail, and such notice shall
inform the proposed medical consent ward:

(i) That he or she has the right to attend any hearing that is held in connection with
the petition to appoint a temporary medical consent guardian;

(ii) That he or she may lose important rights to control the management of his or her
person if a temporary medical consent guardian is appointed;

(iii) That legal counsel has been appointed on his or her behalf; and

(iv) The date and time of the preliminary hearing on the petition to appoint a
temporary medical consent guardian.196

This law does not set forth the amount of time before the preliminary hearing is to be
held (within 72 hours) within which the proposed medical consent ward must be served. It
seems clear, however, that the use of the term “immediately” emphasized above and the fact
that this law contemplates an expedited proceeding, it is suggested that the proposed medical
consent ward be served by the specially appointed person as soon as practicably possible and
within 24 hours.

196 O.C.G.A. §24-4-18(d)(2).
Unless waived by the court, notice of the petition and the preliminary hearing shall also be served on the following persons who have not joined in the petition or otherwise consented to the proceedings:

(1) The administrator of the hospital or other health care facility where the proposed medical consent ward is located;
(2) The primary treating physician and other physicians believed to have provided any medical opinion or advice about any condition of the proposed medical consent ward relevant to the petition;
(3) All other persons the petitioner believes may have information concerning the expressed wishes of the proposed medical consent ward; and
(4) Any other persons as the court may direct.\(^\text{197}\)

Here, the law does not provide either the manner of service or the time frame. Service shall be affected in such manner and within such time as set forth in the court’s order for service. It is recommended that the person specially appointed to serve the proposed medical consent ward also serve the administrator of the facility, the physicians, if present at the facility, and any persons authorized to consent (See Section 24.1 above) found present at the facility, and that he/she make a return of service identifying all persons, in addition to the proposed medical consent ward, so served. It is recommended that service upon all others be affected in a manner believed to convey actual notice, preferably within 24 hours. For example, if the physician is not present at the facility when service is made on the proposed medical consent ward, the court should attempt to obtain an electronic mail (email) address or a facsimile number for the physician or his/her office and transmit a copy of the notice in such manner. When no manner of delivery or transmittal of a copy of the notice appears feasible, notice should be given by an employee of the court by telephone, if a telephone number is provided in the petition or can be obtained by the court prior to the preliminary hearing.

At the preliminary hearing, the court, in its discretion, shall:

(1) Appoint a temporary medical consent guardian;
(2) Order an evidentiary hearing to be conducted not later than four days after the preliminary hearing; or
(3) Dismiss the petition and provide the proposed medical consent ward with the order dismissing the petition.\(^\text{198}\)

\(^{197}\) O.C.G.A. §24-4-18(e).
\(^{198}\) O.C.G.A. §24-4-18(f).
If the court orders an evidentiary hearing, in addition to any other evidence presented to the court, the court may consider any case review by the hospital's or health care facility's ethics committee or subcommittee thereof or by any other ethics mechanism selected by the hospital or health care facility. If the court holds an evidentiary hearing, the court, in its discretion, shall either:

(1) Appoint a temporary medical consent guardian; or
(2) Dismiss the petition and provide the proposed medical consent ward with the order dismissing the petition.

24.4.3 Appointment and Authority of Medical Consent Guardian

The court shall have the authority to appoint as a temporary medical consent guardian any individual the court deems fit with consideration given to any applicable conflict of interest issues so long as such individual is: (1) willing and able to become involved in the proposed medical consent ward's health care decisions and (2) willing to exercise reasonable care, diligence, and prudence and to consent in good faith to medical or surgical treatment or procedures which the proposed medical consent ward would have wanted had he or she not been incapacitated. Note that only an individual may be appointed as a medical consent guardian. There appears to be no authority to appoint the Georgia Department of Human Services. This may present a very real practical problem to the court, unless a person authorized to consent (See Section 24.1 above) agrees to serve by court appointment. It may be advisable for courts in counties in which there is/are hospital(s) located in urban areas within the county to seek out one or more persons who would be willing to serve in advance of proceedings actually being filed.

Where the proposed medical consent ward's preferences are not known, the temporary medical consent guardian shall agree to act in the proposed medical consent ward's best interests. However, a temporary medical consent guardian shall not be authorized to withdraw life-sustaining procedures unless specifically authorized by the court pursuant to the Code.

24.4.4 Reliance on Decisions of Medical Consent Guardian; Liability

No hospital or other health care facility, health care provider, or other person or entity

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199 An evidentiary hearing is not mandatory. Presumably, it should be ordered when, at the preliminary hearing, there is insufficient evidence to support either to appointment of a medical consent guardian or to dismiss the case because the court finds that there is no need for a medical consent guardian.

200 O.C.G.A. §24-4-18(g).

201 O.C.G.A. §24-4-18(h).

202 O.C.G.A. §24-4-18(i).

203 Id.
shall be subject to civil or criminal liability or discipline for unprofessional conduct solely for relying in good faith on any direction or decision by a temporary medical consent guardian, even if death or injury to the medical consent ward ensues. Each hospital or other health care facility, health care provider, and any other person or entity who acts in good faith reliance on any direction or decision by a temporary medical consent guardian shall be protected and released to the same extent as though such person had interacted directly with the medical consent ward as a fully competent person.204

No temporary medical consent guardian who, in good faith, acts with due care for the benefit of the medical consent ward, or who fails to act, shall be subject to civil or criminal liability for such action or inaction.205

24.4.5 Withdrawing Life-Sustaining Treatment

Notwithstanding the statement in Section 24-4-18(i) that a medical consent guardian shall not be authorized “to withdraw life-sustaining procedures unless specifically authorized by the court pursuant to this Code section,” the Code section sets forth no procedure by which such authority is to be sought from the court, makes no provisions for service of notice, makes no provision for the appointment of a an attorney or guardian-ad-litem for the medical consent ward, and provides no criteria for the court to consider in deciding when a medical consent guardian should be authorized to terminate life-sustaining treatment.

The only reference in the law which may partially address the issue is subsection (l) of the Code section, which provides: “The Department of Community Health shall develop and make available a Physician Order for Life-sustaining Treatment (‘POLST’), a specific form voluntarily executed by a patient and his or her authorized representative and a physician which provides directions regarding end of life care.”207

24.4.6 Termination of Appointment of Medical Consent Guardian

The temporary medical consent guardianship shall terminate on the earliest of:

204 O.C.G.A. §24-2.18(k)(1).
205 O.C.G.A. §24-2.18(k)(2).
206 The “National POLST Paradigm” is a program instituted at the Oregon Heath & Science University. The program is designed to create a standard document, accepted nationwide, by which a physician can enter orders to apply to life-sustaining treatment outside a facility. Physicians have, for years, entered Do Not Resuscitate (“DNR”) orders in patient charts in treatment and/or care facilities. The program is designed to encourage states to enact specific laws authorizing physicians to execute these orders and to have them followed by first-responders, emergency medical facilities or wards, and other medical facilities. For more information on the program, visit the program’s site at www.ohsu.edu/polst/index.htm. On the site, Georgia is shown as a state “developing programs.” However, this reference is the only enactment to date of legislation concerning the issue in Georgia.
207 O.C.G.A. §24-4-18(l).
(1) The court’s removal of the temporary medical consent guardian;
(2) The effective date of the appointment of a permanent guardian;
(3) The duration of the current hospitalization of the medical consent ward or a substantially continuous stay in another health care facility; or
(4) Sixty days from the date of appointment of the temporary medical consent guardian.\textsuperscript{208}

Hence, the appointment of a medical consent guardian cannot extend beyond 60 days but will terminate earlier upon the occurrence of any of the other three conditions. The third condition may prove to be problematic. The proposed medical consent ward may not, at the time of the appointment of the medical consent guardian, be in a hospital. In fact, the consent given by the medical consent guardian may include the hospitalization of the medical consent ward, which would seem not to be a “current hospitalization.” Furthermore, “substantially continuous stay” is not quantified or limited. However, the 60-day maximum duration of the appointment may obviate any practical problems.

\textsuperscript{208} O.C.G.A. §24-4-18(j).
CHAPTER 13
VITAL RECORDS, LICENSES, PERMITS, AND CERTIFICATES OF RESIDENCE

PART II. MARRIAGE LICENSES

6.0 ISSUANCE OF LICENSES: APPLICATION AND LICENSE

6.1 Application and Supplement Report

The statute requires only that the application “must be verified by the oath of the applicants.”\textsuperscript{209} There is no requirement that the oath of verification must be before the judge or clerk. The approved form for the application shows that it may be taken before a notary public. [See also the reference material for Vital Records Custodians.]

6.6 License and Return

Pursuant to S. B. 238, as of July 1, 2010, governors and former governors of this State have been given authority to perform marriage ceremonies. Hence, licenses should be directed to “the Governor or any former Governor of this state, any judge, including judges of state and federal courts of record in this state, city recorder, magistrate, minister, or other person of any religious society or sect authorized by the rules of such society to perform the marriage ceremony.”\textsuperscript{210} All other provisions which apply to other persons authorized to perform marriage ceremonies apply also to governors and former governors.\textsuperscript{211}

PART III. WEAPONS CARRY LICENSES

NOTE: In 2010, Senate Bill 308 passed out of the General Assembly which rewrote and/or revised many of the provisions of law concerning owning, possessing, and carrying of firearms and other weapons. The name of the license authorizing the carrying of a concealed weapon was changed to “Georgia Weapons Carry License. The following replaces, in its entirety, all of Part III of Chapter 13 in the Handbook.

\textsuperscript{209} O.C.G.A. §19-3-33.
\textsuperscript{210} O.C.G.A. §9-3-30(c).
11.0 FIREARMS VIOLATIONS

11.1 Definitions\textsuperscript{212}

As used in this part, the term:

(1) "Handgun" means a firearm of any description, loaded or unloaded, from which any shot, bullet, or other missile can be discharged by an action of an explosive where the length of the barrel, not including any revolving, detachable, or magazine breech, does not exceed 12 inches; provided, however, that the term "handgun" shall not include a gun which discharges a single shot of .46 centimeters or less in diameter.

(2) "Knife" means a cutting instrument designed for the purpose of offense and defense consisting of a blade that is greater than five inches in length which is fastened to a handle.

(3) "License holder" means a person who holds a valid weapons carry license.

(4) "Long gun" means a firearm with a barrel length of at least 18 inches and overall length of at least 26 inches designed or made and intended to be fired from the shoulder and designed or made to use the energy of the explosive in a fixed:

(A) Shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger or from which any shot, bullet, or other missile can be discharged; or

(B) Metallic cartridge to fire only a single projectile through a rifle bore for each single pull of the trigger;

provided, however, that the term "long gun" shall not include a gun which discharges a single shot of .46 centimeters or less in diameter.

(5) "Weapon" means a knife or handgun.

(6) "Weapons carry license" or "license" means a license issued pursuant to Code Section 16-11-129.

11.2 Weapons Violations

11.2.1 Possession and carrying a concealed weapon; penalty for violating licensing requirement\textsuperscript{213}

Any person who is not prohibited by law from possessing a handgun or long gun may have or carry on his or her person a weapon or long gun on his or her property or inside his or her home, motor vehicle, or place of business without a valid weapons carry license.

\textsuperscript{212} O.C.G.A. §16-11-125.1
\textsuperscript{213} O.C.G.A. §16-11-126(a) – (i).
Any person who is not prohibited by law from possessing a handgun or long gun may have or carry on his or her person a long gun without a valid weapons carry license, provided that if the long gun is loaded, it shall only be carried in an open and fully exposed manner.

Any person who is not prohibited by law from possessing a handgun or long gun may have or carry any handgun provided that it is enclosed in a case and unloaded.

Any person who is not prohibited by law from possessing a handgun or long gun who is eligible for a weapons carry license may transport a handgun or long gun in any private passenger motor vehicle; provided, however, that private property owners or persons in legal control of property through a lease, rental agreement, licensing agreement, contract, or any other agreement to control access to such property shall have the right to forbid possession of a weapon or long gun on their property, except as provided in Code Section 16-11-135.

Any person licensed to carry a handgun or weapon in any other state whose laws recognize and give effect to a license issued pursuant to this part shall be authorized to carry a weapon in this state, but only while the licensee is not a resident of this state; provided, however, that such licensee shall carry the weapon in compliance with the laws of this state.


Any person with a valid hunting or fishing license on his or her person, or any person not required by law to have a hunting or fishing license, who is engaged in legal hunting, fishing, or sport shooting when the person has the permission of the owner of the land on which the activities are being conducted may have or carry on his or her person a handgun or long gun without a valid weapons carry license while hunting, fishing, or engaging in sport shooting.

Notwithstanding Code Sections 12-3-10, 27-3-1.1, 27-3-6, and 16-12-122 through 16-12-127, any person with a valid weapons carry license may carry a weapon in all parks, historic sites, or recreational areas, as such term is defined in Code Section 12-3-10, including all publicly owned buildings located in such parks, historic sites, and recreational areas, in wildlife management areas, and on public transportation; provided, however, that a person shall not carry a handgun into a place where it is prohibited by federal law.

No person shall carry a weapon without a valid weapons carry license unless he or she meets one of the exceptions to having such license as provided above.

A person commits the offense of carrying a weapon without a license when he or she violates the provisions of paragraph (1) of this subsection.

Upon conviction of the offense of carrying a weapon without a valid weapons carry license, a person shall be punished as follows:

(1) For the first offense, he or she shall be guilty of a misdemeanor; and

(2) For the second offense within five years, as measured from the dates of previous arrests for which convictions were obtained to the date of the current arrest for which a conviction is obtained, and for any subsequent offense, he or she shall be guilty of a felony and, upon conviction thereof, shall be imprisoned for not less than two years and not more than five years.

11.2.2 Carrying weapons in unauthorized locations; penalty

As used in this Code section, the term:

(1) "Bar" means an establishment that is devoted to the serving of alcoholic beverages for consumption by guests on the premises and in which the serving of food is only incidental to the consumption of those beverages, including, but not limited to, taverns, nightclubs, cocktail lounges, and cabarets.

(2) "Courthouse" means a building occupied by judicial courts and containing rooms in which judicial proceedings are held.

(3) "Government building" means:

   (A) The building in which a government entity is housed;
   (B) The building where a government entity meets in its official capacity; provided, however, that if such building is not a publicly owned building, such building shall be considered a government building for the purposes of this Code section only during the time such government entity is meeting at such building; or
   (C) The portion of any building that is not a publicly owned building that is occupied by a government entity.

(4) "Government entity" means an office, agency, authority, department, commission, board, body, division, instrumentality, or institution of the state or any county, municipal corporation, consolidated government, or local board of education within this state.

(5) "Parking facility" means real property owned or leased by a government entity,
courthouse, jail, prison, place of worship, or bar that has been designated by such
government entity, courthouse, jail, prison, place of worship, or bar for the parking of motor
vehicles at a government building or at such courthouse, jail, prison, place of worship, or
bar. 215

A person shall be guilty of carrying a weapon or long gun in an unauthorized location
and punished as for a misdemeanor when he or she carries a weapon or long gun while:
(1) In a government building;
(2) In a courthouse;
(3) In a jail or prison;
(4) In a place of worship;
(5) In a state mental health facility as defined in Code Section 37-1-1 which admits
individuals on an involuntary basis for treatment of mental illness, developmental
disability, or addictive disease; provided, however, that carrying a weapon or long
gun in such location in a manner in compliance with paragraph (3) of subsection (d)
of Code section 16-11-127 shall not constitute a violation of this subsection;
(6) In a bar, unless the owner of the bar permits the carrying of weapons or long guns
by license holders;
(7) On the premises of a nuclear power facility, except as provided in Code Section
16-11-127.2, and the punishment provisions of Code Section 16-11-127.2 shall
supersede the punishment provisions herein; or
(8) Within 150 feet of any polling place, except as provided in subsection (i) of Code
Section 21-2-413. 216

Except as provided in Code Section 16-11-127.1, a license holder or person
recognized under subsection (e) of Code Section 16-11-126 shall be authorized to carry a
weapon as provided in Code Section 16-11-135 and in every location in this state not listed in
subsection (b) of Code 16-11-127; provided, however, that private property owners or
persons in legal control of property through a lease, rental agreement, licensing agreement,
contract, or any other agreement to control access to such property shall have the right to
forbid possession of a weapon or long gun on their property, except as provided in Code
Section 16-11-135. A violation of these provisions shall not create or give rise to a civil

215 O.C.G.A. §16-11-127(a).
216 O.C.G.A. §16-11-127(b).
These provisions shall not apply: (1) to the use of weapons or long guns as exhibits in a legal proceeding, provided such weapons or long guns are secured and handled as directed by the personnel providing courtroom security or the judge hearing the case; (2) to a license holder who approaches security or management personnel upon arrival at a location described above and notifies such security or management personnel of the presence of the weapon or long gun and explicitly follows the security or management personnel's direction for removing, securing, storing, or temporarily surrendering such weapon or long gun; and (3) to a weapon or long gun possessed by a license holder which is under the possessor's control in a motor vehicle or is in a locked compartment of a motor vehicle or one which is in a locked container in or a locked firearms rack which is on a motor vehicle and such vehicle is parked in a parking facility.

11.2.3 Carrying weapons within school safety zones, at school functions, or on school property

As used in this Code section, the term:

(1) "School safety zone" means in or on any real property owned by or leased to any public or private elementary school, secondary school, or school board and used for elementary or secondary education and in or on the campus of any public or private technical school, vocational school, college, university, or institution of postsecondary education.

(2) "Weapon" means and includes any pistol, revolver, or any weapon designed or intended to propel a missile of any kind, or any dirk, bowie knife, switchblade knife, ballistic knife, any other knife having a blade of two or more inches, straight-edge razor, razor blade, spring stick, knuckles, whether made from metal, thermoplastic, wood, or other similar material, blackjack, any bat, club, or other bludgeon-type weapon, or any flailing instrument consisting of two or more rigid parts connected in such a manner as to allow them to swing freely, which may be known as a nun chahka, nun chuck, nunchaku, shuriken, or fighting chain, or any disc, of whatever configuration, having at least two points or pointed blades which is designed to be thrown or propelled and which may be known as a throwing star or oriental dart, or any weapon of like kind, and any stun gun or taser as defined in subsection (a) of Code Section 16-11-106. This paragraph excludes any of these instruments used for

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217 O.C.G.A. §16-11-127(c).
classroom work authorized by the teacher.\textsuperscript{218}

Except as otherwise provided below, it shall be unlawful for any person to carry to or to possess or have under such person's control while within a school safety zone or at a school building, school function, or school property or on a bus or other transportation furnished by the school any weapon or explosive compound, other than fireworks the possession of which is regulated by Chapter 10 of Title 25. Any license holder who violates this provision shall be guilty of a misdemeanor. Any person who is not a license holder who violates this subsection shall be guilty of a felony and, upon conviction thereof, be punished by a fine of not more than $10,000.00, by imprisonment for not less than two nor more than ten years, or both. Any person convicted of a violation of this provision involving a dangerous weapon or machine gun, as such terms are defined in Code Section 16-11-121, shall be punished by a fine of not more than $10,000.00 or by imprisonment for a period of not less than five nor more than ten years, or both. A child who violates this subsection may be subject to the provisions of Code Section 15-11-63.\textsuperscript{219}

The provisions of this Code section shall not apply to:

(1) Baseball bats, hockey sticks, or other sports equipment possessed by competitors for legitimate athletic purposes;

(2) Participants in organized sport shooting events or firearm training courses;

(3) Persons participating in military training programs conducted by or on behalf of the armed forces of the United States or the Georgia Department of Defense;

(4) Persons participating in law enforcement training conducted by a police academy certified by the Georgia Peace Officer Standards and Training Council or by a law enforcement agency of the state or the United States or any political subdivision thereof;

(5) The following persons, when acting in the performance of their official duties or when en route to or from their official duties:

(A) A peace officer as defined by Code Section 35-8-2;

(B) A law enforcement officer of the United States government;

(C) A prosecuting attorney of this state or of the United States;

(D) An employee of the Georgia Department of Corrections or a correctional facility operated by a political subdivision of this state or the United States who is authorized by the head of such correctional agency or facility to carry a

\textsuperscript{218} O.C.G.A. §16-11-127.1(a).

\textsuperscript{219} O.C.G.A. §16-11-127.1(b).
firearm;

(E) A person employed as a campus police officer or school security officer who is authorized to carry a weapon in accordance with Chapter 8 of Title 20; and

(F) Medical examiners, coroners, and their investigators who are employed by the state or any political subdivision thereof;

(6) A person who has been authorized in writing by a duly authorized official of the school to have in such person's possession or use as part of any activity being conducted at a school building, school property, or school function a weapon which would otherwise be prohibited by this provision. Such authorization shall specify the weapon or weapons which have been authorized and the time period during which the authorization is valid;

(7) A person who holds a valid weapons carry license or has been issued a permit pursuant to Code Section 43-38-10, when such person carries or picks up a student at a school building, school function, or school property or on a bus or other transportation furnished by the school or a person who holds such license or permit when he or she has any weapon legally kept within a vehicle when such vehicle is parked at such school property or is in transit through a designated school zone;

(8) A weapon possessed by a license holder which is under the possessor's control in a motor vehicle or which is in a locked compartment of a motor vehicle or one which is in a locked container in or a locked firearms rack which is on a motor vehicle which is being used by an adult over 21 years of age to bring to or pick up a student at a school building, school function, or school property or on a bus or other transportation furnished by the school, or when such vehicle is used to transport someone to an activity being conducted on school property which has been authorized by a duly authorized official of the school; provided, however, that this exception shall not apply to a student attending such school;

(9) Persons employed in fulfilling defense contracts with the government of the United States or agencies thereof when possession of the weapon is necessary for manufacture, transport, installation, and testing under the requirements of such contract;

(10) Those employees of the State Board of Pardons and Paroles when specifically designated and authorized in writing by the members of the State Board of Pardons and Paroles to carry a weapon;

(11) The Attorney General and those members of his or her staff whom he or she specifically authorizes in writing to carry a weapon;
(12) Probation supervisors employed by and under the authority of the Department of Corrections pursuant to Article 2 of Chapter 8 of Title 42, known as the "State-wide Probation Act," when specifically designated and authorized in writing by the director of the Division of Probation;

(13) Public safety directors of municipal corporations;

(14) State and federal trial and appellate judges;

(15) United States attorneys and assistant United States attorneys;

(16) Clerks of the superior courts;

(17) Teachers and other school personnel who are otherwise authorized to possess or carry weapons, provided that any such weapon is in a locked compartment of a motor vehicle or one which is in a locked container in or a locked firearms rack which is on a motor vehicle; or

(18) Constables of any county of this state.\(^{220}\)

This Code section shall not prohibit any person who resides or works in a business or is in the ordinary course transacting lawful business or any person who is a visitor of such resident located within a school safety zone from carrying, possessing, or having under such person's control a weapon within a school safety zone; provided, however, it shall be unlawful for any such person to carry, possess, or have under such person's control while at a school building or school function or on school property, a school bus, or other transportation furnished by the school any weapon or explosive compound, other than fireworks the possession of which is regulated by Chapter 10 of Title 25. Any person who violates this provision shall be subject to the penalties specified above. This subsection shall not be construed to waive or alter any legal requirement for possession of weapons or firearms otherwise required by law.\(^{221}\)

It shall be no defense to a prosecution for a violation of the above provision that:

(1) School was or was not in session at the time of the offense;

(2) The real property was being used for other purposes besides school purposes at the time of the offense; or

(3) The offense took place on a school vehicle.\(^{222}\)

In a prosecution under this section, a map produced or reproduced by any municipal

\(^{220}\) O.C.G.A. §16-11-127.1(c).
\(^{221}\) O.C.G.A. §16-11-127.1(d).
\(^{222}\) O.C.G.A. §16-11-127.1(e).
or county agency or department for the purpose of depicting the location and boundaries of
the area of the real property of a school board or a private or public elementary or secondary
school that is used for school purposes or the area of any campus of any public or private
technical school, vocational school, college, university, or institution of postsecondary
education, or a true copy of the map, shall, if certified as a true copy by the custodian of the
record, be admissible and shall constitute prima-facie evidence of the location and
boundaries of the area, if the governing body of the municipality or county has approved the
map as an official record of the location and boundaries of the area. A map approved under
this provision may be revised from time to time by the governing body of the municipality or
county. The original of every map so approved or revised or a true copy of such original
map shall be filed with the municipality or county and shall be maintained as an official
record of the municipality or county. This shall not preclude the prosecution from
introducing or relying upon any other evidence or testimony to establish any element of this
offense nor preclude the use or admissibility of a map or diagram other than the one which
has been approved by the municipality or county.\textsuperscript{223}

A county school board may adopt regulations requiring the posting of signs
designating the areas of school boards and private or public elementary and secondary
schools as "Weapon-free and Violence-free School Safety Zones."\textsuperscript{224}

\textbf{11.2.4 Weapons on premises of nuclear power facility}

Except as provided below, it shall be unlawful for any person to carry, possess, or
have under such person's control while on the premises of a nuclear power facility a weapon
or long gun. Any person who violates this subsection shall be guilty of a misdemeanor. Any
person who violates this provision with the intent to do bodily harm on the premises of a
nuclear power facility shall be guilty of a felony and, upon conviction thereof, shall be
punished by a fine of not more than $10,000.00, by imprisonment for not less than two nor
more than 20 years, or both. This Code section shall not apply to a security officer
authorized to carry dangerous weapons pursuant to Code Section 16-11-124 who is acting in
connection with his or her official duties on the premises of a federally licensed nuclear
power facility; nor shall this Code section apply to persons exempted from the “school safety
zones” prohibitions above.\textsuperscript{225}

\textsuperscript{223} O.C.G.A. §16-11-127.1(f).
\textsuperscript{224} O.C.G.A. §16-11-127.1(g).
\textsuperscript{225} O.C.G.A. §16-11-127.2.
11.3 Weapons Carry Licenses; temporary permits; mandamus

11.3.1 Application

The judge of the probate court of each county may, on application under oath and on payment of a fee of $30.00, issue a weapons carry license or renewal license valid for a period of five years to any person whose domicile is in that county or who is on active duty with the United States armed forces and who is not a domiciliary of this state but who either resides in that county or on a military reservation located in whole or in part in that county at the time of such application. Such license or renewal license shall authorize that person to carry any weapon in any county of this state notwithstanding any change in that person's county of residence or state of domicile.  Applicants shall submit the application for a weapons carry license or renewal license to the judge of the probate court on forms prescribed and furnished free of charge to persons wishing to apply for the license or renewal license.

An applicant who is not a United States citizen shall provide sufficient personal identifying data, including without limitation his or her place of birth and United States issued alien or admission number, as the Georgia Bureau of Investigation may prescribe by rule or regulation. An applicant who is in nonimmigrant status shall provide proof of his or her qualifications for an exception to the federal firearm prohibition pursuant to 18 U.S.C. Section 922(y).

Forms shall be designed to elicit information from the applicant pertinent to his or her eligibility under this section, including citizenship, but shall not require data which is not pertinent or is irrelevant, such as serial numbers or other identification capable of being used as a de facto registration of firearms owned by the applicant. The Department of Public Safety (“DPS”) shall furnish application forms and license forms required by law. The forms shall be furnished to each judge of each probate court within the state at no cost.

11.3.2 Licensing Exceptions

As used in this section, the term:

(A) "Controlled substance" means any drug, substance, or immediate precursor

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226 The use of the term “renewal license” defies the substantive provisions of the law. “Renewal” applications are processed in the same manner as original applications. Ed.
227 This means that a properly issued license remains valid, unless revoked, for the full five years, even if the licensee moves to another county in Georgia or to another state.
228 O.C.G.A. §16-11-129(a).
229 Id.
230 Id. DPS has not provided forms to the probate courts for many years; they have approved forms for use.
included in the definition of controlled substances in paragraph (4) of Code Section 16-13-21.

(B) "Convicted" means a plea of guilty or a finding of guilt by a court of competent jurisdiction or the acceptance of a plea of nolo contendere, irrespective of the pendency or availability of an appeal or an application for collateral relief.231

(C) "Dangerous drug" means any drug defined as such in Code Section 16-13-71.

No weapons carry license shall be issued to:

(A) Any person under 21 years of age;

(B) Any person who has been convicted of a felony by a court of this state or any other state; by a court of the United States including its territories, possessions, and dominions; or by a court of any foreign nation and has not been pardoned for such felony by the President of the United States, the State Board of Pardons and Paroles, or the person or agency empowered to grant pardons under the constitution or laws of such state or nation;

(C) Any person against whom proceedings are pending for any felony;

(D) Any person who is a fugitive from justice;

(E) Any person who is prohibited from possessing or shipping a firearm in interstate commerce pursuant to subsections (g) and (n) of 18 U.S.C. Section 922;

(F) Any person who has been convicted of an offense arising out of the unlawful manufacture or distribution of a controlled substance or other dangerous drug;

(G) Any person who has had his or her weapons carry license revoked pursuant to provisions set forth below;

(H) Any person who has been convicted of any of the following: (i) pointing a gun or a pistol at another in violation of Code Section 16-11-102, (ii) carrying a weapon without a weapons carry license in violation of Code Section 16-11-126, or (iii) carrying a weapon or long gun in an unauthorized location in violation of Code Section 16-11-127, and who has not been free of all restraint or supervision in connection therewith and free of any other conviction for at least five years immediately preceding the date of the application;

(I) Any person who has been convicted of any misdemeanor involving the use or possession of a controlled substance and has not been free of all restraint or supervision in connection therewith or free of: (i) a second conviction of any misdemeanor involving the use or possession of a controlled substance; or (ii) any conviction under subparagraphs (E)

231 O.C.G.A. §16-11-129(b)(1).
through (G) above for at least five years immediately preceding the date of the application; or

(J) Any person who has been hospitalized as an inpatient in any mental hospital or alcohol or drug treatment center within the five years immediately preceding the application. The judge of the probate court may require any applicant to sign a waiver authorizing any mental hospital or treatment center to inform the judge whether or not the applicant has been an inpatient in any such facility in the last five years and authorizing the superintendent of such facility to make to the judge a recommendation regarding whether the applicant is a threat to the safety of others and whether a license to carry a weapon should be issued. When such a waiver is required by the judge, the applicant shall pay a fee of $3.00 for reimbursement of the cost of making such a report by the mental health hospital, alcohol or drug treatment center, or the Department of Behavioral Health and Developmental Disabilities (“DBHDD”), which the judge shall remit to the hospital, center, or department. The judge shall keep any such hospitalization or treatment information confidential. It shall be at the discretion of the judge, considering the circumstances surrounding the hospitalization and the recommendation of the superintendent of the hospital or treatment center where the individual was a patient, to issue the weapons carry license or renewal license.\(^\text{232}\)

\(^{232}\) O.C.G.A. §16-11-129(b)(2).
In the opinion of the Editor, this provision concerning mental health records, reports and recommendations is particularly problematic. As of the effective date of this law, there was no legal requirement that a central database of mental health hospitalizations, voluntary or involuntary, be maintained by DBHDD (or the former Department of Human Resources), and the database maintained in Georgia is woefully incomplete. Unless the applicant discloses treatment, discovery of such treatment in Georgia is highly improbable; discovery of such treatment in other states is wholly dependent upon the accuracy and completeness of the records of other states’ databases. Voluntary treatment, alone, is not a federal prohibitor, while involuntary treatment is a federal prohibitor for life. Voluntary treatment as an inpatient within five years preceding an application, in any state, is a potential Georgia prohibitor; that is, issuance is in the judge’s discretion, considering the circumstances and any recommendation which a superintendent of a facility might give concerning the applicant’s “threat to the safety of others.” Since the rendering of such an opinion is entirely voluntary on behalf of the superintendent, or even the treating physician, for that matter, receiving any recommendation is also highly improbable.

If first offender treatment without adjudication of guilt for a conviction contained in subparagraph (F) or (I) above (i.e., arising out of the unlawful manufacture, distribution, use or possession of a controlled substance or dangerous drug) was entered and such sentence was successfully completed (i.e., discharged\textsuperscript{233} without adjudication of guilt) and such person has not had any other conviction\textsuperscript{234} since the completion of such sentence and for at least five years immediately preceding the date of the application, he or she shall be eligible for a weapons carry license provided that no other license exception applies.\textsuperscript{235}

11.3.3 Fingerprinting

Following completion of the application for a weapons carry license or the renewal of a license, the judge of the probate court shall require the applicant to proceed to an appropriate law enforcement agency in the county with the completed application. The appropriate local law enforcement agency in each county shall then capture the fingerprints of the applicant for the weapons carry license or renewal license and place the name of the applicant on the blank license form. The appropriate local law enforcement agency shall

\textsuperscript{233} Insist on a certified copy of the discharge, unless the criminal records report says the applicant was discharged.

\textsuperscript{234} It is unclear what is meant by “other conviction” in this subsection.

\textsuperscript{235} O.C.G.A. §16-11-129(b)(3).
place the fingerprint on a blank license form which has been furnished to the law enforcement agency by the judge of the probate court if a fingerprint is required to be furnished pursuant to these provisions. The law enforcement agency shall be entitled to a fee of $5.00 from the applicant for its services in connection with the application.\footnote{236}{O.C.G.A. §16-11-129(c).}

11.3.4 Investigation and Reports

For both weapons carry license applications and requests for license renewals, the judge of the probate court shall within five days following the receipt of the application or request direct the law enforcement agency to request a fingerprint based criminal history records check from the Georgia Crime Information Center and Federal Bureau of Investigation for purposes of determining the suitability of the applicant and return an appropriate report to the judge of the probate court. Fingerprints shall be in such form and of such quality as prescribed by the Georgia Crime Information Center and under standards adopted by the Federal Bureau of Investigation. The Georgia Bureau of Investigation may charge such fee as is necessary to cover the cost of the records search. For both weapons carry license applications and requests for license renewals, the judge of the probate court shall within five days following the receipt of the application or request also direct the law enforcement agency to conduct a background check using the Federal Bureau of Investigation's National Instant Criminal Background Check System and return an appropriate report to the probate judge.\footnote{237}{Id.}

When a person who is not a United States citizen applies for a weapons carry license or renewal of a license under this Code section, the judge of the probate court direct the law enforcement agency to conduct a search of the records maintained by the United States Bureau of Immigration and Customs Enforcement and return an appropriate report to the probate judge. As a condition to the issuance of a license or the renewal of a license, an applicant who is in nonimmigrant status shall provide proof of his or her qualifications for an exception to the federal firearm prohibition pursuant to 18 U.S.C. Section 922(y).\footnote{238}{Id.}

The law enforcement agency shall report to the judge of the probate court within 30 days, by telephone and in writing, of any findings relating to the applicant which may bear on his or her eligibility for a weapons carry license or renewal license under the terms these provisions. When no derogatory information is found on the applicant bearing on his or her
eligibility to obtain a license or renewal license, a report shall not be required. The law enforcement agency shall return the application and the blank license form with the fingerprint thereon directly to the judge of the probate court within such time period.239

The above “requirements” are also problematic for at least the following reasons:

1. The probate judge has no way of requiring the applicant to go immediately to the law enforcement agency (“LEA”);
2. If the applicant does not go to the LEA within five days, the judge cannot effectively direct the LEA to conduct the fingerprint search;
3. Neither the judge nor the LEA has authority to demand that the GBI, FBI, NICS, or ICE return reports within 30 days;
4. If all reports have not been received within 30 days, the LEA cannot return an appropriate report;
5. If the LEA is to determine whether the information in the reports is “derogatory,” the eligibility of the applicant, at least in part, is given to the LEA without the judge’s knowledge or input; and
6. Most applicants work, and many, if not most, have taken time off to come apply; they just might have to do the fingerprint part later.

11.3.5 Issuance of License

Not later than ten days after the judge of the probate court receives the report from the law enforcement agency concerning the suitability of the applicant for a license, the judge of the probate court shall issue such applicant a license or renewal license to carry any weapon unless facts establishing ineligibility have been reported or unless the judge determines such applicant has not met all the qualifications, is not of good moral character, or has failed to comply with any of the requirements contained in the Code section. The judge of the probate court shall date stamp the report from the law enforcement agency to show the date on which the report was received by the judge of the probate court.240

This “requirement” is more than simply problematic; it is, in the Editor’s opinion, an abuse of legislative power. In order to keep from getting sued (see “Mandamus” below), a probate judge may never attend an educational conference or class or take a vacation of nine days or longer; the judge may not have surgery which might require recuperation or rehabilitation in excess of nine days; if the judge is at home sick, he/she may have to require

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239 Id.
240 Id.
staff to bring licenses which must be issued to a facility or the judge’s home. Finally, the issuance of these licenses, contrary to the General Assembly’s apparent belief, is not the most important issue or matter before the court.

11.3.6 Revocation and Replacement; Possession of License

If, at any time during the period for which the weapons carry license was issued, the judge of the probate court of the county in which the license was issued shall learn or have brought to his or her attention in any manner any reasonable ground to believe the licensee is not eligible to retain the license, the judge may, after notice and hearing, revoke the license of the person upon a finding that such person is not eligible for a weapons carry license or upon an adjudication of falsification of application, mental incompetency, or chronic alcohol or narcotic usage.

It shall be unlawful for any person to possess a license which has been revoked, and any person found in possession of any such revoked license, except in the performance of his or her official duties, shall be guilty of a misdemeanor.

It shall be required that any license holder under this Code section have in his or her possession his or her valid license whenever he or she is carrying a weapon under the authority granted by this Code section, and his or her failure to do so shall be prima-facie evidence of a violation of Code Section 16-11-126.

Loss of any license issued in accordance with this Code section or damage to the license in any manner which shall render it illegible shall be reported to the judge of the probate court of the county in which it was issued within 48 hours of the time the loss or damage becomes known to the license holder. The judge of the probate court shall thereupon issue a replacement for and shall take custody of and destroy a damaged license; and in any case in which a license has been lost, he or she shall issue a cancellation order and notify by telephone and in writing each of the law enforcement agencies whose records were checked before issuance of the original license. The judge shall charge the fee specified in subsection (k) of Code Section 15-9-60 for such services.

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241 This can be reasonably interpreted only as meaning that, if the licensee were to apply on the date such knowledge shall come to the judge, the applicant would be ineligible for the issuance of a license.
242 O.C.G.A. §16-11-129(e). This provision is unclear whether such “adjudication” is to be made by the probate judge or must have occurred in some other proceeding.
243 Id.
244 Id.
245 Id.
11.3.7 License Specifications (Prior to January 1, 2012)

Weapons carry licenses issued as prescribed in these provisions shall be printed on durable but lightweight card stock, and the completed card shall be laminated in plastic to improve its wearing qualities and to inhibit alterations. Measurements shall be 3 1/4 inches long and 2 1/4 inches wide. Each shall be serially numbered within the county of issuance and shall bear the full name, residential address, birth date, weight, height, color of eyes, and sex of the licensee. The license shall show the date of issuance, the expiration date, and the probate court in which issued and shall be signed by the licensee and bear the signature or facsimile thereof of the judge. The seal of the court shall be placed on the face before the license is laminated. Licenses issued on and before December 31, 2011, shall bear a clear print of the licensee's right index finger; however, if the right index fingerprint cannot be secured for any reason, the print of another finger may be used but such print shall be marked to identify the finger from which the print is taken.246

11.3.8 License Specifications (After December 31, 2011)

On and after January 1, 2012, newly issued or renewal weapons carry licenses shall incorporate overt and covert security features which shall be blended with the personal data printed on the license to form a significant barrier to imitation, replication, and duplication. There shall be a minimum of three different ultraviolet colors used to enhance the security of the license incorporating variable data, color shifting characteristics, and front edge only perimeter visibility. The weapons carry license shall have a color photograph viewable under ambient light on both the front and back of the license. The license shall incorporate custom optical variable devices featuring the great seal of the State of Georgia as well as matching demetalized optical variable devices viewable under ambient light from the front and back of the license incorporating microtext and unique alphanumeric serialization specific to the license holder. The license shall be of similar material, size, and thickness of a credit card and have a holographic laminate to secure and protect the license for the duration of the license period.247

Using the physical characteristics of the license set forth above, the Council of Probate Court Judges of Georgia shall create specifications for the probate courts so that all weapons carry licenses in this state shall be uniform and so that probate courts can petition the Department of Administrative Services to purchase the equipment and supplies necessary

for producing such licenses. The department shall follow the competitive bidding procedure set forth in Code Section 50-5-102.\textsuperscript{248}

These changes were implemented with the AOC’s/Council’s contract with PASP.

11.3.9 Alteration or Counterfeiting

A person who deliberately alters or counterfeits a weapons carry license or who possesses an altered or counterfeit weapons carry license with the intent to misrepresent any information contained in such license shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for a period of not less than one nor more than five years.\textsuperscript{249}

11.3.10 Licenses for former Law Enforcement Officers

Except as otherwise provided in Code Section 16-11-130, any person who has served as a law enforcement officer for at least ten of the 12 years immediately preceding the retirement of such person as a law enforcement officer shall be entitled to be issued a weapons carry license without the payment of any of the fees provided for in Code section 16-11-129. Such person shall comply with all the other provisions of this Code section relative to the issuance of such licenses.\textsuperscript{250} As used here, the term "law enforcement officer" means any peace officer who is employed by the United States government or by the State of Georgia or any political subdivision thereof and who is required by the terms of his or her employment, whether by election or appointment, to give his or her full time to the preservation of public order or the protection of life and property or the prevention of crime. Such term shall include conservation rangers.\textsuperscript{251}

11.3.11 Temporary Renewal Licenses

Any person who holds a weapons carry license may, at the time he or she applies for a renewal of the license, also apply for a temporary renewal license if less than 90 days remain before expiration of the license he or she then holds or if the previous license has expired within the last 30 days. Unless the judge of the probate court knows or is made aware of any fact which would make the applicant ineligible for a five-year renewal license, the judge shall at the time of application issue a temporary renewal license to the applicant. Such a temporary renewal license shall be in the form of a paper receipt indicating the date...

\textsuperscript{248}Id.
\textsuperscript{249}O.C.G.A. §16-11-129(G).
\textsuperscript{250}Presumably, the former officer is eligible for waiver of the court fees only, since the probate judge has no authority to direct state and/or federal agencies to perform records searches without the payment of the fees.
\textsuperscript{251}O.C.G.A. §16-11-129(h).
on which the court received the renewal application and shall show the name, address, sex, age, and race of the applicant and that the temporary renewal license expires 90 days from the date of issue. During its period of validity the temporary renewal permit, if carried on or about the holder's person together with the holder's previous license, shall be valid in the same manner and for the same purposes as a five-year license. A $1.00 fee shall be charged by the probate court for issuance of a temporary renewal license. A temporary renewal license may be revoked in the same manner as a five-year license.  

11.3.12 Mandamus

When an eligible applicant fails to receive a license, temporary permit, or renewal license within the time period required by the Code section and the application or request has been properly filed, the applicant may bring an action in mandamus or other legal proceeding in order to obtain a license, temporary license, or renewal license. If such applicant is the prevailing party, he or she shall be entitled to recover his or her costs in such action, including reasonable attorney's fees. This provision was affirmed by the Court of Appeals in an opinion holding that where a statute's language as to an award of attorney fees is mandatory, the trial court is required to award attorney fees. The award of statutory attorney fees presents a question in law, and when the statutory requisites are met, the trial court's discretion to deny the award is eliminated.

PART IV. VETERANS’ LICENSES

14.0 Exemptions from Business License Fees for Certain Veterans and Blind Persons

Pursuant to H.B. 128, as of July 1, 2010, certificates of eligibility issued by the judges of the probate courts shall be valid for a period of ten (10) years from the date of issuance.
CHAPTER 14
MISCELLANEOUS DUTIES OF THE
JUDGE OF THE PROBATE COURT;
PROBATE COURT DOCKETS, BOOKS,
MINUTES AND RECORDS

PART I.
MISCELLANEOUS DUTIES OF
THE JUDGE OF THE PROBATE COURT

13.0 EXEMPTIONS FROM LEVY AND SALE

13.2 Constitutional Exemption

The “constitutional exemption” was modified under S.B. 117 (2012 Session) to provide as follows:

Except as otherwise provided in this article, there shall be exempt from levy and sale by virtue of any process whatever under the laws of this state any real or personal property or both of a debtor in the amount of $5,000.00 or $21,500 for real and personal property that is the debtor’s primary residence. No court or ministerial officer in this state shall ever have jurisdiction or authority to enforce any judgment, execution, or decree against property set apart under this Code section, including such improvements as may be made thereon from time to time, except for taxes, for the purchase money of the property, for labor done on the property, for material furnished for the property, or for the removal of encumbrances on the property.

27.0 WRITS OF HABEAS CORPUS  (SECTION RENUMBERED FROM 26.0 ONLY)

28.0 AMENDMENTS TO OR REPEALS OF COUNTY LOCAL ACTS,
ORDINANCES, RESOLUTIONS, OR REGULATIONS

Pursuant to Article IX, Section II, Paragraph 1(b)(2) of the Georgia Constitution of 1983, a petition to amend or repeal county local Acts, Ordinances, Resolutions, or Regulations may be filed in the probate court of the county. This process apparently seldom used, it permits a citizen/voter to file a petition for these purposes containing the signatures of the following percentage of registered voters: up to 4,999 in population, 25%; from 5,000
to 49,999, 20%; 50,000 and higher, 10%. The Paragraph requires:

(b)(2) “...(the) petition shall specifically set forth the exact language of the proposed amendment or repeal. The judge of the probate court shall determine the validity of such petition within 60 days of its being filed with the judge of the probate court. In the event the judge of the probate court determines that such petition is valid, it shall be his duty to issue the call for an election for the purpose of submitting such amendment or repeal to the registered electors of the county for their approval or rejection. Such call shall be issued not less than ten nor more than 60 days after the date of the filing of the petition. He shall set the date of such election for a day not less than 60 nor more than 90 days after the date of such filing. The judge of the probate court shall cause a notice of the date of said election to be published in the official organ of the county once a week for three weeks immediately preceding such date. Said notice shall also contain a synopsis of the proposed amendment or repeal and shall state that a copy thereof is on file in the office of the judge of the probate court of the county for the purpose of examination and inspection by the public. The judge of the probate court shall furnish anyone, upon written request, a copy of the proposed amendment or repeal. If more than one-half of the votes cast on such question are for approval of the amendment or repeal, it shall become of full force and effect; otherwise, it shall be void and of no force and effect. The expense of such election shall be borne by the county, and it shall be the duty of the judge of the probate court to hold and conduct such election. Such election shall be held under the same laws and rules and regulations as govern special elections, except as otherwise provided herein. It shall be the duty of the judge of the probate court to canvass the returns and declare and certify the result of the election. It shall be his further duty to certify the result thereof to the Secretary of State in accordance with the provisions of subparagraph (g) of this Paragraph. A referendum on any such amendment or repeal shall not be held more often than once each year. No amendment hereunder shall be valid if inconsistent with any provision of this Constitution or if provision has been made therefor by general law.

In the event that the judge of the probate court determines that such petition was not valid, he shall cause to be published in explicit detail the reasons why such petition is not valid; provided, however, that, in any proceeding in which the validity of the petition is at issue, the tribunal considering such issue shall not be limited by the reasons assigned. Such publication shall be in the official organ of the county in the week immediately following the date on which such petition is declared to be not valid.
(g) No amendment or revision of any local act made pursuant to subparagraph (b) of this section shall become effective until a copy of such amendment or revision, a copy of the required notice of publication, and an affidavit of a duly authorized representative of the newspaper in which such notice was published to the effect that said notice has been published as provided in said subparagraph has been filed with the Secretary of State. The Secretary of State shall provide for the publication and distribution of all such amendments and revisions at least annually."²⁵⁶.

PART II.

PROBATE COURT DOCKETS, BOOKS, MINUTES AND RECORDS

[NOTE: the following Sections Renumbered from 26.0 Only]

29.0  CLERKS OF THE PROBATE COURTS

29.1 Duties of Clerks

29.2 Dockets and Minutes (Recording Proceedings)

29.3 English as the Official Language for Records

29.4 Costs of Court and Additional Charges

[NOTE: the following Sections Renumbered from 27.0 Only]

30.0 RECORDS SYSTEMS

30.1 Establishing and Maintaining Records

30.2 Computer, Photographic and Microfilm Equipment

30.3 Storage of Original Documents

30.4 Retention Schedules

[NOTE: the following Sections Renumbered from 28.0 Only]

31.0 PUBLIC ACCESSIBILITY TO RECORDS AND CONFIDENTIAL RECORDS

31.1 Open Records Act

31.2 Exemptions under the ORA

31.3 Confidentiality by Statute

31.3.1 Aids Confidential Information

See Chapter 2, Section 4.7.4.

²⁵⁶  Ga. Const. 1983 Article IX, Section II, Paragraph 1(b)(2)
31.3.2 Firearms License Applications; Criminal History Reports; Mental Health Records
31.3.3 Marriage License Applications and Application-Supplement Marriage Report
31.3.4 Behavioral Health and Developmental Disabilities Records
31.3.5 Wills Filed for safekeeping
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31.3.8 Confidentiality by Court Order
31.3.9 Sterilization Proceedings
CHAPTER 15
APPENDIX TO 2011-2012 SUPPLEMENT

Important Notice

Several sample orders and forms have been included in this Appendix. These sample orders and forms have not been officially sanctioned by the Georgia Council of Probate Court Judges. They have, unless otherwise noted, been prepared by the author. They are provided solely as samples. They should be modified or adapted to the specific court for the specific purpose, with any unnecessary material being deleted and any additional material being added.

William J. Self, II

A3-5 Sample Rule Nisi to Compel Filing of Will
APPENDIX A3-5

IN THE PROBATE COURT OF ___________ COUNTY
STATE OF GEORGIA

IN RE: : DOCKET NO.

TO: _________________________________________________________

Name Address

The within Motion to Compel Filing of Will of Decedent having been filed, read and considered, and

It having been alleged that you are in possession of a Will of the above-named Decedent,

IT IS ORDERED that the said ________________, be and appear before the Court on ________________ at ________.M., then and there to show cause, if any she has, why s/he cannot produce and file said Will, as required by O.C.G.A. §53-5-5.

IT IS ORDERED further that, if you are in possession of any document purporting to be a Will of the Decedent, you shall promptly file same with this court or show cause on the above date why you should not be held in contempt of court until you shall comply with O.C.G.A. §53-5-5. Service of this Rule Nisi shall be perfected in the manner required under Chapter 11 of Title 53 Code of Georgia Annotated.

___________________________________
JUDGE, PROBATE COURT OF
___________________COUNTY

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