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CALENDAR CALL

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ARTICLES

- Chairman's Corner 2
- Standing To Sue Under The Georgia Wrongful Death Act 3
  by Cal Callier 7
- Asset Protection Planning 10
  by James C. Morton
- Transfer Taxes After The Economic Growth and Tax Relief Reconciliation Act of 2001 13
  by David F. Golden & Timothy B. Phillips
- Mid Year Meeting Luncheon 18
- When I Die... 19
  by Martin N. Ghen

Calendar Call is the official publication of the General Practice and Trial Section of the State of Georgia. Statements and opinions expressed in the editorials and articles are not necessarily those of the Section or the Bar. Calendar Call welcomes the submission of articles on topics of interest to the Section. Submissions should be double-spaced, typewritten and on letter-size paper and addressed to Susan L. Howick, Macey, Wilensky, Cohen, Wittner & Kessler, LLP, Marquis Two Tower, Suite 600, 285 Peachtree Center Avenue, NE, Atlanta, Georgia 30303. **Published by Appleby & Associates, Austell, Georgia.**

CHAIRMAN'S CORNER

By S. Lester Tate, III
Section Chair

In his memoir "Vernon Can Read," lawyer and civil rights leader Vernon Jordan tells about growing up in Atlanta. His mother was a caterer and provided the meal for the monthly Lawyers' Club dinner. Vernon often worked as a waiter at these events and tells of how watching these men, whom he perceived as successful and powerful, mingle and discuss the issues of the day inspired him to want to be a lawyer. Two things struck me about his story.

First, it is doubtful that any of this white male group of lawyers even noticed the young African American who "neglected" his duties in the kitchen just to hear their after dinner speakers. And if they did, certainly none took him under their wing or guided or advised him. They were, in a manner of speaking, role models, but distant and uninvolved ones.

Second, the allure of the law was real to Vernon Jordan, even at this young age. He steadfastly moved forward toward becoming a lawyer in an era when most bright, young, African Americans were steered to either the ministry or teaching instead of law. Consciously or unconsciously he correctly realized that the "law" had the power to effect real change in people's lives. What is more, Jordan realized this fact long before Brown v. Board of Education or the other decisions that ended de jure desegregation.

I wonder if we as lawyers today fully comprehend these truths. Wherever we go and whatever we do someone is watching, maybe even using us as a role model. And while being a role model is good, there is often much more that we could do with a small investment of time or a kind word. From the beginning of our country, lawyers have occupied a place of leadership, whether arguing cases that changed the course of history or performing such non-legal tasks as authoring the Star Spangled Banner or the Gettysburg Address. We should actively be involved in passing this tradition to the next generation.

I also wonder whether in the maelstrom of every day events we forget what a powerful thing the law is. It has the power to take property, to determine who raises children, to incarcerate, to compensate and to protect citizens, even from their own government. All of our cases big, small and medium sized, have real effects on individual lives. It doesn't have to be an earth shattering decision to be a life shattering event for one of our clients.

Young Vernon Jordan realized these things. Later, he was part of the legal team that desegregated the University of Georgia. He knew as a lawyer he could do a lot more than just read. You can too!

Standing To Sue Under The Georgia Wrongful Death Act

by Cal Callier

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When the Georgia Supreme Court was first formed, it was only authorized to exist for a few years. The thinking was that in a short time all disputed questions of law would be resolved and the Supreme Court would no longer be necessary. I am reminded of this as we approach the topic of standing to sue under the Georgia Wrongful Death Act. It is always amazing how concepts and ideas that seem so simple and straightforward on paper become so complex when applied to the real world circumstances of living human beings. So it is with the Georgia Wrongful Death Act. First enacted in 1850, the Act has undergone many major revisions and the legislature still finds need to tinker with the statute every few years. The courts still grapple with conflicting and unresolved issues.

A principal theme and recurring problem in Georgia's wrongful death law is that the statutory scheme is filled with inherent conflicts of interest. Children are pitted against parents; parents are pitted against each other; administrators are pitted against survivors/heirs; aunts and uncles are pitted against nieces and nephews, and so on. Often one person wears multiple hats as plaintiff and has the delicate task of serving multiple masters. The fractured nature of the various causes of action, i.e. wrongful death, estate claims, loss of services, loss of consortium, medical and funeral expenses, etc. and the differing persons who may bring them are root causes of much of the litigation. As Judge McMurray so aptly stated in describing our statutory scheme: "Though this be madness, yet there is method in't." [1]

Or is there? It is very easy to imagine that there would be a lot less litigation in this area if the cause of action were vested in the administrator or executor of the estate as our sister states of Florida, Alabama, South Carolina and North Carolina have done.

Because wrongful death claims are in derogation of the common law and are strictly construed, there are many cases on the books where a harsh injustice occurred because the proper plaintiff(s) failed to sue. In some of those cases, it was clear who the proper plaintiff should have been and that person simply failed to assert the action. In other cases, the person with standing was not so clear. One would think that most questions would have been answered once and for all after so many years of litigation. However, many questions remain unanswered.

The purpose of this article is to organize existing case law into a framework that can serve as the beginning of more extensive research. Many endnotes are included for this purpose.

Pleading Capacity

OCGA § 9-11-9 provides:

"(a) Capacity. It is not necessary to

aver the capacity of a party to bring or defend an action, [or] the authority of a party to bring or defend an action in a representative capacity..When a party desires to raise an issue as to the legal existence of any party, the capacity of any party to bring or defend an action, or the authority of a party to bring or defend an action in a representative capacity, he shall do so by specific negative averment."

A challenge to capacity is timely if raised at any time before judgment.[2] The goal, of course, is to choose the proper party [ies] at the outset so that we will not have to concern ourselves with section 9-11-9, waiver, substitution, adding parties, relation back, etc. These topics are outside the scope of this article, although a post-verdict amendment can sometimes save the cause of action.[3]

Pleadings often describe the plaintiff with different "tags" stuck on the end. For example: "individually," "as surviving spouse of," "as parent of," "as child of," etc. These tags seem to be merely another way of saying that the plaintiff sues "individually," which of necessity encompasses the relation as parent, spouse, or child of the deceased. Nevertheless, it is probably wise to follow this practice and sue in the name of the plaintiff "individually," and then describe the relationship to the deceased ("as surviving spouse of," etc.).

Further, the plaintiff can sue as the representative of another. If the plaintiff sues as representative, he does so because he has fulfilled some legal requirement to gain the right to represent the other's interest. His title, as representative, will be whatever the law says it is (i.e. administrator, executor, guardian, etc.) and this should be clearly set forth on the pleadings.

Standing as a Substantive Matter

Our courts seem to treat the subject of "standing" as a substantive matter rather than a procedural matter.[4] In the case of *Record Truck Line, Inc. v. Harrison, Administrator*, 109 Ga. App. 653 (137 SE2d 65) (1964), the plaintiff, as *administrator*, brought a wrongful death action in Georgia for a death occurring in Alabama. The law of Alabama governed all substantive matter (*lex loci delicti*). Under Alabama law, the cause of action vested in the personal representative. The plaintiff lost in *Record Truck Line* because he failed to plead and prove the law of Alabama authorizing the action to be brought by the personal representative.

The lesson from *Record Truck Line* is that a suit in Georgia applying foreign substantive law will succeed if brought by the plaintiff in the "capacity" established by the foreign law, *if the foreign law is properly plead and proved.* (See OCGA § 9-11-43). Do not file a *lex loci delicti* case solely in the "capacity" established by Georgia law (if it is different than the foreign law) or you may end up trying to convince our appellate courts that "capacity" is a matter of procedure. To stay out of trouble, the safest course is to file suit in both the capacity required by Georgia law and by the foreign law. This seems the surest way to avoid any conflict of law issues.

Georgia's two year statute of limitations is the public policy of this State and must be complied with.[5]

STANDING TO SUE UNDER THE GEORGIA WRONGFUL DEATH ACT

The Wrongful Death Act (Title 51, Ch. 4) tells us that the damages under the Act are confined to "the full value of the life." Other damages that may be recoverable (pain and suffering, property damage, etc.) are not wrongful death damages but stem from some other authority, such as the "survival" statute (OCGA § 9-2-41).[6]

The following principles govern standing in Georgia wrongful death cases:

1. If a person dies and leaves a spouse or child surviving, OCGA § 51-4-2 governs.

2. If a person dies and leaves no spouse or child surviving, but one or both parents is alive, OCGA § 19-7-1 governs.

3. If a person dies and leaves no spouse, child, or parent surviving, OCGA § 51-4-5 governs.

4. Always look to the time of death and determine which persons have standing at that time and under which statute the standing vests. The cases seem to confirm the principle that once standing vests under a particular statute at the time of death, you will never change statutes. If the plaintiff dies, standing will survive (a) first to another named person under the same statute, then (b) to the personal representative of a person named under the same statute by operation of section 9-2-41.

5. Grandparents, grandchildren, siblings, aunts, uncles, nephews, nieces, and cousins never have standing, unless in a representative capacity for one of the statutory plaintiffs.

OCGA § 51-4-2

Prior to 1985 OCGA §§ 51-4-2 and 51-4-3 addressed the rights of beneficiaries in wrongful death claims. Section 51-4-3 dealt with the rights of beneficiaries of deceased women, while section 51-4-2 dealt with beneficiaries of deceased men. Beneficiaries of deceased women had *broad* rights. Beneficiaries of deceased men had *restrictive* rights. The Georgia Supreme Court in *Tolbert v. Murrell*, 253 Ga. 566 (322 SE2d 487) (1984) held the disparity unconstitutional and declared that all beneficiaries would have equally *broad* rights whether the deceased was a man or a woman. The legislature defied the Georgia Supreme Court and enacted a version of OCGA § 51-4-2 in 1985 which imposed on all beneficiaries the more *restrictive* rights. Even though *Tolbert* was nullified by the 1985 amendment, *Tolbert* is an important case in order to appreciate the law regarding wrongful death standing to sue.

Actions by Surviving Spouses Under OCGA § 51-4-2

If a deceased is survived by a spouse or children, OCGA § 51-4-2 governs standing. Section 51-4-2 (a) provides as follows:

"(a) The surviving spouse or, if there is no surviving spouse, a child or children, either minor or sui juris, may recover for the homicide of the spouse or parent the full value of the life of the decedent, as shown by the evidence."

A surviving spouse, if there is one, is the sole person who may bring a wrongful death claim.[7] Surviving spouse includes common-law spouse.[8] Surviving spouse means that person to whom the decedent is married at the time of death.[9] A surviving spouse does not have to be married to the deceased spouse at the time the injuries are inflicted; but only at the time of death, since that is the date the cause of action accrues.[10] Separation by the surviving spouse and the deceased spouse before death is no defense and the right of action is not cut off by remarriage.[11] A surviving spouse has sole authority to settle the claim; and settlement by the surviving spouse, even if fraudulent, is binding on all the wrongful death beneficiaries, who then have no recourse against the tortfeasor.[12] OCGA § 51-4-2 says that a settlement by a surviving spouse is valid even without approval of the guardian or representative of the children and without any order of court. If the surviving spouse fails or refuses to bring the wrongful death claim, the remaining wrongful death beneficiaries have no legal right to do so.[13] Naming additional beneficiaries as plaintiffs, along with the surviving spouse, is prohibited.[14] Minor beneficiaries cannot appear on the pleadings with the surviving spouse even if the surviving spouse purports to act "as next friend" of the minors.[15] A beneficiary cannot intervene in an action brought by the surviving spouse.[16] A beneficiary cannot compel the surviving spouse to join the action as an "involuntary plaintiff" in order to perfect standing.[17] A surviving spouse cannot relinquish, renounce, or assign the right to bring the claim to any other person.[18] The surviving spouse holds and disburses the proceeds as set forth in section 51-4-2(d). The recovery passes as set forth in the statute even if this is antagonistic to the deceased's will.[19] The spouse owes a duty to the other beneficiaries and can be held liable to them for breach of duty as a representative.[20]

In a claim for the wrongful death of John Doe, if the plaintiff surviving spouse (Jane) dies, the cause of action survives under section 51-4-2 to John's children. The cause of action survives under section 51-4-2 to Jane's personal representative only if John left no surviving children.[21] Presumably, Jane's personal representative would have preference over the personal representative of any John's children who died after John.

If John dies leaving a surviving spouse or child, section 51-4-2 is fixed at the time of death as the statute from which the plaintiff derives authority to sue. The cause of action passes to the surviving spouse, surviving children, or their personal representatives under section 51-4-2. Section 19-7-1 never comes into play unless John left no surviving spouse or child. Likewise, section 51-4-5 never comes into play unless John left no surviving spouse, child or parent.

Surviving children do not have standing and rights vis-a-vis the tortfeasor while the surviving spouse is alive. However, the spouse owes a duty to the children and can be held liable to them for breach of duty as a representative. Therefore, the lawyer for the surviving spouse has duties to the children, or other statutory beneficiaries, and must take great care to protect the interests of all beneficiaries both in prosecuting the claim and in disbursing the proceeds. In Home Insurance Company v. Wynn, 229 Ga. App. 220 (493 SE2d 622)(1997), the surviving spouse and her lawyer were held liable for breaching their duties to protect the interests of the statutory beneficiary children.

Actions by Surviving Children Under OCGA § 51-4-2

If there is a surviving spouse and she brings suit and then dies "pending the action," the cause of action survives under section 51-4-2 to the surviving children of the wrongful death decedent. If there are no such children, then the claim passes to the representative of the deceased surviving spouse. Likewise, if there is no surviving spouse, the cause of action vests initially in the surviving children. One would think that the cause of action would pass the same way even if the surviving spouse dies before bringing the suit. However, at least one case has held that if the surviving spouse died before bringing suit, the cause of action did not survive to the children.[22] Notably, this case was decided before the 1952 amendment to section 9-2-41 which now provides for the survival of both actions and causes of actions. See West v. Mathews, 104 Ga. App. 57 (121 SE2d 41) (1961).

For purposes of the Wrongful Death Act, the fact that a child was born out of wedlock is no defense.[23] There is no requirement as to dependency.[24] Minor children and sui juris children are treated equally.[25] A minor child, of course, would bring the action through a guardian or by a "next friend."[26] Adoption of a child by a third person, prior to the death of the natural parent, cuts off the right of the child to bring or share in an action or recovery for the death of the natural parent.[27] Adoption of a child by a third person, after the death of the natural parent, does not cut off the child's rights.[28] A child has no right of action for the wrongful death of a step-parent or for one standing in loco parentis.[29] If a plain-

tiff surviving child dies, the cause of action appears to survive under the terms of section 51-4-2 to the remaining surviving children. Where there are no other surviving children, the cause of action survives to the plaintiff child's personal representative.[30] There is no language in the statute indicating that the cause of action survives to the personal representative of the deceased child as long as there remain other surviving children and section 9-2-41 would seem to prohibit this.

Tolbert v. Maner, 271 Ga. 207 (518 SE2d 423) (1999) is an interesting case. In *Tolbert*, a unanimous Supreme Court reversed the trial court and a unanimous Court of Appeals panel, which of itself demonstrates great uncertainty in the area. Technically, *Tolbert* was not a standing to sue case. The focus of *Tolbert* was the division of settlement proceeds. The issue was whether a grandchild of the wrongful death decedent could share in those proceeds where the grandchild's parent had predeceased the wrongful death decedent. The Supreme Court said no. The Court employed much language addressing standing to sue issues. For example, the Court held that "a deceased child's rights in a wrongful death action do not pass to anyone unless the child was an original wrongful death claimant who died during the pendency of the claim." It will be interesting to see if this language really means what it says when applied to a true standing to sue case.

Prior to 1985, the law provided that actions under Section 51-4-3 could be maintained by fewer than all the surviving children,[31] while all children had to be joined as plaintiffs under Section 51-4-2.[32] Since the current section 51-4-2 (enacted in 1985) virtually mirrors the former section 51-4-2, we can look to the former section 51-4-2 case law to see what happens when there are multiple children vested with the cause of action.

Apparently, all surviving children are deemed necessary parties and joint action is required by them or else the action is defective.[33] However, if the tortfeasor settles with one or more of the children, the remaining children can proceed with the suit for their proportionate share of the full value of the life.[34] If all the children cannot be added before the running of the statute of limitations, the remaining children can be added after the statute has expired and the amendment relates back.[35]

OCGA § 19-7-1

If a decedent leaves no surviving spouse or child, the cause of action vests in the surviving parents. OCGA § 51-4-4 refers us to OCGA §19-7-1 to determine a parent's right to bring a claim for the death of a child. Section 19-7-1 provides:

> "(C) (1) In every case of the homicide of a child, minor or sui juris, there shall be some party entitled to recover the full value of the life of the child, either as provided in this Code section or as provided in Chapter 4 of Title 51.

(2) If the deceased child does not leave a spouse or child, the right of recovery shall be in the parent or parents, if any, given such a right by this paragraph as follows:..."

The statute then goes on to provide that the right is jointly in both parents if alive and living together. If one parent is deceased, the right is in the surviving parent. If both parents are living but are divorced, separated, or living apart, the right shall be in both parents. The cause of action is joint and the third dismissal, by either parent, is on the merits.[36] If one parent refuses to proceed or cannot be located to proceed, the other parent has the right to contract for representation for both parents and also the right to proceed on behalf of both parents to recover for the homicide of the child. In 1980, section 19-7-1 was amended to eliminate custody as a factor in determining standing to sue. Either parent has the statutory right to intervene in an action filed by the other.[37] The division of the proceeds is a different matter and is addressed in section 19-7-1. The trial court's division of the proceeds will not be set aside absent an abuse of discretion.[38]

An obvious question is what happens if an action is brought in the name of one parent and the other parent does not join in the action but there is no showing that the non-participating spouse refused to proceed or could not be located. The Georgia Supreme Court answered this in *Blanton v. Moshev*, 262 Ga. 254 (416 SE2d 506) (1992). In *Blanton* the wife/mother brought a wrongful death claim without the husband/father being a party plaintiff, although he did become a party after the statute of limitations expired, which was too late. The Supreme Court held that the non-participating spouse is bound in the action brought by the other spouse. The court noted there was no detriment to the defendant because both spouses are bound by the result. Therefore, the husband/father was not a necessary party to the action. Whether the husband/father had initially refused to participate or could not be located was not a factor in the court's opinion. What was important to the court is that one spouse can proceed alone and if the other spouse does not participate, he is nevertheless bound by the result. The reason for the absence of the non-participating spouse is immaterial.

The fact that the child was born out of wedlock shall be no bar to recovery and a parent can sue for the death of children both minor and sui juris.[39] There does not appear to be any clear authority that failure to support the child, short of a termination of parental rights, cuts off the rights to the cause of action for the child's death.[40] However, failure of the parent to provide support for the child does diminish the parent's right to share in the recovery.[41] A parent can intervene in an action brought by the

other parent because it is a jury question which parent is liable for and has incurred the medical and funeral expenses.[42] Adoption of the child by a third person prior to the child's death cuts off the right of the natural parents to assert the wrongful death claim.[43] A foster parent cannot sue for the death of a foster child.[44]

Where a surviving parent brings an action for the wrongful death of a child and the plaintiff parent dies during the pendency of the action, the parent's cause of action for the wrongful death of the child survives to the parent's representative.[45] In *Caylor v. Potts*, 183 Ga. App. 133 (358 SE2d 291) (1987), the court noted that this is also true *regardless* of whether the action was filed during the parent's lifetime. Since section 19-7-1 expressly gives both surviving parents the right of action, potentially there could be two plaintiffs: the remaining surviving parent and the personal representative of the now deceased surviving parent.

However, in *Hosley v. Davidson*, 211 Ga. App. 529 (439 SE2d 742) (1993), the court limited *Caylor* and held that "where one of the parents of a minor child dies *before* instituting an action for the child's wrongful death, the representative of that parent's estate is not authorized to bring such an action *if* there is a surviving parent or other person entitled to it." The underpinnings of *Caylor* and *Hosley*, decided barely six years apart, may well be mutually exclusive and demonstrate the difficultly our courts continue to have with survivorship issues.

OCGA § 51-4-5

OCGA § 19-7-1 provides that if the wrongful death decedent leaves no surviving spouse, children, or parent vested with the wrongful death cause of action under either section 51-4-2 or section 19-7-1, the right of recovery is then determined by section 51-4-5. Section 51-4-5 is a catch-all provision which insures that there will be some person who may recover the full value of the life of the deceased. Section 51-4-5 vests the decedent's executor or administrator with the cause of action to recover the full value of the life of the decedent for the benefit of the "next of kin." Next of kin are determined by section 53-2-1, the law of descent and distribution.[46] The minority of the next of kin does not toll the statute of limitations[47] nor does any time that passes between the date of death and appointment of the representative.[48]

EQUITABLE RELIEF

Because of the rigid statutory scheme for determining standing, the books are full of cases where injustice occurred by virtue of the statutory plaintiff not asserting the appropriate action. Even when our courts have tried to judicially remedy this situation (*Tolbert v. Murrell*, *supra*, would have vested children with a *joint* cause of action for death of a parent), the legislature has thwarted these efforts (see 1985 amendment to section 51-4-2, rejecting *Tolbert*).

The answer to this may be found in *Brown v. Liberty Oil Company*, 261 Ga. 214 (403 SE2d 806) (1991), in which a surviving husband, having abandoned the family, failed to bring suit for the death of the wife/mother. Under every principle of *law*, the surviving husband, solely, was vested with the wrongful death cause of action. Just before the expiration of the statute of limitations, the surviving children filed suit in *equity*, rather than at law. The Georgia Supreme Court held that the equitable powers of the superior courts were great enough to confer standing on the children despite what the law provided. In every circumstance where it appears that an injustice will occur because of the lawful plaintiff's failure to assert the cause of action (either spouse, child, or representative), counsel should consider calling upon the equitable powers of the superior courts to preserve the action on behalf of any person who has a property interest in the recovery.

Funeral, Medical, and Other Expenses

OCGA § 51-4-5 provides that the personal representative of the deceased can recover medical and funeral expenses. This is limited by the more general rule that such expenses are recoverable by the person legally liable for the expenses. Therefore, there is no need to set up an estate to recover medical or funeral expenses of a minor child. Since the parents are liable for the necessaries of a minor child, the parents have the right to recover the medical and funeral expenses.[49] The parents are entitled to recover these expenses, not the child's personal representative. Section 51-4-5 vests the claim in the personal representative of the minor child only when there is no surviving parent.[50]

For deceased adults, medical and funeral expenses are recoverable by the personal representative.[51] Unlike minor children, there is no longer a presumptive duty that one adult is liable for the debts of another adult.

Comparative Negligence and Immunities

Wrongful death claims sometimes interact with other substantive laws and result in broader avenues of recovery. For example, some claims that are traditionally barred by spousal or other immunity can be asserted in the wrongful death context.[52] Further, the statutory wrongful death plaintiff may be one of the tortfeasors whose negligence contributed to the death. This does not bar the wrongful death claim and the statutory plaintiff, even if one of the tortfeasors, is nevertheless the person who must bring the action.[53] If the plaintiff's negligence bars him from sharing in the recovery, the recovery would be held by the plaintiff for the beneficiaries on whose behalf he sues. The negligence of the statutory

plaintiff is not imputed to the deceased or to the other beneficiaries. For an excellent discussion of this, see Matthews v. Douberly, 207 Ga. App. 578 (428 SE2d 588) (1993).

Other Recoverable Damages

Upon the death of a minor child, the parents have the right to recover for the loss of services of the child.[54] This is considered a loss to the personal property of the parent and the statute of limitations is four years.[55] The parents bring this claim in their individual capacity.

Upon the wrongful death of a spouse, the surviving spouse has a loss of consortium claim for the period of time between the injury and the resulting death.[56] This is a loss to the personal property of the surviving spouse and the statute of limitations is four years.[57]

Property damage claims are vested in the owner of the property. If the deceased was the owner of the damaged property, the claim is brought by the deceased's personal representative.[58]

A separate cause of action exists for the pain and suffering of the deceased prior to death.[59] This includes pre-injury shock, fright, and terror.[60] The statute of limitations is two years measured from the date of injury rather than from death. See OCGA § 9-3-33. The claim is brought by the personal representative of the deceased.[61] The proceeds pass with the decedent's estate. The resolution of a personal injury claim is not a bar to a later wrongful death claim even where the death occurs as a consequence of the original injuries.[62] For this reason, in serious injury cases, defendants sometimes seek a wrongful death release even though the death has not occurred. This circumstance raises delicate issues regarding division of the proceeds.

Under Lee v. State Farm, 272 Ga. 583 (533 SE2d 82) (2000), a parent now has a cause of action for the parent's own emotional distress in witnessing a child's death, subject to the impact rule.

Punitive damages are not recoverable in wrongful death actions.[63] Without an award of actual damages, even nominal damages, punitive damages cannot be recovered.[64] The punitive damage claim is brought by the person who has the cause of action for the underlying claim upon which the punitive damage award is sought. Although punitive damages cannot be awarded in the wrongful death portion of the claim, punitive damages are properly awarded if there is an underlying suit for property damage[65] or pain and suffering.[66]

Joinder of Claims

The defendant can force joinder of the wrongful death and pain and suffering claims.[67] Presumably, this is also true for loss of consortium/loss of services claims.[68] A property damage claim can be brought separately.

Joinder of Multiple Parties

If there is a surviving spouse, there is no issue of joinder of parties because there can be only one surviving spouse and that person, once determined, has the sole cause of action. However, there can be a dispute to determine who is the surviving spouse. In Tarver v. Martin, 175 Ga. App. 689 (334 SE2d 18) (1985) two women, both claiming to be the widow of the deceased, brought separate suits for the death of their alleged husband. The trial court joined the actions. The court of appeals held that joinder was error since only one of the women could possibly be the proper plaintiff. The correct procedure would have been for the defendant to file a motion for a declaratory judgment.

The declaratory judgment procedure is not limited to use by defendants but can be used by a potential plaintiff to establish the right to the claim.[69]

If multiple children are potential plaintiffs under section 51-4-2, joinder does become important. Our courts have held that all children are necessary parties to a wrongful death action for the death of a parent; therefore the non-participating children should be subject to joinder as involuntary plaintiffs.[70]

If the potential plaintiffs are the parents under section 19-7-1, there is no need to join the non-participating parent because Blanton v. Moshev, supra, makes clear that one parent can prosecute the action in the absence of the other.

CONCLUSION

Litigation under the Wrongful Death Act during the past decade only spotlights that there remain troublesome and unresolved issues. Much uncertainty exists in the area of survivorship of causes of action as demonstrated by the tension between Caylor and Hosley, supra. Further, the impact of Tolbert v. Maner, supra, in true standing to sue cases, and whether it can be applied consistently with other authority, remains to be seen. Counsel should approach this area with great caution.

As always there remain those cases where family members are pitted against each other for the right to the cause of action or a share of the proceeds. When courts have to reach into equity, see Brown v. Liberty Oil, supra, to find justice, that is a sure sign that there are holes in the statutory scheme.

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1 Matthews v. Douberly, 207 Ga. App. 578 (428 SE2d 588)(1994) quoting William Shakespeare, Hamlet, Act 2.

2 Patterson v. Duron Paints of Ga. Inc., 144 Ga. App. 123 (240 SE2d 603) (1977).

3 Weldon v. Williams, 170 Ga. App. 589 (317 SE2d 570) (1984).

4 Green v. Johnson, 71 Ga. App. 777 (32 SE2d 443) (1944).

5 Taylor v. Murray, 231 Ga. 852 (204 SE2d 747) (1974).

6 Anderson v. Jones, 508 F. Supp. 399 (N.D. Ga. 1980).

7 Mack v. Moore, 256 Ga. 138 (345 SE2d 338) (1986).

8 Georgia Osteopathic Hosp. v. O'Neal, 198 Ga. App. 770 (403 SE2d 235) (1991).

9 Odom v. Atlanta & W.P.R.R, 78 Ga. App. 477 (51

SE2d 466) (1949).
[10] Lovett v. Garvin, 232 Ga. 747 (208 SE2d 838) (1974).
[11] Central of Ga. Ry. v. Bond, 111 Ga. 13 (36 SE 299) (1900).
[12] Odom v. Atlanta & W.P.R.R, 78 Ga. App. 477 (51 SE2d 466) (1949).
[13] Mack v. Moore, 256 Ga. 138 (345 SE2d 338) (1986); O'Kelley v. Hosp. Auth., 256 Ga. 373 (349 SE2d 382) (1986).
[14] Western & Atlantic R.R. Co. v. Davis, 16 Ga. App. 831 (159 SE2d 134) (1967).
[15] Lynn v. Wagstaff Motor Co., 126 Ga. App. 516 (191 SE2d 324) (1972).
[16] General Motors Corp. v. Rasmussen, 255 Ga. 544 (340 SE2d 586) (1986). This case was based on Tolbert v. Murrell as interpreted before the 1985 amendment but apparently is still good law on this point.
[17] Lawrence v. Whittle, 146 Ga. App. 686 (247 SE2d 212) (1978).
[18] Bloodworth v. Jones, 191 Ga. 193 (11 SE2d 658) (1940).
[19] Boggan v. Boggan, 145 Ga. App. 401 (243 SE2d 664) (1978).
[20] O'Kelley v. Hosp. Auth., 256 Ga. 373 (349 SE2d 382) (1986).
[21] Campbell v. Western & A.R.R, 57 Ga. App. 209 (194 SE2d 927 (1938). This case also discusses the procedure to be followed after the death of the named plaintiff.
[22] Hood v. Southern Ry., 169 Ga. App. 168 (149 SE 898) (1929).
[23] OCGA § 51-4-2(f).
[24] Peeler v. Central of Ga. Ry., 163 Ga. 784 (137 SE2d 24) (1927).
[25] OCGA § 51-4-2(a).
[26] OCGA § 9-11-17; Weldon v. Williams, 170 Ga. App. 589 (317 SE2d 570) (1984).
[27] Johnson v. Parrish, 159 Ga. App. 613 (284 SE2d 111) (1981).
[28] Emory University v. Dorsey, 207 Ga. App. 808 (429 SE2d 307)(1993).
[29] Weems v. Saul, 52 Ga. App. 470 (183 SE2d 661) (1936).
[30] West v. Mathews, 104 Ga. App. 57 (121 SE2d 41)(1961).
[31] OCGA § 51-4-3 (b) (2); American Erectors Inc. v. Hainie, 157 Ga. App. 687 (278 SE2d 196) (1981).
[32] Gordon v. Gillespie, 135 Ga. App. 369 (217 SE2d 628) (1975).
[33] Gordon v. Gillespie, 135 Ga. App. 369 (217 SE2d 628) (1975) and Pollard v. Reid, 56 Ga. App. 594 (193 SE 370) (1937).
[34] Lynn v. Wagstaff Motor Co., 126 Ga. App. 516 (191 SE2d 324) (1972); Southeastern Greyhound Lines v. Wells, 204 Ga. 814 (51 SE2d 56) (1949).
[35] Southern Ry. v. Waldrup, 76 Ga. App. 356 (45 SE2d 775) (1947). This case was decided under former 51-4-3 but should apply to 51-4-2 as it is written today.
[36] Belco Electric, Inc. v. Bush, 204 Ga. App. 811 (420 SE2d 602) (1992).
[37] Hulsey v. Hulsey, 212 Ga. App. 269 (441 SE2d 477) (1994).
[38] Wymbs v. Stokes, 236 Ga. App. 742 (512 SE2d 669) (1999); Richardson v. Barber, 241 Ga. App. 254 (527 SE2d 8) (1999).
[39] OCGA § 19-7-1.
[40] Deloach v. Floyd, 160 Ga. App. 728 (288 SE2d 65) (1981). But see Pickett v. Amoco Oil Co., 735F.2d 445 (11th Cir. 1984) in which a father was denied the right to intervene in an action brought by the mother of an illegitimate child because of the father's failure to provide reasonable support and Sapp v. Solomon, 252 Ga. 532 (314 SE2d 878) (1984).
[41] This is the rule for causes of action arising after July 1, 1987. Dove v. Carter, 197 Ga. App. 733 (399 SE2d 216) (1990).
[42] Atkinson v. Atkinson, 249 Ga. 247 (290 SE2d 423) (1982).
[43] Johnson v. Parrish, 159 Ga. App. 613 (284 SE2d 111) (1981).
[44] Smith v. Jones, 72 Ga. App. 638 (34 SE2d 623) (1945).
[45] Caylor v. Potts, 183 Ga. App. 133 (358 SE2d 291) (1987); Roadway Express Inc. v. Jackson, 77 Ga. App. 341 (48 SE2d 691) (1948).
[46] Stewart v. Bourn, 250 Ga. App. 755 (552 SE2d 450)(2001).
[47] Deloach v. Emergency Medical Group, 155 Ga. App. 866 (274 SE2d 38) (1980).
[48] Patellis v. King, 52 Ga. App. 118 (182 SE 808) (1935).
[49] Caylor v. Potts, 183 Ga. App. 133 (358 SE2d 291) (1987); Atkinson v. Atkinson, 249 Ga. 247 (290 SE 2d 423) (1982).
[50] Cobb & Eldridge, Georgia Law of Damages, 3rd Ed. § 37-8.
[51] Forrester v. Southern Ry., 268 F. Supp. 194 (N.D. Ga. 1967); Georgia Osteopathic Hosp. v. O'Neal, 198 Ga. App. 770 (403 SE2d 235) (1991).
[52] Jones v. Jones, 259 Ga. 49 (376 SE2d 674)(1989); Trust Co. Bank v. Thornton, 186 Ga. App. 706(368 SE2d 158) (1988); See also Barnwell v. Cordle, 438 F.2d 236 (5th Cir. 1971).
[53] Lynn v. Wagstaff Motor Co., 126 Ga. App. 516 (191 SE2d 324) (1972); Walden v. Coleman, 217 Ga. 599 (124 SE2d 265) (1962); Happy Valley Farms, Inc. v. Wilson, 192 Ga. 830 (16 SE2d 820) (1941); and Fulford v. ITT Rayonier, 676 F. Supp. 252 (S.D. Ga. 1987).
[54] Caylor v. Potts, 183 Ga. App. 133 (358 SE2d 291) (1987); Peppers v. Smith 151 Ga. App. 680 (261 SE2d 427) (1979).
[55] Silvertooth v. Shallenberger, 49 Ga. App. 133 (174 SE 365) (1934).
[56] Walden v. Coleman, 217 Ga. 599 (124 SE2d 265) (1962).
[57] Silvertooth v. Shallenberger, 49 Ga. App. 133 (174 SE 365) (1934).
[58] Jackson v. Central of Georgia Ry., 82 Ga. App. 498 (61 SE2d 586) (1950).
[59] Spradlin v. Ga. Ry. & Elec. Co., 139 Ga. 575 (77 SE 799) (1912); Complete Auto Transit Inc. v. Floyd, 214 Ga. 232 (104 SE2d 208) (1958).
[60] Monk v. Dial, 212 Ga. App. 362 (441 SE2d 857)(1994).
[61] Georgia Osteopathic Hosp. v. O'Neal, 198 Ga. App. 770 (403 SE2d 235) (1991).
[62] Winding River Village Condominium Assn. v Barnett, 218 Ga. App. 35 (459 SE2d 569)(1995).
[63] Engle v. Finch, 165 Ga. 131 (139 SE 868) (1927). Donson Nursing Facilities v. Dixon, 176 Ga. App. 700 (337 SE2d 351) (1985); Ford Motor Co. v. Stubblefield, 171 Ga. App. 331 (319 SE2d 470) (1984); Georgia Osteopathic Hosp. v. O'Neal, 198 Ga. App. 770 (403 SE2d 235) (1991).
[64] Daiss v. Woodbury, 163 Ga. App. 88 (293 SE2d 876) (1982); Foster v. Sikes, 202 Ga. 122 (42 SE2d 441) (1947).
[65] Colonial Pipeline v. Brown, 258 Ga. 115 (365 SE2d 827) (1988).
[66] Stubblefield v. Ford Motor Co., 111 Ga. App. 331 (319 SE2d 470) (1984).
[67] Stenger v. Grimes, 260 Ga. 838 (400 SE2d 318) (1991).
[68] Stapleton v. Palmore 250 Ga. 259 (297 SE2d 270) (1982).
[69] Cobb & Eldridge, Georgia Law of Damages, 3rd Ed. § 37-10.
[70] Gordon v. Gillespie, 135 Ga. App. 369 (217 SE2d 628) (1975).

SCHEDULE OF EVENTS

JUNE 13-16, 2002 - STATE BAR ANNUAL CONVENTION
Amelia Island Resort, Florida

JUNE 14, 2002 - 7:00 AM - 9:00 AM
TRADITION OF EXCELLENCE AWARD BREAKFAST

JUNE 14, 2002 - 5:00 PM - 7:00 PM
TRADITION OF EXCELLENCE RECEPTION

Asset Protection Planning

by James C. Morton

After graduating with honors in 1979 from the State University of New York Law School, Jim was law clerk to U.S. District Judge Newell Edenfield in Atlanta. Jim has done civil trial and appellate work in state and federal courts in Georgia and other states. These cases have involved contract disputes, secured and unsecured indebtedness, the Uniform Commercial Code, business torts, RICO, government administrative litigation, attorney and accountant professional liability, claims against directors and officers, insurance company insolvency, corporate governance, shareholder rights and partnership dissolution.

Jim speaks at legal education seminars on federal court practice, bankruptcy issues and internet and digital technology law.

Forget about the Silicon Age. As we enter the 21st century, we are living in the Age of Liability. Our society increasingly rejects the notion that living carries inherent, unavoidable risks. Instead, for every injury, someone else must be at fault and should pay big damages; plaintiffs rarely are very choosy about who that should be. And no injury ever is caused by mere accident or negligence; it always results from conduct that is "willful, wanton and in bad faith" entitling the injured party to stupendous punitive damages. Jury trials have become lotteries, and woe to the person whose number comes up.

Fact: In a dispute between business partners, a Gwinnett County, Georgia jury awarded $454 million to the plaintiffs. The verdict included $257 million in punitive damages. Not only is it the largest jury award ever in Georgia (by several times), it is one of the ten largest verdicts ever reported in the country.

Fact: In September 1999, a Fulton County, Georgia jury returned a verdict for $136 million in a lawsuit by a sales representative for unpaid commissions. The plaintiff originally claimed $182,000. The jury awarded $1.2 million in actual damages and almost $135 million in punitive damages.

These numbers were not dreamed up for the climax in a John Grisham novel. They actually came from your neighbors, in real cases, here and now. And we're not talking about exotic theories of personal injury liability applied to sellers of hot coffee and makers of guns. These were just disputes between people engaged in ordinary business transactions.

And if you think your insurance will bail you out, you'd better carefully read your policy. While in theory punitive damages can be insured against in Georgia, insurers carefully write most policies to exclude them.

What, then, can people do to protect their assets from these kinds of claims?

The emergence of litigation-as-casino has prompted the growing use of offshore trusts to place assets beyond creditors' reach. The asset protection function of offshore trusts can level the playing field between plaintiffs and defendants. While in the past only a few wealthy individuals sought and enjoyed this protection, anyone with net worth of $250,000 or more can benefit from asset protection planning.

An offshore trust can be useful for a number of purposes in addition to sheltering assets from creditors with inflated or unjustified claims: estate planning, economic diversification, pre-marriage protection of separate assets, confidentiality, purchasing foreign securities

not offered in the U.S., holding title to foreign property and to plan for changing your domicile or citizenship.

Basic Concept

The concept of the trust has been recognized by the law for hundreds of years. A trust is a three-cornered arrangement. It is created when someone (the "grantor(s)") transfers legal title to property to someone else (the "trustee(s)") to hold and administer for the benefit of a third party (the "beneficiary(ies)") according to the terms of the trust documents.

Trusts commonly provide that the beneficiary cannot transfer, pledge or assign his interest in the trust, voluntarily or involuntarily, which keeps the trust property free from claims by the beneficiary's creditors. Lawyers have dubbed this kind of provision a "spendthrift clause". A spendthrift clause allows the trustee to control the disposition of the trust assets, rather than the beneficiary or his creditors.

The grantor can be a beneficiary of the trust he creates (a "grantor trust"). Many years ago, someone clever combined a grantor trust with a spendthrift clause to allow people to defeat their creditors' claims by putting their property in a trust that made payments to them, but that their creditors could not reach. It is not surprising that every state in the United States enacted laws prohibiting this type of trust.

The offshore trust is popular precisely because it does permit this arrangement. The grantor transfers assets to a foreign trust administered by a foreign trustee, such as a bank. The offshore trust generally is a discretionary trust, meaning that the trustee distributes the trust's money as and when it pleases. However, the trustee actually follows a "letter of wishes" from the grantor telling it how to pay out the trust's funds. Since the foreign trustee's "discretion" decides when and how to pay, it may deny creditors' requests for distribution from the trust to satisfy a debt of the grantor. When a trust is properly established under the laws of a foreign country, obtaining jurisdiction over the trustee through a U.S. court action generally is impossible, forcing creditors to file a lawsuit in the foreign country in their attempt to reach the trust assets. If the foreign legal system will not enforce liability against the trust assets, removal of the assets from the U.S. may totally defeat recovery by a creditor.

Two other provisions are included in an effective offshore trust: a "duress" clause and a "migration" clause. The duress clause requires the foreign trustee to refuse to carry out any instruction from the settlor made under duress. This clause will preclude a court or government agency from forcing the settlor to make the trust assets available under threat of sanctions. Under a duress clause, the trustee will exercise independent control over the trust until the settlor no longer is acting under duress.

The migration clause requires the trustee to move the trust assets to another jurisdiction if there is any attempt by a governmental agency or creditor to collect information from or assert a claim against the trust.

The combination of these, and other, provisions makes the offshore trust a potent means of securing assets.

Potential Locations for an Offshore Trust

Selecting the best location for an offshore trust requires considering several important factors. Primarily, a grantor will seek a jurisdiction where enforcing a foreign judgment against a trustee is so difficult that claimants won't even bother to try. Grantors also should consider the country's banking and investment infrastructure, language, political stability, economy, communication capabilities, access to qualified trustees, specific trust laws, time zones, and set-up and maintenance costs.

Popular jurisdictions for offshore trusts include:

- Bahamas
- Bermuda
- British Virgin Islands
- Cayman Islands
- Cook Islands
- Isle of Man
- Turks and Caicos
- St. Kitts and Nevis.

Other less well-known jurisdictions that have enacted asset protection laws are Belize, Cyprus, Gibraltar and Mauritius. Each of these jurisdictions has advantages and disadvantages. The Bahamas offer professional services, such as licensed banks, trust companies, and insurance management, which are exceptional and well established, and are particularly good for banking. Bermuda is part of the United Kingdom with a currency at par with the U.S. dollar. The British Virgin Islands are attractive because the currency is the U.S. dollar, but there are few professional services. The Cook Islands offers very aggressive trust law, but has limited professional services, and the location is remote. The Isle of Man is under its own court system, the professional services are excellent, and aggressively seeks these investments. The Turks and Caicos are self-governing and dynamic, but are relatively new offshore players, and there are few professional services. Lastly, St. Kitts and Nevis provide aggressive trust law, but both are similar to the Turks and Caicos in that they are new players in the offshore financial market and have few professional services.

Recently, the Cook Islands courts

handed down a decision that strengthened its asset protection laws. In that case, a U.S. court held two U.S. citizens in contempt of court when they claimed to be unable to bring back funds sought by the FTC for alleged consumer fraud violations. After the contempt finding, and faced with imprisonment, the U.S. citizens attempted to turn over the money by directing the trustee in the Cook Islands to make the FTC a trustee with power to direct the money. The trustee sought guidance from the Cook Islands court, which held that the attempted change in trustee was void and unenforceable. Thus, even when the trust grantor and beneficiary instructs the Cook Islands trustee to return the money, it will not be done if the trustee determines that the request is made under duress.

Tax Issues

A foreign trust can be created with almost no tax implications, both regarding the amount of tax payable and the reporting that must be made. Generally, a U.S. grantor of a foreign trust only needs to see that the trust files an annual information return with the IRS, and has a representative in this country to respond to any information requests by the IRS. These requirements assist the IRS in collecting proper taxes from offshore trusts, and should not impair the asset protection and other purposes behind creation of the trust in light of the taxpayer privacy requirements imposed on the IRS.

Recent State Law Changes

Within the recent past, Alaska and Delaware have enacted laws to overturn two centuries of U.S. law prohibiting grantor spendthrift trusts intended to be immune from creditor claims. These changes were made in an effort to capture some of the billions of dollars that are sent to offshore trusts each year. Although these new laws have the potential to be attractive, because of their recent enactment a number of important issues remain unlitigated and unresolved. Until those questions are resolved, it will be risky to rely upon those state laws for asset protection from creditors.

Fraudulent Conveyance Laws

Under Georgia law, certain transfers of property are labeled fraudulent and void as to creditors. These are:

(1) transfers by a person whose liabilities exceed their assets either before or after the transfer, into a trust in which the grantor retains a benefit;
(2) transfers made with the intention to hinder, delay or defraud a creditor, where the intention is known or should be known by the transferee; and
(3) gifts by a person whose liabilities exceed their assets either before or after the transfer. Because these transfers are void as to creditors, the creditor may seek to recover from the transferee the property conveyed.

The relation of debtor and creditor exists under Georgia law "[w]henever one person, by contract or by law, is liable and bound to pay to another an amount of money, certain or uncertain." For that reason, it is questionable whether a Georgia court would find a transfer fraudulent as to creditors whose claims did not exist and were not reasonably anticipated at the time of the transfer.

Under federal bankruptcy law, a fraudulent transfer is one made within one (1) year before the bankruptcy is filed either with the intent to hinder delay or defraud creditors, or for less than a reasonably equivalent value if the debtor was insolvent before or after the transfer. A bankruptcy trustee may avoid fraudulent transfers and recover the subject property. Of course, this law only applies if a voluntary or involuntary bankruptcy case is filed by or against you within one year after a transfer.

It is because of these laws that creation of an offshore trust should be viewed as a "vaccine" against future asset protection problems, rather than a "cure" for existing ones.

Conclusion

An offshore trust can be useful to achieve a number of objectives, including protecting assets from seizure by creditors. The time to establish such a trust is before assets are threatened, in order to avoid a claim of fraudulent conveyance. In addition, the popularity of these trusts has caused increased attention from Congress and government regulators, which suggests that attempts may be made to curb their use. Accordingly, if you intend to create an offshore trust, it may be prudent to do so without unnecessary delay.

WE HAVE A NEW MEMBERSHIP FEATURE CALLED "E-NEWSCAST" THAT WILL BE SENT BY E-MAIL EACH MONTH. WE NEED FOR YOU TO LET US KNOW YOUR E-MAIL ADDRESS SO YOU CAN RECEIVE IT.

Transfer Taxes After The Economic Growth and Tax Relief Reconciliation Act of 2001

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On June 7, 2001 President George W. Bush signed into law the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA" or the "2001 Tax Act"). [1] Proponents claimed that the 2001 Tax Act was the most sweeping and significant tax relief in twenty years, but its changes primarily affect individuals. The amendments to the Code[2] reduce individual income tax rates, provide relief to married couples and lessen the burdens of the alternative minimum tax. Yet, the crown jewel of the legislation considered to provide the greatest relief to individuals and their heirs was the "repeal" of the estate tax. However, despite the extensive media coverage surrounding repeal, the reality of the 2001 Tax Act is that repeal is only effective for one year - 2010 - after which the estate tax returns to its pre - 2001 Tax Act level.

Thus, practitioners (and their clients) who perceived that Congress was taking steps to simplify the planning process for transferring wealth, have been deceived. In fact, the new laws we must interpret and apply have been appropriately described as perplexing and quixotic,[3] resulting in an "estate planning roller coaster."[4] In an effort to ease the anxiety attendant to the roller coaster ride, this article highlights certain transfer tax provisions of the 2001 Tax Act of which the practitioner should be aware.

"Repeal" of the Estate GST Taxes

The federal transfer tax system

imposes a tax on the transfer of property from one individual to another[5], whether the transfer occurs during life (the gift tax) or at death (the estate tax). In addition, there is a separate tax imposed on a transfer of property from one individual to another individual who is two or more generations below the transferor (the generation skipping transfer, or "GST," tax). The most common context in which the GST tax is imposed is on a transfer from a grandparent to a grand child.

Under new provisions of the Code, the estate tax and the GST tax will gradually be phased out over an eight year period pursuant to new schedules of tax rates and exemptions contained in Code Sections 2001 and 2010. The table in EXHIBIT Ashows the maximum estate and GST rates and exemptions from 2001 (before changes) to 2011 (when original rates are scheduled to return). As the table demonstrates, the increase in the exemption combined with the decrease in maximum rate results in a maximum tax of 45% on estates in excess of $3.5 million just prior to repeal. However, in 2011, an estate in excess of $3.5 million would only qualify for a $1 million exemption. The remaining estate would be taxed on the basis of the pre - 2001 Tax Act graduated rates (37% - 55%). Thus, wealthy clients who fail to properly plan in anticipation of permanent repeal may pay dearly for the gamble.

A "Byrd" into the Sunset

Congress did not "pay for" the cost of repeal through permanent spending cuts. Rather, Congress "borrowed" the cost based on anticipated budget surpluses. Because fewer than 60 senators voted for the tax bill, a fiscal responsibility rule known as the "Byrd rule" applies to the legislation. Under the Byrd rule, any tax cut that is not offset by permanent spending cuts must expire, or "sunset," in ten years. Thus, although the estate and GST taxes are repealed effective January 1, 2010, the taxes will be reinstated at pre-2001 Tax Act levels, i.e., 55% top rate with $1 million exemption on January 1, 2011. Therefore, assuming the 2001 Tax Act survives the five future Congresses and three administrations that could take office during its tenure, an individual must die in 2010 in order to truly benefit from repeal. Such an anomalous provision has added new life to the prospect of tax planning through living wills.

De-Unification - Retention of the Gift Tax

Surprisingly, the 2001 Tax Act did not repeal the gift tax. The table in EXHIBIT B shows the gift tax rates and exemptions from 2001 (before changes) to 2011 (when original rates are scheduled to return). The table demonstrates that the 2001 Tax Act reduces the marginal gift tax rates gradually, in step with the marginal estate and generation skipping transfer tax rates shown in EXHIBIT A, but the corresponding increase in exemption amount is frozen at $1 million effective as of January 1, 2002. The result is a de-unification of the gift and estate tax regimes. Formerly, the transfer system was designed to be neutral as between transfers during life and those at death. The unified system of rates and exemptions neither encouraged nor discouraged lifetime versus testamentary transfers. However, after the 2001 Tax Act clients will no longer be neutral with regard to their decisions to make intervivos transfers of wealth. Effective use of leveraged lifetime gifting strategies is now more important than it was under the unified regime.

Most commentators cite prevention as Congress' rationale for retaining the gift tax.[6] Congress apparently feared that there would be an additional of loss in revenue generated when taxpayers in higher income tax brackets shifted appreciated assets to taxpayers in lower income tax brackets, by means of a gift, without having to pay a tax. Effective January 1, 2010, new Code Section 2511(c) changes the rules governing the determination of a completed gift. Under the new rules, any lifetime transfer to a trust that is not a grantor trust,[7] in its entirety with respect to the grantor or his spouse (regardless of the retained powers that would have made the transfer an incomplete gift under pre-EGTRRA rules) will be treated as a complete gift for tax purposes. Thus, the new transfer tax system (should it remain intact until 2010) broadens the definition of a taxable lifetime transfer and equalizes the rate of tax on such transfers with the highest marginal income tax rate scheduled to be in effect at the time of repeal - 35%.[8]

Watch Your Step! - Step-Up in Basis Repealed

Currently, under Code Section 1014, property transferred at death generally receives a "Step-up" in income tax basis from the decedent's pre-death basis to the property's fair market value. Thus, an heir who receives stock worth $1 million that had a pre-death basis of $100,000 could immediately sell the stock for $1 million and recognize no gain. From a practitioner's standpoint, the step-up in basis rule is beneficial because it simplifies the determination of the bases of a decedent's assets.

The 2001 Tax Act repealed the step-up in basis rule for assets transferred at death upon repeal of the estate tax. Under new Code Section 1022, which applies to estates of decedents dying after 2009, a transferee of property from a decedent takes a carryover basis in that asset. Thus, unless he or she may benefit from one of the exceptions described below, the heir in the earlier example would recognize $900,000 of capital gain upon the sale of the stock.

Exceptions to the Carryover Basis Rule

The 2001 Tax Act provided some

relief from the effect of carryover basis by permitting executors to allocate $1.3 million of basis increase among the estate's assets transferred to a non-spouse.[9] The $1.3 million limit may be increased by the decedent's unused capital losses, net operating losses, and certain built-in losses.[10] Executors may allocate an additional $3 million of basis increase to the estate's assets transferred to a spouse—either outright or through a special type of trust commonly referred to as a qualified terminable interest property ("QTIP") trust..[11] Pursuant to such a trust, the spouse receives all income and is the only beneficiary of the trust during his or her lifetime. The result is a $4.3 million step-up in basis for assets passing to a spouse in 2010. Thereafter, basis increases will be indexed periodically for inflation, with such increases occurring in high, fixed dollar amounts—$100,000 for non-spouses, $250,000 for spouses.

The new rules prohibit executors from increasing the basis of an asset above its fair market value,[12]and not all property is eligible for a basis increase. Property such as income in respect of a decedent, generally income earned prior to death put paid subsequent to death, which was ineligible for a step-up in basis under prior law, will continue to be ineligible. In addition, property of a decedent acquired by gift from a non-spouse less than three years before death is excluded. This prevents gifts of low-basis assets in anticipation of a basis step-up.

The carryover basis regime will be much more complicated for the practitioner, and record keeping requirements will be increasingly burdensome for executors. Under new Code Section 6018 (effective in 2010), in the case of transfers from a decedent of assets (other than cash) in excess of $1.3 million, the executor must file a return, reporting (<u>for each asset</u>): the name and taxpayer identification number of the recipient; a description of the asset; the asset's fair market value at death; the decedent's basis, holding period and sufficient information regarding character of gain that would be recognized upon disposition (ordinary or capital); the amount of basis increase allocated to the asset; and such other information as the IRS may prescribe in Regulations. It bears mentioning that carryover basis rules have been previously enacted. In 1976, Congress instituted a carryover basis regime. The regime proved so difficult to administer that it was repealed, retroactively, in 1980.[13]

Federal Government's Gain is States' Loss - Elimination of State Death Tax Credit

Beginning in 2002, the state death credit under Code Section 2011 is gradually phased out over a four year period. The 2001 Tax Act provides that for estates of decedents dying after 2001, the state death tax credit cannot exceed the "applicable percentage" of the credit that would otherwise be available under Code Section 2011. The applicable percentages are 75% in 2002; 50% in 2003; and 25% in 2004. In 2005, the credit is completely eliminated, and at that time, new Code Section 2058 will provide a deduction from the gross estate for any state and local death taxes paid.

Currently, 37 states and the District of Columbia impose a "pick-up" inheritance tax. Heretofore, the pick-up tax has operated as a means of revenue sharing between the states that have enacted it and the federal government. Formerly, Code Section 2011 permitted a dollar for dollar reduction in the federal estate tax liability for the amount of state inheritance taxes paid (subject to a cap of 16%). Thus, the pick-up tax is an inheritance tax imposed by a state that exactly equals the state death tax credit allowed. However, under the 2001 Tax Act, the state revenue generated by the pick-up tax will be gradually reduced and ultimately eliminated unless there is action at the state legislative level. The cost to the federal government for the change? Nothing. If anything, the federal government will have increased its revenues at the cost of the states.

It is certainly reasonable to expect state legislatures to act to prevent the enlargement of their ever increasing budget shortfalls. Where not constitutionally prohibited, practitioners can anticipate legislation to enact taxes in some form to recover revenues lost as a result of the elimination of the state death tax credit.

Other Notable Changes

Expansion of Deferral Through Installment Payments

Prior to the 2001 Tax Act, an executor could elect to pay all or part of the estate tax attributable to an "interest in a closely held business" in installments if the interest was greater than 35% of the decedent's gross estate.[14] An executor could elect to pay the tax in two or more (up to a maximum of ten) equal installments, with the first installment due on the fifth anniversary of the due date of the estate tax return. For purposes of the deferral, an "interest in a closely held business" generally meant an interest in an <u>active</u> trade or business or an interest as a partner in a partnership carrying on an active trade or business.[15]

The 2001 Tax Act expanded the definition of an interest in a closely held business to include interests in a "qualified lending and finance business" and certain holding company stock. To be a qualified lending and finance business ("QLAFB") the business must satisfy one of two sets of criteria:

(1) During at least three of the five years preceding the decedent's death, the business must have employed at least one full-

time employee, engaged in the active management of the business; ten full-time employees (none of whom were owners) who provided services directly related to the business; and the business had to have $5 million or more in gross receipts from the activities of a QLAFB; or

(2) There was substantial activity immediately before the decedent's death with respect to the lending and financial business carried on by the corporation rendering services or making facilities available or by another corporation that is a member of the same affiliated group.

Although Code Section 6166 has been expanded to include interests in larger companies and partnerships engaged in a broader range of financial activities, the deferral period for estates that hold such interests has been decreased. The installment limitation for tax payments is reduced from ten to five. In addition there is no five year grace period after the date the estate tax return is due. Thus, the effective fourteen year deferral period for the traditional interest in a closely held business has been reduced to four for the expanded interests.

Qualified Family Owned Business Interest Repeal

For estates of decedents dying after 2003, the rule which permitted executors to exclude all a portion of the value of a family held business from a decedent's estate[16] is repealed. The extra exemption provided by QFOBI relief is effectively swallowed by the increase in available exemption effective in 2004—up to $1.5 million. Thus there is no "net loss" to taxpayers from the repeal. However, the recapture provisions of QFOBI relief are retained, even after repeal. Under the recapture provisions, if an interest from which relief was elected is sold within ten years of the filing of the estate tax return claiming the exclusion, the tax is recaptured. Thus, although the estate tax is suspended in 2010, because QFOBI relief expires as late as 2003, an estate that claimed the exclusion could be subject to estate tax in the form of recapture as late as 2013..

Conservation Easements Broadened

The 2001 Tax Act significantly broadened the rule for the exclusion of certain conservation easements from a decedent's gross estate.[17] The act eliminated the requirement that the land subject to the easement be located near areas such as a national park or historic building. Effective upon enactment, the only requirement for location of the real property subject to the easement is that it be in the United States or one of its possessions. However, like QFOBI relief, the recapture provisions of the conservation easement exclusion will remain effective even after repeal.

Residential Relief

Under Code Section 121, taxpayers may exclude up to $250,000 ($500,000 for married taxpayers filing jointly) of gain realized on the sale or exchange of a principal residence from gross income. For estates of decedents dying after 2009, the exclusion of gain on the sale or exchange of a principal residence carries over to the decedent's estate, heirs and a trust established by the decedent that immediately prior to the decedent's death, was a qualified revocable trust.[18]

Generation Skipping Transfer Tax Provisions

Increased Exemption

As noted above, the GST exemption amount is scheduled to increase during the next eight years to a maximum of $3.5 million in year 2009, prior to repeal in 2010. After repeal, the exemption returns to its pre - 2001 Tax Act level of $1,060,000. (See Table in EXHIBIT A).

Automatic Allocation for Indirect Skips

Prior to the 2001 Tax Act, the Code provided certain relief in the form a deemed allocation of GST exemption for transfers during lifetime to a person (including a trust in which grandchildren or lower generations are the only present and future beneficiaries) who is more than one generation below the transferor. The transfer to the "skip person" would be allocated sufficient GST exemption to make the inclusion ratio for the property equal zero, i.e., to make the transfer exempt from GST tax. However, the Code did not provide for such automatic allocation of GST exemption in the case of transfers to so-called "dynasty trusts." In a typical dynasty trust a grandparent transfers property to a trust, which pays income to the parent (grandparent's child) for life and principal is held for the health, maintenance and welfare of the parent. Upon the death of the parent, the trust is held for the benefit of the grandchildren on the same terms, and this chain continues subject only to the state "rule against perpetuities" limitations, if any.

In the case of dynasty trusts, practitioners often failed to allocate a sufficient amount of the grandparent's GST exemption to the trust under the mistaken belief that such trusts qualify for the GST tax annual exclusion. Dynasty trusts do not qualify for the exclusion either before or after the 2001 Tax Act. The transfers are not direct skips. However, if the parent dies, the result would be a taxable termination of the trust and the transfer to the grandchild would be fully taxable on the date of the parent's death. The 2001 Tax Act added new Code Section 2632(c) which provides for an automatic allocation of a transferor's remaining GST exemption in "indirect skips," where an indirect skip is defined as any lifetime transfer of property (other than a direct skip),

EXHIBIT A

MAXIMUM ESTATE AND GST TAX RATES AND EXEMPTIONS: 2001 to 2011

Calendar Year	Estate / GST Exemption	Estate and GST Maximum Tax Rate
2001	$ 675,000/$ 1.06 million	55% + 5%
2002$	1 million/$ 1.06 million	50%
2003$	1 million /$ 1.06 million	49%
2004$	1.5 million	48%
2005$	1.5 million	47%
2006$	2 million	46%
2007$	2 million	45%
2008$	2 million	45%
2009$	3.5 million	45%
2010	Tax repealed for one year	0%
2011	$1 million/$ 1.06 million	55% + 5%

EXHIBIT B

GIFT TAX RATES AND EXEMPTIONS: 2001 to 2011

Calendar Year	Gift Tax Exemption	Gift Tax Maximum Rate
2001	$ 675,000	55% + 5%
2002	$ 1 million	50%
2003	$ 1 million	49%
2004	$ 1 million	48%
2005	$ 1 million	47%
2006	$ 1 million	46%
2007	$ 1 million	45%
2008	$ 1 million	45%
2009	$ 1 million	35%
2010	$ 1 million	35%
2011	$1 million	55% + 5%

which is subject to gift tax and is made to a GST trust[19]

Administrative Relief - Late Elections

Prior to the effective date of the 2001 Tax Act, there was no authority for an extension of time for a practitioner to file an election to allocate GST exemption to a transfer. Thus, if a gift tax return was not timely filed, the value of the gift to which GST exemption was allocated was the value of the property transferred as of the date of the filing the late election with the IRS, rather than the date of the gift. This often resulted in a "loss" of GST exemption because of the increase in value of an asset such as stock.

The 2001 Tax Act directed the Treasury Secretary to prescribe regulations setting forth circumstances and procedures under which extension of time to make allocations will be granted. Notice 2001-50,[20] established that the standards and procedures used by the IRS will be similar to those used to determine whether administrative relief should be granted in other contexts[21]. Thus, although the IRS will generally base its decision on all relevant facts and circumstances, the primary determination will be whether the transferor acted "reasonably and in good faith."[22] A transferor may meet this standard because of reasonable reliance on a tax return preparer or other tax professional who failed to take the proper action or because of a misunderstanding based on the complexity of the law. In either case, practitioners should review the GST allocations of their clients and

act swiftly to request relief, if necessary.

Conclusion

The uncertainty of repeal is the only thing that is certain at this point. Forgetting for a moment that repeal came with a giant string attached— mandating that it be pulled back after a mere year in existence— there remain five congresses and potentially three Presidential administrations that this legislation must survive. The events of September 11, our military response and the effects of a slowing economy on the anticipated budget surpluses provide further reason to question permanent repeal. What we may see instead is a gradual decrease in the top estate and GST tax rates combined with the gradual increase in exemptions until the point where only those estates in excess of $4 or $5 million would be subject to tax. Of course, itit's anyone's guess what the reality of repeal will be come New Year's Eve 2009, but one thing is certain, to neglect estate planning in anticipation of repeal is foolhearty.

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1 Pub. L. No. 107-16 (6/7/01)
2 All references to the Code are references to the Internal Revenue Code of 1986, as amended.
3 William M.Vandenburgh and Philip J. Harmelink, Transfer Taxes - The Uncertainty of Death and Taxes, Journal of Accountancy, 10-01 J.A. 95 (October 2001)
4 Ronald D. Aucutt, An A-to-Z to Do List Following EGTTRA, Estate Planning, 28 Est. Plan. 606, December 2001.
5 Transfers to spouses, during life or at death, are generally exempt from transfer tax.
6 Vanderburgh and Harmelink, 10-01-J.A. 95 (October 2001); Jeffrey K. Eisen, Estate Planning Under 2001 Tax Act Presents New Challenges, 28 Est. Plan. 515 (November 2001).
7 A grantor trust is a trust from which all income, gain, loss, deduction and credit are attributed to the grantor for tax purposes.
8 The highest personal income tax rate is reduced by the 2001 Tax Act to 35%, effective 2006.
9 Code Section 1022(b)(2)
10 Code Section 1022(b)(2)(c)
11 Code Section 1022(c)
12 Code Section 1022(d)
13 Pub L. No. 96-223, Sec. 401(a) (repealing Sec. 2005(a)(1) of Pub. L. 94-455 (effective for decedents dying after 12/31/1976)
14 Code Section 6166
15 Code Section 6166(b)
16 Code Section 2057
17 Code Section 2031(c)
18 As defined in Code Section 645(b)(1)
19 New Section 2632(c)(3(B) defines a GST trust as any trust that ultimately may produce a taxable termination or taxable distribution except:
- A trust which requires that 25% or more of its principal be distributed to (or which permits such amount to be withdrawn by) a beneficiary who is not a skip person (e.g., a child): (1) before the beneficiary reaches age 46, or (2) who is living on the date of death of another person identified in the trust instrument who is more than ten years older than such nonskip beneficiary. If a trust requires more than 25% of its principal to be distributed to a nonskip beneficiary on the occurrence of such an event, a transfer to such a trust will not qualify for the automatic allocation.
- A trust which provides that if a nonskip person dies on or before a date or event described above, more than 25% of the trust principal (1) must be distributed to the nonskip person's estate or (2) is subject to the nonskip person's general power of appointment.
- A trust any portion of which would be included in the gross estate of a nonskip person (other than the transferor) if such person died immediately after the transfer.
- A trust which is a charitable remainder annuity trust, a charitable remainder unitrust a charitable lead annuity trust or a charitable lead unitrust.
20 Notice 2001-50, 2001-34 IRB 189
21 See, e.g., Treasury Regulations Section 30 1.9100 et., seq.
22 Treas. Reg. Section 301.9100-3(b)

SIGN UP A NEW MEMBER TODAY

Help your Section grow by signing up a new member. Copy the membership form from the back of this magazine and give it out at your local Bar Meetings.

Mid Year Meeting Luncheon

Chairman Lester S. Tate, III, presents Sally Akins with her Chairman plaque at the Mid-Year Section Luncheon

Chief Justice Norman S. Fletcher gave a wonderful speech at the General Practice and Trial Section Luncheon held at the Mid-Year Bar Convention

(l-r) Past Chair Sally Akins, Judge Marion T. Pope, Jr. and Judge Bonnie Oliver

(l-r) Susan Howick, Joe Weeks and Wright Gammon.

(l-r) Ken Shigley, John Barrow, Secretary of State, Cathy Cox, Justice George H. Carley.

When I die...

By Martin N. Ghen

> "We carry an awful lot of information in our heads - and when we're gone, it's gone too."
>
> **Ross A. Sussman, Esq.**

Many more of us are practicing as solos. Many more of us are not remembering to take a few minutes to plan for the unfortunate and unexpected termination of our ability to practice law, such as an untimely death. Taking a few minutes to let our loved ones know how we manage our practices and preparing one or two documents will maximize the value of our practices to our estates.

Should you suddenly die, your survivor is faced with some unique post mortem problems:

- Pending matters must be reviewed immediately by an attorney to determine if a statute of limitations is running, if a trial date is pending, or a pleading is due or an appearance scheduled. Courts, agencies, and opposing counsel must be notified. In some cases the client may have to be notified immediately.
- Clients with pending matters must be notified, and their files referred for proper handling with an equitable arrangement for the estate to receive reasonable value for the work performed.
- Wills kept for safekeeping and other client property or funds, and closed files must be returned, transferred, or properly disposed.
- Where permissible, arrangements made for the sale of the practice.

The uniqueness of the situation is complicated by client confidentiality and control. Nevertheless, if a solo's office is well organized and the practitioner has prepared, these problems can be easily overcome by a surviving spouse or estate representative. Most important is the protection of a client's claim or pending lawsuit. Time may be too short to wait for the review of the will, or the appointment of a receiver. Without a system in place for immediate review and action, a client's claim may be time barred or a pending matter may be forfeited for the failure to timely file a pleading. How can your planning of a future action on your client's behalf be documented for action by a successor? Your thoughts and plans for your clients cannot be transferred for action by a successor if the thoughts die with you. The key therefore to a successful transition of your clients' matters is a well organized and well documented practice.

First and most important is that you have and use a calendaring system that is easy to understand. The first place a successor will search, with or without the assistance of your office staff, if you have one, will be your current calendar where, hopefully, you have documented all your deadlines, client appointments, court hearings and appearances, deadlines for court filings, and even statutory deadlines for every matter from limitations on actions to motions and pleadings.

Second, you need to record the contact information for every one of your open files; such as client name, address and phone number, type of matter, date of any statute of limitation, other contacts such as opposing counsel's address and phone number, and alternative contacts.

With these two important practice tools in place and current, it is important for you to leave instructions to your survivor how to use them. With this information a surviving spouse or successor attorney will have an easier time of notifying the right people of your untimely demise and getting time for replacement counsel. If a statute is running, the client can be immediately contacted and arrangements made with substitute counsel to see that the appropriate writ or pleading is timely filed. Immediate situations resolved, your survivor will have time to make a proper disposition of your

Every lawyer owes it to his family and those who have to pick up the pieces of his professional affairs after death to make arrangements while his health is good and his mind is clear for the eventuality of death."

—Scott McArthur, Esq.

open files, dispose of client property and closed files, and, if allowed in your jurisdiction, for the sale of the law practice.

The best way to leave these instructions is in a letter to your surviving spouse or significant other. This letter should spell out the important office systems and procedures you use, things that will have to be done and when, who should do them, and other pointers to assist in the winding up of your law practice. Also, you must discuss this information with that important person. Both of you should make good notes and an outline of things to be done. The best procedure is to discuss what will have to be done, show your loved one where the documents and information are located, and be sure he or she knows your advisors. Then write the letter and discuss it. The first time may be the hardest, but it is most important. You both should review and update the letter annually. I have tried to take into consideration that many of us rely on computer programs and stored data. If not, references should be made to your unique calendaring or client filing system. I chose to write to my wife, and I repeat this introduction . . .

A SAMPLE LETTER

Dear...

When I die, there will be a lot of things to do. But, before I explain them, let me thank you for your love, support, and encouragement. We've had a good life together and I'm gone, I want to make the details as easy as possible for you. That's why I like to meet with you each year to review and update this letter. This is a summary of the things we discussed. While there are many items, I have divided them into sections because not everything has to be done at once.

FOR IMMEDIATE ACTION

Client Matters: You should contact my secretary Susan and as soon as possible you and she can meet at the office. It is important for her to review my calendar for the immediate future to take the appropriate action to notify the client, court and opposing counsel. Each client file and directory in the computer contains an "Information" form with the important contact information. You can ask my good friend Linda Shick to help with those litigation matters that need immediate attention. She is a very competent trial attorney and she is familiar with the type of personal injury matters I am presently handling. If immediate action is required on other types of matters, Linda can seek help if she needs it from my brother Greg, or Robert Ruehl whom we met with to discuss our estates and prepare our wills.

Bar Associations: I have been active in the Solo and Small Firm Section of both the Pennsylvania Bar Association and Bucks County Bar Association. I suggest you call Section Relations Coordinator at PBA, Michael Shatto (800-932-0311) to let him know of my demise. Also contact Ellen Friedman, Law Practice Management Coordinator for the PBA with whom I work on various projects (800-932-0311, ext 2228). You may want to post a notice on our listserver. At the Bucks County Bar Association, please contact Patricia Martin, Executive Director (215-348-9413), and the Chairman of our section, Nancy Taylor (215-340-5039). These persons are aware of my activities and will see that someone takes over my projects. I've tried to keep the Bar Association material up-to-date. The project files I have been working on should go to the appropriate association.

Our Wills and Trusts: These documents are in my office desk file drawer under "Wills and Trusts."

FOR ACTION IN FIFTEEN DAYS

Insurance: I have put a "Personal Notebook" together and you will find it in my office desk file drawer. Section I contains a summary of my life insurance, including the policies and claim forms. Our other insurance - home, car, and accident policies, are summarized and the actual policies there. Section II has my business policies. I am sure you will be in touch with Irv Rubin, our insurance agent and friend, about these policies.

Financial: In addition to the insurance money, there will be money from the law practice, social security, and other investments. I suggest you sit down with our accountant Gerald Cherry (215-348-5477) and

discuss your entire financial and income situation with him. I've made a rough draft of the income you might expect and put it in Section III of the notebook. Also, my banker is Terry McGlinchey at Harleysville (215-230-5532). He is knowledgeable about my business financial accounts. You will find that if I have a balance on any lines of credit which I use in some litigation matters, it will be covered by insurance. He can discuss these and other banking matters with you.

FOR CONSIDERATION IN THIRTY DAYS

Office: I have put a notebook labeled "Office Notebook" in the drawer next to the "Personal Notebook." In the Office Notebook I summarize the procedures I use in the office to open and close files. I describe my billing practices and billing system, as well as where and how to find my client lists of both open and closed files. As you know I am an advocate of using the computer to the max so my client matters are in WordPerfect directories, and the client lists and billings are in Time and Billing. Unfortunately, I have not acquired a computerized bookkeeping system, so you will find the financial records under a safeguard system located in the bookkeeper's desk. You remember Cindy, she is still my bookkeeper and will work with you and Jerry. I also describe other programs on our network that I use for word processing and billing. You will see that the client files are kept in numerical order and are in the cabinets. All documents we create are in client folders alphabetized in WordPerfect directories. You should make arrangements with Susan and Cindy regarding their staying on for a time to help with the transition of my clients' matters and closing the office.

FOR CONSIDERATION IN THE NEAR FUTURE

Office Arrangements: The Pennsylvania Supreme Court has just changed the rules to allow the estate of a lawyer to sell a law practice. This may or may not be a viable alternative for you, but you should consider it. Besides the "good will" I may have created, if you could negotiate with a willing attorney to buy the practice, some of the advertising positions (phone numbers) and the location of the office may mean additional income for the estate. Robert, Greg and Linda will discuss this possibility with you. The rules are new. The clients must give their consent. I want to be sure they are well served. If a sale of the practice is not to be, once my client matters have been transferred to appropriate attorneys, any client property returned, and the closed files properly disposed of, you should sell the books, furniture and equipment or give it away to a charity.

Office Lease: The office lease with Jeffrey Naftulin (215-348-5455) runs year to year and it is in the Office Notebook. You should talk to Jeffrey. I am sure he will cooperate with you while this transition process takes place. If the practice is sold, the buying attorney may want to keep the location and he or she must come to terms with Jeffrey. If not, you and Jeffrey should come to an agreement concerning terminating the tenancy.

Malpractice Insurance: In the Insurance Section of the Office Notebook is a copy of my current malpractice policy with Westport Insurance. The policy was obtained through USI Colburn Insurance Service (610-833-1800). My contact there is Mary Frances Benussi, she is a Senior Underwriter and she knows me from my work with the PBA. She can help arrange for a special policy to cover any claims against my estate. This coverage is important and will protect you and my estate from any future claim. Also, retain the old policies for as long as possible in case they are needed.

Remarriage: Should you consider remarrying, and I hope you do, you should have a Pre-Nuptial Agreement. This agreement will insure that all we have worked for during our marriage will remain your and our children's property to have and control. Please discuss this with Robert or an attorney of your choosing familiar with Pre-Nuptials.

Thank you for everything. Love.

Marty

Your letter, of course, should cover your own particular and personal situation. You should include references to your office procedures, location of important documents such as leases and insurance policies, your advisors and professional friends. If you have a specialized practice, it is important that your survivor be directed to the right professional who knows your type of practice. The important thing is to let your loved one know this important information about your practice and document that for when it may be needed.

Martin N. Ghen is a solo practitioner in Doylestown, PA. He is Secretary of the Solo and Small Firm Section of the Pennsylvania Bar Association, and a Founder and Past Chairman of the Solo and Small Firm Section of the Bucks County Bar Association.

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Mark Dehler chaired the trial practice session on the last day

NOTES

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When You Die...