

# GEORGIA BAR Journal

APRIL 2000 • VOL. 5 NO.

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# GEORGIA BAR Journal

APRIL 2000 • VOL. 5 NO. 5

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# GEORGIA BAR Journal

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# IF WE DON'T DEFEND OURSELVES, WHO WILL?

By Rudolph N. Patterson



Recently, while attending a meeting of the Chief Justice's Commission on Professionalism, I realized there is a difference between professionalism and being a professional. Professionalism is the high voluntary standard of conduct we expect from all lawyers. Certainly, every lawyer must act within the mandatory ethical standards of the profession as promulgated by the Supreme Court. But beyond that, we have an obligation to the profession to exceed this level of conduct and strive to a higher standard. We must focus our efforts on the positive.

But this has its challenges, for I fear we have fallen into a trap. A look at the daily headlines or the evening news shows we have become conditioned to absorb only the negative news we hear. Do we respond the same way when we hear good news? Does it get our attention when we hear someone say, "I know some lawyers who did good thing"? Or do we pay more attention when we hear stories about a lawyer in trouble? Do we find ourselves believing that all lawyers are bad? Are we being trained — or have we been trained — to be a negative society?

Could it be that lawyers are too good for their own good? I find that

the great majority are honest to a fault. Does it therefore surprise us that when one lawyer does something wrong, it stands out like a sore thumb? It becomes a news story that is repeated over and over for several days. We continue to hear it said time after time directly or by innuendo that professionalism — and the profession — are going to "the well in a bucket."

Instead of repeating the negatives, we need to make a concerted effort to spread the good news about what lawyers are doing. There are so many who are making a difference not just in the profession as part of their daily practices, but in their professionalism, as true leaders of their bars and in their communities.

Professionalism includes all lawyers like those in south Georgia, led by YLD President Joe Dent and the Young Lawyers Division, who responded to the recent tornado tragedy in that region by providing legal assistance to the victims and by physically helping with the clean up. There were many younger and older lawyers, including entire law firms, involved in this aid. Yes, these were lawyers at work showing their professionalism by helping others in desperate need, and no legal fees were collected.

Professionalism includes members of the Western Circuit Bar Association in Athens who recently bought reading books for over 300 kids and then spent time helping them learn to read. Professionalism includes lawyers and judges volunteering during our annual Law Day activities and the YLD Great Day of Service to complete a variety of

service projects in their hometowns.

Professionalism includes Millard Fuller, who founded and runs Habitat for Humanity. This is a wonderful project he started in his law office in Americus, Ga. They will build their 100,000th home this summer. What a credit he is to our ranks as a symbol of what we all aspire to be.

Professionalism includes great, caring lawyers and judges. The list of those who have done for others and performed their legal duties in a professional manner would fill many pages of this magazine. If their contributions were printed, it would take volumes. They all have dedicated a great part of their professional life to using their legal skills in a very positive manner.

Professionalism includes lawyers who have actively served in various positions and committees of the State Bar. It includes those who have served their communities, cities, counties, the State of Georgia and the federal government as volunteers, as elected and/or appointed officials. Their personal goal has been and is to improve our bar and help make this a greater state and nation.

But as in life, there will always be a few bad apples. However, we can not let them taint the good work that the greater majority of you are accomplishing.

Perhaps we feel that not standing up for our profession makes us popular in the public eye. But what we're doing in reality is unjustly condemning ourselves. Instead of bowing to our "educated negative attitude," please, support our profession and share the reality that we are professional, ethical, concerned citizens, caring neighbors and protective allies. Help us share with others our active concern and good image in every community. Let's be proud of our profession and speak up for it. For if we don't, who will? ☐

# LAWYERS FOUNDATION OFFERS A LASTING TRIBUTE



By Cliff Brashier

Being at an age when I am frequently asked to be a pallbearer at a friend's funeral but never asked to be in a friend's wedding, the memorials program of the Lawyers Foundation

of Georgia is very helpful to me. A gift in memory of a deceased attorney or deceased family member of an attorney is a very meaningful way to honor colleagues through the profession that was such a major part of their life.

When the Lawyers Foundation receives a memorial gift, a written acknowledgment is sent to the surviving spouse, family members or other designated persons to let them know of the tribute. An expression of thanks is also sent to the person making the gift. The funds are then used for law-related charitable purposes.

I have found that the surviving family members especially appreciate this form of lasting remembrance. If you decide to honor your colleague's memory in this manner, please let me know if your experience is the same.

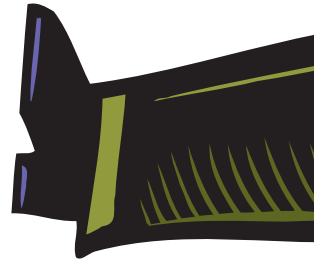
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Your comments regarding my column are welcome. If you have suggestions or information to share, please call me. Also, the State Bar of Georgia serves you and the public. Your ideas about how we can enhance that service are always appreciated. My telephone numbers are (800) 334-6865 (toll free), (404) 527-8755 (direct dial), (404) 527-8717 (fax), and (770) 988-8080 (home). ☒

## So. Ga. Mediation new



# Picking Up the Slip and Fall Plaintiff



By Michael Goldberg

**T**o the average person, the mention of a slip and fall case conjures up visions of a malingerer pouring a Coke on the floor and then lying next to it pretending to be in pain. For some reason, people associate slip and fall cases with the “classic insurance scam.” It could be that most people cannot believe that claimants are so unwary of their surroundings that they cannot see what is in plain view in front of them. Perhaps these cynics have difficulty accepting that claimants could slip on such a wide variety of items as a grape,<sup>1</sup> a partially thawed frozen vegetable,<sup>2</sup> a french fry,<sup>3</sup> and liquid detergent<sup>4</sup> (although, ironically, there has never been a reported decision in Georgia of a slip and fall on a banana peel).

Whatever the reason for the skepticism, these claimants do not have the respect and sympathy that other personal injury plaintiffs enjoy. Given this pervasive attitude towards slip and fall plaintiffs, the recent decision of *Robinson v. Kroger Co.*,<sup>5</sup> in which the Georgia Supreme Court finally decided to pick up the slip and fall plaintiff and treat him with the same dignity as any other plaintiff, is all the more unusual.

## The Law Prior to *Robinson v. Kroger Co.*

Prior to *Robinson*, slip and fall law was dominated by the burdensome test delineated in the 1980 decision of *Alterman Foods, Inc. v. Ligon*.<sup>6</sup> Under the precedent of *Alterman Foods*, in order to state a cause of action, a slip and fall plaintiff had to show (1) that the defendant had





actual or constructive knowledge of the foreign substance and (2) that the plaintiff was without knowledge of the substance or, for some reason attributable to the defendant, was prevented from discovering it.<sup>7</sup> The end result of this test was that a slip and fall plaintiff, unlike any other plaintiff, essentially had to prove his own lack of comparative negligence in order to reach a jury.<sup>8</sup>

Defendant business owners frequently used the *Alterman Foods* test to obtain summary judgment by demonstrating that the plaintiff could have seen and avoided the hazardous condition but failed to do so.<sup>9</sup> Counsel for the defendant business owner would typically ask the plaintiff at his deposition if he could have seen the substance if he had looked down prior to his fall. An unwary plaintiff would usually respond, as one would expect, that he could have seen the grape, water or other foreign substance if he had closely examined the floor before his fall since nothing actually obstructed his view of the floor. Although it was almost always the situation that the plaintiff, in hindsight, could have seen the hazardous substance, the business owner was still entitled to summary judgment because the plaintiff could have seen the substance and avoided the hazard if he had paid more attention to where he was walking.<sup>10</sup> In this manner, the slip and fall plaintiff was kept from presenting his case to a jury, and most cases were adjudicated on a motion for summary judgment.

## The Effect of *Robinson v. Kroger Co.*

As this trend continued for several years, slip and fall cases became so difficult to prosecute that attorneys would turn them away because of the risky proposition of maneuvering through the difficult test of *Alterman Foods*. Then, in 1997, Henrietta Robinson came before the Georgia Supreme Court, and the court had a change of heart.

Mrs. Robinson had been shopping in a grocery store when she injured her knee as a result of slipping on a substance on the floor. She admitted that she did not look at the site where she placed her foot prior to her fall and that she could have seen the hazardous condition if she had examined the floor. After the trial court granted summary judgment to the store and the Court of Appeals affirmed, ruling that the proximate cause of her fall was her failure to exercise ordinary care for her own safety, Mrs. Robinson sought certiorari claiming that a jury should decide if she had been at fault in failing to see and avoid the hazard.<sup>11</sup>

The Georgia Supreme Court agreed with Mrs. Robinson and confirmed that the *Alterman Foods* test unfairly forced the slip and fall plaintiff to prove his own

lack of negligence.<sup>12</sup> According to the court, recent appellate decisions had placed in the limelight an invitee's duty to exercise reasonable care for personal safety and, in so doing, relegated to the shadows the duty owed by an owner/occupier to an invitee.<sup>13</sup>

While the *Robinson* court acknowledged that an owner/occupier was not an insurer of an invitee's safety, the court also recognized that an invitee who responds to an invitation and enters the premises does so pursuant to an implied assurance that the premises have been made ready and safe for the invitee's reception, and the entering invitee is entitled to expect that the owner/occupier has exercised and will continue to exercise reasonable care to make the premises safe.<sup>14</sup>

In balancing these competing duties, the court held that the established standard is whether, taking into account all the circumstances existing at the time and place of the fall, the invitee exercised the prudence an ordinarily careful person would use in a like situation.<sup>15</sup> Given this standard, a plaintiff's admission that he did not look at the site on which he placed his foot prior to his fall does not establish as a matter of law that he failed to exercise ordinary care.<sup>16</sup> Furthermore, a defendant is not entitled to summary judgment simply because a plaintiff testifies that he could have seen the hazard had he visually examined the floor before taking the step that led to his accident.<sup>17</sup>

Under the precedent of *Robinson*, a slip and fall plaintiff must now prove (1) that the defendant had actual or constructive knowledge of the hazard; and (2) that the plaintiff lacked knowledge of the hazard despite the exercise of ordinary care due to actions or conditions within the control of the owner/occupier. However, the plaintiff's evidentiary proof concerning the second prong is not shouldered until the defendant establishes negligence on the part of the plaintiff, *i.e.*, that the plaintiff intentionally and unreasonably exposed himself to a hazard which he knew or, in the exercise of ordinary care, should have known existed.<sup>18</sup> The court cautioned that "routine" issues of premises liability, including the negligence of the defendant and the plaintiff, and the plaintiff's lack of ordinary care for personal safety, generally are not susceptible to summary adjudication, and that summary judgment should only be granted when the evidence is "plain, palpable, and undisputed."<sup>19</sup>

## Post-*Robinson* Decisions Concerning Constructive Knowledge

Armed with this new decision, slip and fall claimants fought off summary judgment motions with the mere incantation of the words "*Robinson v. Kroger Co.*" The

Court of Appeals dutifully followed the Supreme Court's mandate and repeatedly held that summary judgment could not be based on the plaintiff's failure to see the condition that caused his fall.<sup>20</sup> Although the situation appeared grim for business owners, they would not be discouraged. Since the plaintiff's conduct no longer provided a basis for summary judgment, defendants searched for an alternate method of escaping liability and eventually focused on the defendant's lack of knowledge of the hazardous condition. Presumably even under *Robinson*, the plaintiff had to demonstrate that the defendant had actual or constructive knowledge of the foreign substance that caused plaintiff's fall.<sup>21</sup> Since few defendants admitted that they knew of the hazardous condition, this issue usually focused on the plaintiff's ability to prove constructive knowledge.<sup>22</sup>

A plaintiff could show the defendant's constructive knowledge by presenting (1) evidence that employees were in the immediate vicinity and easily could have noticed and removed the hazard, or (2) evidence that the substance had been on the floor for such a long time that (a) it would have been discovered had the proprietor exercised reasonable care in inspecting the premises, and (b) upon being discovered, it would have been cleaned up had the proprietor exercised reasonable care in its method of cleaning the premises.<sup>23</sup> In regard to employees in the vicinity of the foreign substance, the plaintiff had to show that the substance was visible and capable of being discerned by the employee.<sup>24</sup> In regard to liability for failure to inspect the premises properly, the central issue was the plaintiff's proof of the actual amount of time the substance had been on the floor.<sup>25</sup>

Although the *Robinson* court was explicit in the treatment of the issue of plaintiff's exercise of ordinary care for his own safety, the court's decision was silent in regard to the requirement that the plaintiff must demonstrate that the defendant had actual or constructive knowledge of the foreign substance that caused plaintiff's fall. Left with no guidelines from the Supreme Court, the Court of Appeals held in the decision of *Sharfuddin v. Drug Emporium, Inc.* that the first prong of the old *Alterman Foods* test regarding the defendant's knowledge of the hazard was not altered by the *Robinson* decision.<sup>26</sup>

In *Sharfuddin*, the plaintiff slipped and fell in water on the floor of defendant's store. The plaintiff admitted that there were no employees of the defendant in the

vicinity and further admitted that she did not know how long the water had been present on the floor. Despite the fact that the defendant offered no evidence of its inspection procedures, the court affirmed the grant of summary judgment to the defendant on the ground that the plaintiff had failed to point to specific evidence giving rise to a triable issue on the question of the defendant's knowledge of the water.<sup>27</sup> According to the court, the plaintiff had to prove the amount of time the water had been present on the floor or else there would be no evidence by which a jury could determine that a reasonable inspection would have revealed the foreign substance.<sup>28</sup>

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## The plaintiff, who had not seen the substance prior to his fall, was required to produce evidence as to the amount of time it had been on the floor.

The *Sharfuddin* decision created a new point of attack for defendants, and this basis for summary judgment was as onerous on the slip and fall plaintiff as the *Alterman Foods* test. Under the precedent of *Sharfuddin*, the plaintiff, who had not seen the substance prior to his fall,

was required to produce evidence as to the amount of time it had been on the floor. In order to prove this element, the plaintiff was forced to rely on the testimony of the defendant's employees since the plaintiff could not rely on his own knowledge. However, the employees rarely saw the substance before the accident and usually could not be of any assistance. The plaintiff was left with no evidence to support his claim and again faced an inevitable dismissal on a motion for summary judgment. *Robinson* had given the slip and fall plaintiff a new chance to reach a jury, only to have that opportunity crushed by *Sharfuddin*.

Realizing that it had created a pitfall similar to the *Alterman Foods* test, the Court of Appeals refined the doctrine of *Sharfuddin* in the decision of *Straughter v. J. H. Harvey Co.*<sup>29</sup> In *Straughter*, the plaintiff slipped and fell on a green, leafy object in the produce section of defendant's grocery. The plaintiff admitted that there were no employees in the vicinity of her fall and that she did not know how long the object had been on the floor. The defendant offered no evidence as to the reasonableness of its inspection procedure except for the affidavit of the manager who stated that the store had a policy of sweeping the floor every two to three hours.

The defendant moved for summary judgment since the plaintiff could not testify as to the amount of time the object was on the floor. The court refused to grant sum-

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CONTINUED ON PAGE 73



# Georgia's Law of Undue Influence in Gift-Making

By Bertram L. Levy and Robert P. Bartlett III

**C**ontradictory case law and ambiguous statutory authority make Georgia's law of undue influence in gift-making a relatively unsettled doctrine. The Georgia Supreme Court has defined undue influence as "the exercise of sufficient control over the person, the validity of whose act is brought in question, to destroy his free agency and constrain him to do what he would not have done if such control had not been exercised."<sup>1</sup> As in the context of wills, translating this standard into a workable rule for invalidating inter vivos gifts has led to a variety of legal presumptions and evidentiary rules that often are uncertain in their application and in their effect.<sup>2</sup> Although the Georgia code has codified the common law definition of undue influence in wills, as discussed later,

the statutory provision governing undue influence in gift-making conflicts with the majority of cases that have addressed the issue.<sup>3</sup> Drawing on judicial and statutory materials, this article seeks to provide an integrated understanding of Georgia's law of undue influence in gift-making.

In general, a party seeking to set aside a gift under a claim of undue influence must prove by a preponderance of the evidence that the beneficiary coerced the grantor into making the gift at the time of the grant.<sup>4</sup> In this regard, the legal standard governing undue influence in gift-making is the equivalent to the standard governing wills and contracts.<sup>5</sup> Nevertheless, three different — and not always consistent — standards may apply when the beneficiary of a gift stands in a "confidential relationship" to the grantor. First, a court might simply require a

showing of “undue influence” — that is, a showing that the beneficiary coerced the grantor into making the gift.<sup>6</sup> Second, a court might apply a rebuttable presumption of undue influence,

requiring the beneficiary to show that the transaction in question took place in the absence of duress or excessive coercion.<sup>7</sup> Lastly, a court might rely on O.C.G.A. § 44-5-86, the provision governing undue influence in gift-making, and require only a minimal showing of “influence” to set the gift aside.<sup>8</sup> Although courts have relied on each of these approaches, the following article argues that the rebuttable presumption provides the most sensible and authoritative approach for analyzing allegations of undue influence in gift-giving.

## Presumption of Undue Influence in Certain Confidential Relationships

### A. Presumption of Undue Influence in General

Most Georgia courts raise a presumption of undue influence in gifts where the beneficiary stands in a confidential or fiduciary relationship with the donor, the donor is of weak mentality, and the beneficiary occupies a dominant position.<sup>9</sup> The Georgia Supreme Court elaborated on this presumption in *Trustees of Jesse Parker Williams Hospital v. Nisbet*.<sup>10</sup> There, the widow of John Nisbet sued to enforce a written contract entered into by Cora Williams (then deceased) which promised to pay

Nisbet \$210,000 upon the sale of Williams’ stock in the Georgia, Florida & Alabama Railroad Company.<sup>11</sup>

After an adverse judgment, the administrators of the

Williams’ estate alleged error for failure to instruct on the presumption of undue influence in confidential relations. They asserted that Mrs. Williams had been in an intimate relationship with Mr. Nisbet, had trusted him entirely, and had become dependent on his financial advice.<sup>12</sup> Moreover, they presented evidence indicating that her mental condition was “subnormal” because of her illness and medications.<sup>13</sup> As a consequence, they argued, the contract should be presumed to have been procured by undue influence



absent proof by the plaintiff that the transaction was fair and honest.

The Court agreed with the administrators and required a new trial that would include a jury charge instructing the jury that it could presume undue influence if it found that a confidential relationship existed between Mrs. Williams and Mr. Nisbet and that Mrs. Williams’ mind was “weak.” The Court cited numerous cases from other jurisdictions applying this presumption to invalidate contracts, wills, and gifts. It also noted the use of a similar presumption used in Georgia for determining whether a gift made in a confidential relationship was obtained by fraud.<sup>14</sup> According to the Court, the underlying rationale of the presumption in the fraud context was to “‘protect, effectually, weak men from the machinations of artful men of superior mind . . . .’”<sup>15</sup>

This protection, the Court opined, was particularly important in confidential relations because “whenever a fiduciary or confidential relation exists between the parties to a deed, gift, contract or the like, the law implies a condition of superiority held by one of the parties over the other . . . .”<sup>16</sup> Thus, the Court rejected the lower court’s instructions that the jury had to find that Mr. Nisbet specifically exercised great influence over Mrs. Williams “about this matter.” Rather, the jury should have been permitted to infer his undue influence from the overall nature of the parties’ relationship and Mrs. Williams’ debilitated mental capacity.<sup>17</sup> The burden would then be on the plaintiff to rebut this inference by showing that the transaction was “‘fair, honest and free from fraud or all undue or improper influence of the master-mind . . . .’”<sup>18</sup>

Despite most Georgia courts’ acceptance of this form of the presumption of undue influence in confidential relationships, a handful of courts have applied one of two variations of the presumption.

Under the first variation, a challenging party needs to show only two elements before shifting the burden to the beneficiary of a gift: that the beneficiary stood in a confidential relationship with the grantor and that the beneficiary was the “dominant” party between the two. In *Mathis v. Hammond*,<sup>19</sup> for instance, the Georgia Supreme Court rejected the contention that a grantor of property must suffer from “feeble-mindedness” to receive the benefit of the presumption.<sup>20</sup> There, a widower sought to void a deed granted by his wife to her daughter. The daughter had obtained the deed when her mother was terminally ill and was residing in the daughter’s home. Although no evidence indicated that the mother suffered from “weakened mentality,” the trial court applied the presumption. Citing *Trustees II*, the Supreme Court upheld the lower court, stating that “‘weakened mentality’ covers not only feeble-mindedness but also, in the case of an elderly grantor, the domination of the grantor by the grantee, exemplified by the grantee’s provision of shelter and care.”<sup>21</sup>

Such a strong form of the presumption, however, goes against the substantial body of case law requiring a showing of diminished mental ability for the presumption to apply.<sup>22</sup> Moreover, given that confidential relations imply a relation of dominance by one of the parties,<sup>23</sup> the

reasoning of *Mathis* would require using the presumption in every confidential relationship.<sup>24</sup> Yet Georgia cases have repeatedly held that a confidential relationship between the donor and the beneficiary is insufficient by itself to raise the presumption.<sup>25</sup> On the contrary, Georgia courts permit individuals involved in confidential relations to lobby for self-gain.<sup>26</sup> Lastly, as a matter of policy, defining the issue as whether a jury sees a “position of dominance” risks making the vague doctrine of undue influence even more arbitrary in its application.

In contrast, a second variant of the presumption asserts that the party seeking to invalidate a grant must show, in addition to a confidential relationship and weakened mental capacity, actual undue influence. For instance, in *Scurry v. Cook*<sup>27</sup> the Georgia Supreme Court stated that undue influence:

may be inferred in all cases of a confidential or quasi-confidential relationship where the power of the person receiving a gift or other benefit has been so exerted upon the mind of the donor as, by improper acts or circumvention, to have induced him to confer the benefits contrary to his deliberate judgement, reason, and discretion. In order to render a transaction void, *it must operate to deprive the donor of his free agency by substituting for his will that of another.*<sup>28</sup>

This definition, however, merges the presumption with the ordinary proof of undue influence, thereby substantially increasing the proof necessary to shift the burden to the grantee. As such, it virtually eliminates the presumption and the administrative benefits it provides: under this alternative standard, juries and judges must divine the subjective “will” of the grantor.

Thus, we believe that the presumption of undue influence as articulated in *Trustees II* possesses the strongest doctrinal pedigree while avoiding the administrative pitfalls of the *Scurry* variation. Admittedly, under the *Trustees II* formulation — in which a party must establish a “confidential relationship,” a “position of dominance,” and “weakened mentality” to receive the benefit of the presumption — courts must still make the difficult determination of whether all three factors are satisfied, but they are not without judicial guidance. As discussed later in the section on evidentiary rules, Geor-

## A challenging party needs to show that the beneficiary stood in a confidential relationship with the grantor and that the beneficiary was the “dominant” party between the two.



gia precedents suggest several evidentiary principles that courts may use in determining whether each of these factors is satisfied in a particular case.

### **B. Effect of the Presumption**

Once raised, the presumption of undue influence throws upon the grantee the burden of establishing the fairness of the transaction.<sup>29</sup> Should a grantee fail to produce evidence of the gift's fairness, the presumption must lead to a judgment against the grantee.<sup>30</sup> Nonetheless, the burden of persuasion remains on the party seeking to invalidate the instrument.<sup>31</sup>

Thus, in a case involving the challenge of a gift of stock on the ground of undue influence, the burdens of proof applied as follows: The challenger bore the initial burden of establishing a prima facie case indicating the grantor was of "weak mentality," that the grantee occupied a position of dominance over the grantor at the time of the transaction, and that the beneficiary stood in a position of confidential relationship with the grantor. Such a showing raised a presumption of undue influence. Upon this showing, the beneficiary had to present evidence to rebut the presumption. The challenger at all times bore the ultimate burden of proving by a preponderance of the evidence that the transaction was, as a result of the grantor's mental incompetence, the result of the beneficiary's exercise of undue influence.<sup>32</sup>

### **C. Relation of the Presumption of Undue Influence to O.C.G.A. § 44-5-86**

In addition to case law, the Georgia Code also provides for the avoidance of gifts due to the presence of undue influence. O.C.G.A. § 44-5-86 states:

[a] gift by a person who is just over the age of majority or who is particularly susceptible to be unduly influenced by his parent, guardian, trustee, attorney, or other person standing in a similar confidential relationship to one of such persons shall be closely scrutinized. Upon the slightest evidence of persuasion or influence, such gift shall be declared void at the instance of the donor or his legal representative and at any time within five years after the making of such gift.<sup>33</sup>

Although this statutory language dates back to the 1866 Georgia Code, only a few courts have attempted to interpret the language, with the courts differing significantly over how the language affects the legal standard of undue influence. The first two 19th century cases that analyzed the statutory language appeared to interpret it as establishing a presumption against the validity of gifts

made in confidential relationships. In *Sasser v. Sasser*,<sup>34</sup> for instance, the Georgia Supreme Court affirmed a lower court's ruling that voided a gift from a wife to her husband. Relying on the predecessor to O.C.G.A. § 44-5-86, the Supreme Court stated that the conveyance was valid only if the jury affirmatively found that it "was a free and voluntary gift by the wife to the husband . . ."<sup>35</sup> Similarly, in *Ralston v. Turpin*<sup>36</sup> the United States Supreme Court interpreted the statutory language to require that gifts made by a ward to his guardian may be upheld only if it "appear[s] that they were freely and voluntarily made, upon full knowledge of the facts, without misrepresentation or suppression of material facts by the guardian."<sup>37</sup>

Two years later, however, the Georgia Supreme Court rejected this interpretation in *Hadden v. Larned*,<sup>38</sup> although it made no reference to either *Ralston* or *Sasser*. In *Hadden*, the Court noted that many jurisdictions "treat the [confidential] relation alone as generating a presumption of undue influence."<sup>39</sup> However, the Court found significant the statutory requirement that there must be "slight evidence" of undue influence before a gift made in a confidential relationship will be set aside. When contrasted with the legal rule in other jurisdictions, this statutory requirement made "clear that the code throws the weight of the legal presumption in favor of the gift and not against it."<sup>40</sup> Despite the significant conflict between *Sasser*, *Ralston*, and *Hadden*, subsequent Georgia decisions that considered the statutory language have failed to address this conflict.<sup>41</sup>

Georgia cases have further confused the meaning of O.C.G.A. § 44-5-86 through their uniform silence on the relationship of the statute to *Trustees II*.<sup>42</sup> Of the eight decisions that addressed the statute after *Trustees II*, only one decision considered the relationship of Section 44-5-86 to the judicially-crafted presumption of undue influence.

In *Armour v. Lunsford*,<sup>43</sup> two daughters and a grandson sought to cancel deeds made by their mother and grandmother. The plaintiffs alleged mental weakness or incapacity on the part of the grantors due to "extreme old age." They also alleged that the defendant grantee, who lived with the grantors and was the widow of a deceased son, exerted undue influence.<sup>44</sup> Using a jury instruction that relied on the statute, the trial court permitted the plaintiffs to prevail on only "slight evidence."<sup>45</sup> The Georgia Supreme Court later reversed on different grounds;<sup>46</sup> however, in the process, the Court contrasted the instruction with *Trustees II*, noting vaguely that "[t]he charge is not construed as an instruction as to what would

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# Annual Meeting



# Annual Meeting



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## FAMILY VIOLENCE IN GEORGIA

## The Protective Order Registry Pilot Project

By The Hon. Clarence Seeliger  
and The Hon. Cliff Jolliff

**IN JANUARY, A LOCAL NEWS-**paper reported an incident in which a Clayton County man went to his estranged wife's apartment carrying a loaded gun. When police arrived at the scene, the man fired several shots at the officers. As they took cover behind a car parked in front of the apartment, the man ran around to the back of the apartment and forced his way in through the back door. With his two children watching, the man shot and killed his wife. Then, he took the same gun and shot himself in the head, while the two children, still in shock from the death of their mother, watched their father die. The incident ironically occurred the same day as the couple's scheduled hearing on the wife's temporary restraining order.<sup>1</sup>

This recent incident of domestic violence was especially gruesome. Attention to victims of domestic violence and issues relating to family violence typically heightens on the aftermath of an event like the one described above that happened to catch the media's attention because of the particularly appalling facts of the incident. Sometimes acts of family violence get coverage because they involve a high profile public figure or a celebrity.

The vast majority of incidents, however, do not receive any publicity. Literally thousands of spouses and children suffer from violence

each day in Georgia. They know too well the effect these crimes have on them and their families.

In 1998, there were 54,418 reported cases of family violence in this state. Children were involved in almost 22 percent (11,877) of the total incidents. Additionally, 46 percent (24,847) of the incidents of violence were committed in the presence of children.<sup>2</sup> In the same year in Georgia, approximately 50,000 calls were made to domestic violence crisis lines and family violence programs served approximately 18,000 adults and 10,000 children.<sup>3</sup>

Nationally, a woman is physically abused every nine seconds, or about two to four million women annually. Studies show that battering is the leading cause of injury to women in this country, and between 15 and 25 percent of pregnant women are battered. Studies also indicate that child abuse is 15 times more likely to occur in families where a parent is battered.<sup>4</sup> While the statistics are staggering, it is likely they are incomplete since many victims will not talk about, much less report to the police, acts of violence against them for fear of what might happen the next time they are victimized.

### The Georgia Commission on Family Violence

Recognizing the growing numbers of reported and suspected

unreported incidents relating to domestic violence, the Georgia General Assembly during the 1992 legislative session passed legislation creating the Georgia Commission on Family Violence ("Commission"). The General Assembly stated its intent in the statute, in pertinent part, as follows:

The General Assembly has enacted comprehensive legislation addressing family violence, including provision for the issuance of temporary protective orders to protect individuals from violence. It has become evident that enforcement of these laws is inconsistent and an effective response to family violence will require a comprehensive community effort as well as coordination among the courts, prosecutors, law enforcement agencies, the correctional system, and public assistance and other service providers.<sup>5</sup>

The 1992 statute created a 37-member Commission composed of lawyers, advocates, legislators, prosecutors, judges, sheriffs and others with specific interest in these issues.<sup>6</sup> Since 1992, the Commission has been responsible for a variety of tasks including conducting comprehensive studies, coordinating community task forces on the local level, creating various protocols to deal appropriately with incidents of domestic violence, and training victim's advocates, law enforcement

personnel and others involved in issues relating to family violence.

The Commission also has worked with judges, lawyers, advocates and law enforcement personnel in making certain victims are receiving all of the protection contemplated under Georgia's Family Violence Act.<sup>7</sup> Perhaps the most effective mechanisms in the Act are the provisions in the law that give the victim the ability to have a temporary protective order issued against the abuser.<sup>8</sup>

To obtain such an order, a victim must file a petition with the court that alleges specific facts that probable cause exists to establish that family violence has occurred in the past and may occur in the future. The court is authorized to grant an order providing such temporary relief ex parte as "it deems necessary to protect the petitioner or a minor of the household from violence."<sup>9</sup> Within 10 days of the filing of the petition or "as soon as practical thereafter, but in no case later than 30 days after the filing of the petition," a hearing must be held at which the petitioner must prove the allegations contained in the petition by a preponderance of the evidence as in other civil cases.<sup>10</sup> At the first hearing, the court may grant a six-month protective order.<sup>11</sup>

Protection to the victim in the form of a temporary order or a six-month protective order is vital to the safety of the victim and the victim's children. When the court grants an ex parte or a six-month order, the victim and the respondent get a copy of the order and the court retains a copy.

## Why a Protective Order Registry is Needed

While the availability of protective orders under the Act has improved, enforcement is still a significant problem. What happens when

the victim misplaces an order, must flee for safety to another jurisdiction and leaves the order behind? Or, what if a law enforcement officer is called to a residence in which a protective order is issued, but the victim cannot find her order and it is during the night or on a weekend when law enforcement officers may not have access to court files?

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**Georgia does not have a centralized system for tracking active protective orders issued in this state. This inability to track orders puts the victim and law enforcement officers at a distinct disadvantage.**

Approximately 36 states across the country have protective order registries in place and another 11 states are developing protective order registries.<sup>12</sup> Currently, Georgia does not have a centralized system in place for tracking active protective orders issued in this state. This inability to track orders during the night and on weekends and to allow other states access to active orders issued by Georgia courts puts the victim and law enforcement officers at a distinct disadvantage.

In Georgia and other states with no centralized database for protective orders, when a victim is granted protection from the court, she must be responsible for possessing a copy of her protective order at all times

during the period of protection. Many victims of domestic violence are placed in threatening situations even after a protective order is issued, and oftentimes, the victim flees from the jurisdiction in which the order was issued. If, in her haste to flee, she leaves behind the order, she is in an unfortunate situation in the new jurisdiction because law enforcement officers and judges would have no way to quickly verify the existence and validity of her order.

Quite often, the woman's safety is placed in peril during the weekend or in the evening when court personnel in the issuing jurisdiction are not available for questions about the existence or content of a protective order. Even in situations in which the victim has a copy of the order, but must flee to another state for safety, she must notify the court in the new jurisdiction that she has a protective order and ask that court to enforce the order in that state.

## Federal Legislation

The United States Congress in 1994 recognized that a centralized database for tracking protective orders is a necessary component to ensure a victim's safety. With the enactment of the federal Violence Against Women's Act ("VAWA"), Congress gave states an opportunity to apply for federal grant money to develop registries that would be linked to the National Crime Information Center ("NCIC") so that law enforcement officers and judges could easily and expediently determine the existence and validity of a protective order.<sup>13</sup> Under VAWA, states are required to extend full faith and credit to protective orders issued in states from which battered women have fled.<sup>14</sup> Additionally, under VAWA, once a hearing is held on the temporary protective order, of which

the respondent received notice and an opportunity to be heard, the respondent is prohibited from possessing, receiving or transporting a firearm or ammunition.<sup>15</sup>

In early 1999, the Georgia Bureau of Investigation (“GBI”) applied for a grant under the Department of Justice and received federal funding to begin the development of a registry in Georgia. The Georgia Commission on Family Violence is serving as the pass-through for these funds and is spearheading the pilot phase of the Protective Order Registry Project.

## Georgia’s Protective Order Registry Project

Last year, the Georgia Commission on Family Violence created a Steering Committee (“Committee”) to assist in the establishment of a Protective Order Registry Pilot Project (“Project”) in Georgia.<sup>16</sup> The Committee, composed of lawyers, judges, victim advocates and other interested parties, drew from other states that have operational registries, studied the various procedures for getting orders to the registries in these states and developed a model for the Georgia Registry. Several states, including Louisiana, Kentucky and New York, are distinguished as having registries with excellent track records in terms of: (1) expediency — *i.e.*, the time it takes to get orders into the registry once the judge issues the orders; (2) accuracy — *i.e.*, the percentage of orders in the registry having correct information; (3) inclusiveness — *i.e.*, the number of active orders in the registry closely matches the number of active orders issued by the courts; and (4) the ability to accurately link information from the registry to the NCIC Protective Order File (“POF”) — the national data base that gives judges and law enforcement person-

nel in every state access to information about protective orders in foreign jurisdictions.<sup>17</sup>

The Committee decided to use the Louisiana registry as the primary model for a registry in this state. The Louisiana registry is located in the state’s office of the courts. Full-time state employees oversee the registry in the development of technology, modification of the registry and revisions to standardized protective order forms. In developing the Louisiana registry, court personnel found that the only way to manage the flow of information into the registry was to develop standardized protective order forms for all judges in the state. Additionally, court personnel developing the registry found that the simplest way to get information from the court to the registry was to ask the clerks of court to fax the orders to the registry. Scanning orders directly into the registry proved unsuccessful because many judges wrote in margins, on the back of orders or the handwriting did not scan properly. Louisiana now has enabling legislation that requires judges to use the standardized forms and requires the clerks of court to fax orders to the registry.<sup>18</sup>

## Georgia’s Pilot Phase

In the first phase of Georgia’s Pilot Project, four counties agreed to serve as pilot sites: Cherokee, Hall, Douglas and Wheeler Counties. Other counties are expressing interest and may be added as pilot sites during this phase. Protective orders issued by judges in these sites will be faxed to the Commission for entry into the Registry. Data entry clerks will enter the data and proof-read for accuracy. During the pilot phase, only Commission personnel and persons contracted to work with the Project will be privy to information in the Registry. To fully imple-

ment the Registry, county clerks of court would be required to send protective orders for entry into the Registry. When all phases of the Project are complete, information collected in the Registry will be sent to the Georgia Crime Information Center (“GCIC”) and the NCIC. Law enforcement agencies and judges in Georgia and across the country eventually will have access to information about active protective orders issued by Georgia courts.

During the pilot phase of this Project, which is expected to culminate July 31, 2000, the Project’s Steering Committee will closely monitor the pilot sites’ experiences and continue to fine-tune the Registry and the standardized protective order forms. The Committee also will be working with members of the bench, bar and law enforcement community, victims’ advocates, and clerks of court to gather input from these interested professions.

## Use of Standardized Protective Order Forms

States like Louisiana that already have developed registries report the use of standardized forms is critical to the success of a registry. From a practical standpoint, standardized forms are essential because data from these forms will be manually entered into a centralized data base. Without a standardized protective order form, more than 159 different versions of the orders would be sent in for entry into the Registry. This would mean that every order would need careful screening to determine the relief granted. Moreover, without standard terms in the orders, legal interpretation of some of the conditions undoubtedly would be required.

Beyond practical implications, the Committee found that usage of standardized forms also achieves the provision of a full spectrum of relief



available under Georgia law, making it more likely that victims will receive the types of relief they require. Additionally, standardized forms can be written so that the terms and conditions are clear and unambiguous, which is crucial to law enforcement's ability to enforce a protective order.

The Committee examined various forms from different courts and other statewide protective order registries to develop the initial forms, which were first sent to the superior court judges for their review and comments. Additionally, the Committee sought input from various organizations that represent or work with victims of domestic violence. Based on these preliminary comments, the revised forms were re-submitted to superior court judges, private attorneys and the chair of the Family Law Section of the State Bar of Georgia. After several more months of revisions based on these lawyers' and judges' comments, a set of standardized forms was drafted for use in the pilot sites.

In an effort to provide conformity in the pilot sites, the Committee asked the Supreme Court for an experimental rule which requires judges to use the standardized forms in the pilot sites. In September 1999, the Supreme Court granted the Committee's request and judges in the pilot sites are currently using the standardized forms for protective orders granted under the state's Family Violence Act. The rule, which is effective for one year, also requires the clerks of court in pilot sites to fax these orders to the Commission within 24 hours of the close of business on the filing day.

The new standardized protective order forms can be used now by any judge and in any court in this state on a voluntary basis. The Committee is encouraging judges and lawyers throughout the state to begin utiliz-

ing them in anticipation of statewide implementation in 2001. Copies of the standardized forms may be obtained from the Commission by calling (404) 657-3412.

## Conclusion

In developing this Project, the Georgia Commission on Family Violence recognizes that improvements in the existing system must go beyond the mere creation of a Registry. While promoting the Registry, the Commission will continue to coordinate efforts of judges, lawyers, law enforcement and to offer education and training to them on the use and enforcement of protective orders for the protection of victims of family violence throughout this state. The proposed Registry is just one element of the Commission's plan to provide victims of family violence in this state protection they so desperately need. ☒

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*Hon. Clarence Seeliger is a DeKalb County Superior Court Judge and chair of the Georgia Commission on Family Violence. Hon. Cliff Joliff is a Hall County Juvenile Court Judge and chair of the Georgia Protective Order Registry Pilot Project Steering Committee. The authors acknowledge the assistance of both Sheila Chrzan, an attorney with Georgia Legal Services, and Joy Hawkins, an attorney and project coordinator for the Georgia Protective Order Registry Pilot Project.*

## Endnotes

1. Bill Montgomery, *Man Shoots at Clayton Cop, Kills Wife, Himself*, ATLANTA J.-CONST., Jan. 21, 2000, at C-4.
2. "1998 Summary Report: Uniform Crime Reporting (UCR) Program, Georgia Crime Information Center."
3. "Domestic Violence in Georgia," Georgia Department of Human Resources, Office of Communications, August 1999.
4. *Id.*
5. O.C.G.A. § 19-13-30(b) (1999).
6. *Id.* § 19-13-32.
7. *Id.* §§ 19-13-1 to -34.
8. *Id.* §§ 19-13-3, -4.
9. *Id.* § 19-13-3(b).
10. *Id.* § 19-13-3(c).
11. *Id.* § 19-13-4.
12. "Protection Order Registry Survey, Summary Information," prepared by the National Center for State Courts and the Full Faith and Credit Project of the Pennsylvania Coalition Against Domestic Violence, February 1, 2000.
13. 42 U.S.C.A. § 14031 (1995).
14. 18 U.S.C.A. § 2265 (Supp. 1999).
15. 18 U.S.C. § 922(g) (Supp. 1999).
16. The Steering Committee is composed of the following: Judge Cliff Joliff, Chair; Rachel Ferencik, Director, Ga. Family Violence Commission; Anne Jarrett, Esquire; Sheila Chrzan, Esquire; Vicky Kimbrell, Esquire; Dan Bloom, Esquire; Shirley Andrews and Rhonda Neal, GBI; Belinda Bingaman and Major David Bores, Cherokee Co. Sheriff's Office; Senator Gloria Butler; Carol Campbell, Gateway House, Hall County; Michael Cuccaro, Council of Superior Court Judges; Don Forbes, Ga. Courts Automation Commission; Gail Giles and Lisa Sills, Ga. Tech Research Institute; Dr. William Holland, GBI; William E. Holland, III, Clerk of Court in Hart County; Carla Hungate, Douglas Co.'s S.H.A.R.E. House, Inc.; Michelle Johnson and Joe Hood, Ga. Criminal Justice Coordinating Council; Marla Moore and Holly Sparrow, Administrative Office of the Courts; Alisa Porter, Ga. Coalition on Family Violence; Meg Rogers, Director, Cherokee Family Violence Center; Sheriff Scott Chitwood, Whitfield Co. Sheriff's Office; Senator Steve Thompson; and Joy Hawkins, Protective Order Registry Pilot Project Coordinator.
17. Interview with Mary Malefyt, Staff Attorney, Full Faith and Credit Project of the Pennsylvania Coalition Against Domestic Violence (Feb. 17, 2000).
18. La. Rev. Stat. Ann. § 44:2136.2 (1999).

LAW DAY MAY 1, 2000

# Celebrate Your Freedom

*The American Bar Association (ABA) Standing Committee on Public Education presented William E. Cannon Jr. of Albany with a Judge Edward R. Finch Law Day Speech Award during the ABA Midyear Meeting. Cannon, the immediate past president of the State Bar, delivered the following speech to the Blue Ridge Circuit Bar Association as part of their 1999 Law Day festivities. The Finch Speech Award was created in 1968 by Ambassador Edward R. Finch Jr. in honor of his father, who had served as a justice of the Supreme Court of New York. Law Day was established by President Dwight D. Eisenhower in 1958 as an annual observance to strengthen the American heritage of liberty, justice and equality under the law. Law Day is celebrated annually on May 1.*

**By William E. Cannon Jr.**

**T**he theme of Law Day 1999 is "Celebrate Your Freedom" and I want to focus my remarks on that theme.

When most of us hear the phrase "Celebrate Your Freedom," we immediately begin making a mental list of the freedoms that are most important to us. I want to interrupt you as you are making your list and

ask you to think about the other part of that phrase — Celebration.

We are all familiar with the sacrifices made over the years by Americans who believed that freedom was a precious commodity — so valuable that they were willing to surrender their own lives in defense of liberty. As we become comfortable with our freedom there is the danger that we will forget that the freedom which was so difficult to obtain can be easily lost. We can become so caught up in enjoying our liberty that we begin to assume that we will always be a free people.

If today we but politely acknowledge the liberty that has been entrusted to us, we risk becoming complacent about that of which citizens of other countries only dream. Unless we consciously celebrate, that is, remember, rejoice and remind ourselves of the freedoms we now enjoy, we run the risk of forgetting the price that was paid for them and the importance they have in our daily lives. We have come too far to let that happen.

Do you remember how you felt as school let out for the summer? We had smiles on our faces and so much unbridled joy that we were bursting with energy. I want us to feel that same way today. Freedom is something to shout about! To revel in. Let's loosen up and celebrate today!

Now it may have been so long since some of us have really cut

loose that we have forgotten how to conduct a proper celebration. A cake might be nice but just about every occasion is celebrated with a cake. We might go to a restaurant and have the servers gather around us and loudly sing a song about Law Day. But even those once unique celebrations are seen every day. Law Day is special and I would like to share with you some special ways we can celebrate our freedom.

The first is by practicing tolerance. Too often we think of freedom from a selfish standpoint. That is, we view freedom as our right to do something that we want to do. We may, of course, talk grandly of respecting other persons' rights to do what they want to do, but it is human nature to think of ourselves first. Consciously practicing tolerance toward other people as they exercise their freedom is a needed method of honoring Law Day. Instead of reacting cautiously or suspiciously when we hear something we don't agree with or see something we don't like, let's resolve today that we will relish the differences of opinion and variety of human experiences that make this country such a wonderful example of what human freedom can accomplish.

It was only a few years ago that I first had the opportunity to visit the cities of New York and Chicago. I cannot adequately describe the thrill that I had in seeing such a variety of

people. I spent hours just walking the streets drinking in the smells, the sounds and the sights of so many things that were so different from Southwest Georgia. I will never forget the absolute joy of that experience.

That same sense of joy can be found by understanding our neighbors and celebrating the variety of our nation. We have Kiwanians and Lions. We have Rotarians who value variety so highly that membership rules require diversity. In this very state and city we have eccentrics and plain old-fashioned nuts. We have Democrats, Republicans and others who are running away from both parties. We have people who irritate us, make us angry and scare us. We have people who make us cry and people who make us laugh. Isn't it just great? We are not all just alike — wouldn't that be incredibly dull and boring? And we have this delightful collection of people because this is one country where everyone has the freedom to just be themselves. Isn't that worth celebrating?

Another way in which we can celebrate our freedom is to encourage dissent. That's right — I said encourage dissent, not just tolerate it. What is popular or correct today may have been unpopular or incorrect yesterday. At some point in time people thought the world was flat and that only birds could fly. Where would we be if some hard headed non-conformist had not dared to disagree with the conventional wisdom?

It is easy to speak of freedom when everyone agrees with our personal definition of it. It is easy to speak of tolerance when there are no differing viewpoints to challenge our way of thinking. Freedom thrives on

dissent. Liberty draws strength from differences in opinion exchanged in an unfettered marketplace of ideas. There could be no better celebration of our freedom than encouraging, not just allowing, differing points of view on all issues.

We all revere the First Amend-



**Bill Cannon received the Finch Law Day Speech Award during the ABA Midyear Meeting. Above are (l-r) President-elect George Mundy; Dawn Cannon; Bill Cannon; Margaret Bush Wilson, ABA Law Day chair; President Rudolph Patterson; and Past President Linda Klein.**

ment and lively proclaim our allegiance to the right to free speech. However, we often forget that the First Amendment protects not only our right to express our own ideas, it also protects our right to listen to other people's ideas — especially those who disagree with the majority point of view. Dissent and discussion can invigorate our system of government and our citizens.

I confess that I am a fan of talk radio, and for some inexplicable reason I enjoy listening to people with whom I disagree. Even though my blood pressure climbs, I sometimes talk back to the radio. I seem to be unable to kick the habit. Just as school children run to a playground fight, I cannot resist the sound of intellectual combat.

However, I'm generally disappointed in talk radio because there is so little dissent. A radio host introduces a topic of the day and invites listeners to call with their comments.

The remainder of the show consists of callers echoing the same thoughts expressed by the host and ridiculing anybody who would dare think differently. Rarely am I treated to a caller who disagrees. Even more rare is the host who admits that someone with a different point of view may be correct on the same issue.

What a wasted opportunity.

I yearn for the day when talk radio will be alive with differing ideas — when the host will be hard pressed to defend ideas and callers will disagree with each other. Defending our own intellectual choices requires that we listen to those who disagree and that is the element missing from the airwaves today.

Lawyers have a wonderful tradition of lively debate and principled dissent coupled with careful listening. We recognize and respect the freedom to disagree. As we celebrate Law Day annually on May 1, it is my fervent wish that our fondness for differing points of view and our desire to hear all sides of an issue will spread throughout our society and that we will vigorously celebrate our freedom by encouraging dissent.

The third thing we can do to celebrate our freedom is to accept the uncertainty that comes with it. So much of the freedom we enjoy today was paid for with the lives of countless patriots who unselfishly fought to protect us in times of crisis. Those brave sacrifices must not and will not be forgotten. However, we must also remember another less well known cost of freedom that we all incur every day — the willingness to accept the accompanying risk that we may suffer at the hands of others who do not respect the freedom we have given them.

It is difficult to speak of the risks of freedom at a time when school-

children lie victim to a senseless act. And yet that terrible tragedy in Colorado reminds us that our liberty does not come without a price. In enabling our citizens to enjoy a level of freedom unrivaled by those of any other nation, we must also realize that not every one of us will act responsibly. We will have those who abuse freedom of speech to spew hatred and bigotry. We will have those persons who will incorrectly interpret due process as a license to commit crimes of violence. They must not be allowed to compound their crimes by taking from us our freedom as well.

At a civic club meeting last week, I overheard a member discussing conditions in an Asian country not known for its devotion to personal freedom. He remarked that the streets were clean, there was no graffiti on buildings, and even those

who committed simple misdemeanors were treated severely. This person concluded his remarks by stating his admiration for such a society and suggesting that the United States should become more like that as a solution to headline-grabbing acts of violence.

We must not succumb to the siren song of easy solutions, which gradually erodes our basic freedoms. Instead, we must remember that each citizen pays a daily price for the liberties we enjoy. At times we may be in fear, at times we may encounter others who do not respect our rights, and in such times we may wish that life were simpler. However, our cherished freedom should not be so easily abandoned.

The events at Columbine High School remind us that freedom is not all pleasure and happiness. This was one of those occasions when we see

the stark reminder of its real cost. While we grieve for those who have paid the ultimate price, we also honor their memories by reaffirming our commitment to maintaining the light of freedom even in this period of darkness.

In closing, I ask lawyers and judges everywhere to celebrate our freedom by becoming better at what we do. We can work harder at offering better services to our clients and to the public to increase understanding of our system of justice and foster a willingness to vigorously defend it. We can joyfully represent unpopular people and unpopular causes in the knowledge that we are securing the full protection of liberty for everyone else. We can remind the public at every opportunity that the rights we speak of today are not just ancient words of the 18th century that no longer have force today, but are an integral part of our daily lives.

Recently I was discussing the conflict in Kosovo with a judge and it prompted an interesting comment from him. The judge had excluded certain evidence that was obtained in a search which he considered to violate protections guaranteed by the Constitution and he explained that his ruling on a routine motion in a typical criminal case was directly related to our conversation. As the judge so correctly pointed out, our country's reverence for personal freedom in even insignificant, small criminal cases marks the difference between the freedom in this country and that which is missing in countries such as Yugoslavia.

That judge recognized and celebrated the freedom we all enjoy every day and often take for granted. Let us resolve this Law Day that we will not forget. Celebrate, rejoice, remember! Our freedom was won with great sacrifice but can be lost with ease. ■

## Bear Stearns new

west new fullpage, b & w  
“differnece of opinion



# ‘Be a Drum Major for Justice’

*I have known Judge Bill Wilson since he was President of the Arkansas Bar and I was President of the State Bar of Georgia 15 years ago. We have remained friends since then. Before President Clinton made Judge Wilson his first appointment to the district court bench in 1993, Judge Wilson was an Arkansas trial lawyer whose legendary rapport with juries and passion for his clients took him to almost every courthouse in Arkansas. Besides having a fine legal mind, Bill Wilson is blessed with both a first-rate sense of humor and a great deal of common sense — qualities that are essential if a judge is to survive for the long haul, and qualities that are apparent in his commencement address that follows.*

— Judge Duross Fitzpatrick

## University of Arkansas at Fayetteville, 1999 Law School Commencement

By Judge William Wilson

Chancellor White, Dean Strickman, fellow platform sitters, graduates, their families, friends of the University — I relate an old, old chestnut. I would apologize for telling this thrice-told tale, but I feel compelled because it is so appropriate to my

appearance here today.

The gates were about to open at the Kentucky Derby when a mule jumped out of the mule pen and joined the race. He came in dead last, of course. When he jumped back in the mule pen, the other mules scolded him for his audacity. He replied, “I thought the association with thoroughbreds would do me a world of good.”

When you read the list of luminaries who have stood at this lectern for previous graduations, you can see why this little story is so apt.

As many of you know, the late Vincent Foster Jr. was a graduate of this law school — number one in his class. He then made the highest grade on the bar examination that year. Six years ago — not long before his untimely death — he gave the commencement address. In my judgment, it is the high watermark of commencement addresses. I was sorely tempted, for my part, simply to make copies of his address and hand it out to you to read at your leisure. Ultimately I decided that it would be considered a little untoward — unusual at least — if I didn’t address you at all. Still, I want to share a small portion of Vince’s great talk. I think the part I quote will serve to encourage those of you who were not at or near the top of the class, and it may serve a word to the wise for those of you who have made top marks. Please listen to Vince:

Some of you have earned special recognition this afternoon,

and we all congratulate you...

But, tomorrow, my friends, the slate is wiped clean again. Prospective clients don’t inquire about class rank. The local bar association you will join does not have a special class of membership for law review staffs. Judges and jurors will not ask to see your resume.

You will be evaluated instead by your product, your energy, your temperament and your backbone. The reputation you develop for intellectual and ethical integrity will be your greatest asset or your worst enemy. You will be judged by your judgment.

Let me put this last thought in a more roughhewn way: Strive to be that type of lawyer about whom other lawyers will say, “I would shoot craps with her over the telephone.”

Dean Strickman, I feel electricity in the air today. It may partially be because I know there may be one among these graduates who will rise to the top of the legal profession and one day sit on the Supreme Court of the United States — a latter day Justice Oliver Wendell Holmes Jr. There may be one or more of these young people who will become great, nationally known lawyers or law professors. There may be a great elected official sitting before us — a 21st Century Daniel Webster.

There may be some who will leave this profession and rise to the

heights in other callings. There might be one with us today who will become a great religious leader, persuading the nations of the earth to beat their swords into plowshares.

All of these are exciting possibilities, but I feel the electricity primarily because I know there are many in this class who will leave here and go to county seat towns across Arkansas and across America. They will become top-of-the-line county seat lawyers. And these lawyers are, in my opinion, the backbone of our beloved profession, and they are the backbone of our unequalled justice system.

I believe it was President Truman who said there is nothing all that mysterious about the qualifications for the Supreme Court of the United States. He opined that every county seat town in America with a population of over 10,000 had a potential great Supreme Court justice practicing within its corporate limits. I would disagree with this postulation only in the size of the county seat town. I would at least cut it in half to 5,000.

My hat is off to those lawyers who practice in the county seat towns and represent the citizens by drafting their deeds, drawing their wills, representing them in Social Security cases and in personal injury cases. These lawyers will draw the articles of incorporation for a growing new business in that county, and this business, along with others, will make the community more prosperous. From time to time, these lawyers will represent the son or daughter who has been raised with loving care, but who has run afoul of the law.

The citizens of this country put their property, their livelihood, their hopes, their dreams and sometimes their freedom and even their lives in the hands of these stalwart lawyers.

I do not believe it is farfetched to

say that these lawyers are, indeed, the trustees of liberty. But this is so only if we look beyond the mechanics of drafting a will, drawing a complaint, putting the witness on the stand, and the like. We must, among other things, steep ourselves in the history of our Constitution, especially the Bill of Rights and most of

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**My hat is off to those lawyers who practice in the county seat towns . . . The citizens of this country put their property, their livelihood, their hopes, their dreams and sometimes their freedom and even their lives in the hands of these stalwart lawyers.**

the other amendments. I believe that it was Learned Hand, the great jurist of two generations ago, who wrote something to the effect that we will not have our rights and privileges in America because our Constitution is written on a certain type of parchment, and preserved carefully at our nation's capital. We will have these rights and liberties only as long as they exist in the hearts and minds of the people.

And, I submit that you — brand new lawyers now — must take the torch and preach the gospel of individual liberty and individual rights — and, lest we forget, indi-

vidual responsibility.

I am one of those who believes that there truly was a miracle in Philadelphia during that dreadfully hot summer of 1787 — not a perfect miracle to be sure, but a miracle improved upon by most of the amendments which are, in my judgment, also part and parcel of this miracle.

In the words of the sainted Abraham Lincoln, the miracle of this government “sprung forth upon this continent.”

What are you to do to be esteemed as a lawyer? Listen to the words written by Chief Justice Charles Evans Hughes many, many years ago:

The highest reward that can come to a lawyer is the esteem of his professional brethren. That esteem is won in unique conditions and proceeds from an impartial judgment of professional rivals. It cannot be purchased. It cannot be artificially created. It cannot be gained by artifice or contrivance to attract public attention. It is not measured by pecuniary gains. It is an esteem which is born in sharp contests and thrives despite conflicting interests. It is an esteem commanded solely by integrity of character and by brains and skill in the honorable performance of professional duty. . . . In a world of imperfect humans, the faults of human clay are always manifest. The special temptations and tests of lawyers are obvious enough. But, considering trial and error, success and defeat, the bar slowly makes its estimate and the memory of the careers which it approves are at once its most precious heritage and an important safeguard of the interests of society so largely in the keep-

ing of the profession of the law  
in its manifold services. . . .

I can testify, here and now, based upon my 35 years at the bar: You will enjoy the money you will earn as a lawyer; you will enjoy any favorable publicity you get (keep in mind, however, that publicity is cotton candy). But what you will cherish most is the esteem of your sister and brother lawyers and judges. I give you my solemn word on this.

Not long before his death,

Martin Luther King Jr. talked to an audience about his own funeral. Not in a morbid way, but in a realistic way. He said that first of all, he wanted a short funeral. He said that he did not want his eulogist to mention his Nobel Peace Prize, nor his many honorary degrees — he contended that these were nowise important.

He said he hoped his eulogist could say that Martin Luther King Jr. tried to feed the hungry; that Martin Luther King Jr. tried to care for the sick; that Martin Luther King Jr.

tried to visit those who were in prison. And, finally, he hoped that his eulogist could say that Martin Luther King Jr. was a drum major for justice!

Ladies and gentlemen of this graduating class, when you have run your course — when the shadow of your professional career is falling far to the east — and your final report card is about to be issued, wouldn't you like to have it entered that you were a drum major for justice!

Thank you for having me. ☒

# Morningstar new

# REMEMBER, FAMILY MATTERS



By Joseph W. Dent

**T**he title of my column may suggest that it deals with family law issues. However, this article is written to give my perspective of, and remind everyone about, the importance of a strong family.

I consider myself fortunate, because I had the benefit of growing up in the old-fashioned American family unit. I guess you could say my family life was reminiscent of "Leave It to Beaver." During my elementary school days, I remember the entire family gathering around the dinner table each night. We also had big lunches on Sundays, usually with relatives, following a morning of church services.

When my oldest brother entered college, things around the house became more hectic. In the late '70s, the fast-paced world that we know now was just getting underway. As the tuition for my brother's college began to mount, my mother went back to work full-time. She had worked part-time while I was in elementary school and was always home when the bus dropped me off. The nightly meals began to slow, but I remember we still continued with our big Sunday lunches.

My brother going to college was not the only reason the Leave-It-to-

Beaver-style weekly meals began to slow. My other brother and I were in high school and junior high, respectively, and we were involved in all sorts of extracurricular activities.

Our family was living, in the early 80s, what was considered a high-speed life. I look back, and I cherish the early years when we gathered for dinner each night. When we became fast-paced, we did not

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**If you dedicate just a little bit of time to your family, you will find your quality of life will improve immensely.**

forget those values, and we continued with our Sunday lunches. Basically, Sunday became family day.

My point is that, although my family began to move rapidly and my brothers and I went to college and began our endeavors in our respective careers, we still remembered our core value of the family unit from which we began. My mother has always reminded us of the importance of our family, and we continue to gather two to three times a year even though we all have our own Y2K lifestyles.

Both my brothers are married and each has a boy and a girl — by today's standards, the perfect family. One of my favorite joys is visiting and spending time with my nieces

and nephews. I cannot tell you the joy I feel when I arrive to excited cheers of "Uncle Joe is here! Uncle Joe is here!"

As I reflect on my year as President of the YLD, I have a vivid memory of the brunch which followed my swearing-in ceremony. That memory is my mother and two brothers being present with smiles on their faces and words of support and congratulations. It certainly made me feel proud.

I guess what I am trying to stress is that, in today's fast-paced world, we (myself included) may find ourselves missing the importance of a strong family. There is a lot to be said about the good old days and the "Ozzie and Harriet" family lifestyle.

Whether you are married with children, married with no children or just plain old single like me, do not forget to keep your calendar clear for old-fashioned quality time with your family. If you have children, take an afternoon off and go to the park, or bring the kids down to the office one day so they can see what mommy or daddy does. And as spring and summer arrive, do not forget to attend those baseball, softball or soccer games. Why, you may even consider coaching!

If you do not have children, remember your nieces and nephews. Go to that kindergarten graduation or that championship little-league football game. Also, take a long weekend to go back home. I think if you dedicate just a little bit of time to your family, you will find your quality of life will improve immensely.

As I close this article, I am reminded of a couple of old adages:

"Blood is thicker than water" and "your family is all you've got."

So please, do not forget — family matters. ☒

## DONATIONS AND VOLUNTEERS NEEDED

# Celebrating Foster Kids' Accomplishments

**CELEBRATION OF EXCELLENCE** is an event acknowledging the accomplishments of youth in foster care who have graduated from high school, vocational school, college or obtained their GED. The Celebration recognizes youth who were removed from their parents' custody, were never adopted and against the odds, accomplished their educational goals.

We will honor over 165 graduates from across the state on June 22,

2000, at the Fulton County Government Building. We want to give our youth a special event in Atlanta. Since we recognize that many of the foster parents would be unable to help their children attend the celebration, we want to provide for our youth without imposing a financial burden on the foster families.

We have begun our fundraising efforts and need your donations. This year we have instituted a scholarship

program for eligible students going to college. If you know of foster kids who may be eligible for a college scholarship, pass this information on to them. We will make ten \$1,000 scholarship awards.

The Celebration of Excellence is sponsored by the Georgia Association of Homes and Services for Children (GAHSC), a non-profit organization that advocates for children and is organized by a planning committee. The committee consists of volunteers who are attorneys from the YLD Juvenile Law Committee of the State

Bar, caseworkers of the Division of Family and Children Services, child advocates, and community activists who work in the juvenile law field. To make a tax-deductible contribution to the scholarship program or to find out more about the scholarship program, contact Annette VanDevere, Director, Celebration of Excellence GAHSC, 34 Peachtree Street, NW, Suite 710, Atlanta, Georgia, 30303; (404) 572-6170;

[www.excellencega.org](http://www.excellencega.org).

The Celebration of Excellence has expanded its program into the advocacy arena. Through our research, we have learned that the California Youth Connection (CYC) is a design model for implementing programs yielding empowered foster youth. CYC is an advocacy/youth leadership organization for current and former foster youth. The members, because of their experiences with the child welfare system, work to improve foster care, to educate the public and policy makers about pertinent issues, and to change the negative stereotypes many people associate with foster youth. The Celebration has been in communication with them and has developed a program model. We need interested volunteers who would be willing to work with this new youth initiative. Areas in need include giving presentations on advocacy, the legislative process, etc. All interested should call Annette VanDevere at (404) 572-6170; [www.gahsc.org/clac](http://www.gahsc.org/clac). Thank you for your assistance. ☐

National Legal  
Research  
pickup 2/00  
p46





# Grady High Wins State Title

The Grady Knights Mock Trial team is the 2000 Georgia State Champion. In a finalist re-match from the 1999 competition, the team from Henry W. Grady High School in Atlanta met the team from Clarke Central High School in Athens, a school that held the state title for two years and won the national championship in 1999. This time, Grady walked away the victor and will represent Georgia at the National High School Mock Trial Championship to be held May 11-14, 2000, in Columbia, South Carolina.

The Georgia Mock Trial Competition reported gains in its 13th season in several categories. More schools participated than ever before, and over 100 new attorneys and judges participated in judging panels across the state. The following teams were named regional champions:

SCHOOL/CITY	REGION	ATTORNEY COACHES
Central High School, Macon Mary Anne Richardson, Teacher	Central Georgia Jay Dell, Coordinator	John Makowski, Thomas F. Richardson, Michelle Schieber
Chattahoochee High School, Alpharetta Gerri Hilliard, Mary Reeves, Teachers	Fulton County Patrick Moore, Coordinator	Sandra Bourbon, Fred Burkey, Sheila Chrzan, Jeffrey M. Fishman, Bob Kirby
Clarke Central High School, Athens George Harwood, Joyce Harrison, Phyllis Field, Teachers	Northeast Georgia Steve Curtis, Coordinator	Todd Brooks, Rich Connelly, Tom Eaton, Kevin Gonzales, Marcy Gonzales, Elizabeth Grant, Jason B. Green, Phillip Griffeth, Allison Mauldin, Kenneth Mauldin, Ralph Powell, Cindy Wang, Maria Waters
Clinch County High School, Homerville Gloria Peagler, Teacher	Coastal Georgia Donna Crossland, Coordinator	Cathy Helms, Jeff Helms
Duluth High School, Duluth Mary Anne Meeks, Mary Lester, Geri Flanary, Teachers	Gwinnett County Shawn Story, Coordinator	Edwin Hamilton, Hillary Krepistman, Evan Mermelstein, David Miller, John Salter, Dawn Taylor, James Taylor
Henry W. Grady High School, Atlanta	Metro Atlanta Faison Middleton, Coordinator	Michelle Appelrouth, Carl Gebo, DeAnn Gibson, Carrie Hanlon, Jennifer Murphy, Adam Princenthal, Andrew Sheldon, Steffanie Walke
Lee County High School, Leesburg Kathy Thurman, Teacher	Southwest Georgia Susan Huff, Coordinator	Craig Mathis, Edward Meeks, Ralph Scoccimaro
North Forsyth High School, Cumming Kathy Vail, Jeremy Hamm, Teachers	Cherokee County Meredith Ditchen, Coordinator	William Finch, Frank Hamilton, Amy Hillman
Northwest Whitfield County High School, Tunnel Hill Eva Hendrix, Mandy Smith, Teachers	Northern Georgia Jeff Denny, George Govignon, Chris Twyman, Coordinators	Rick Brown, Todd M. Johnson, Matthew Thames
Redan High School, Stone Mountain Kim Chandler, Karyn Williams, Teachers	DeKalb County Stacy Levy, Coordinator	Lawrence Delan, Letitia Delan, Sheryl McCalla, James Michael
Riverdale High School, Riverdale Stacy Niedermeyer, Mary Roberts, Teachers	Clayton County Donna Sims, Coordinator	Judge Clara Bucci, Cheryl Champion, Suellen Fleming, Rolf Jones, Steve Smith
The Walker School, Marietta Fred McCaleb, Teacher	Douglas County Jeff Richards, Coordinator	Jay Bennett, Judge Michael Bozeman, Judge Melodie Clayton, Stephen Goldner, Judge Michael Stoddard
Windsor Forest High School, Savannah Richard Clifton, Teacher	Southeast Georgia Christy Barker, Coordinator	Larry Chisolm, Lisa Gray, Dennis Keene, Mike Schiavone, Mark Smith

For information on how your bar association, firm or legal organization can help the new Georgia champion defray competition expenses, contact the Mock Trial office at (404) 527-8779, (800) 334-6865 (ext. 779), or [mocktrial@gabar.org](mailto:mocktrial@gabar.org).

Judges and evaluators are needed in Columbia, S.C., on Friday and Saturday, May 12th and 13th, to serve on the judging panels scoring the 42 state teams participating in the tournament. If you are able to serve, please volunteer by contacting the Mock Trial office. Judges and attorneys from South Carolina were very helpful to Georgia when it hosted the 1993 tournament, and we would like to reciprocate in 2000. Information on the national tournament may be found online at: [http://www.schar.org/LRE/National\\_Mock\\_Trials/National\\_Mock\\_Trials\\_home.htm](http://www.schar.org/LRE/National_Mock_Trials/National_Mock_Trials_home.htm)



## Sign Up For Orientations on Professionalism

**THE ORIENTATIONS ON PROFESSIONALISM** conducted by the State Bar Committee on Professionalism and the Chief Justice's Commission on Professionalism at each of the state's law schools have become a permanent part of the orientation process for entering law students. The Committee is now seeking lawyers and judges to volunteer from across the state to return to your alma maters or to any of the schools to help give back part of what the profession has given you by dedicating a half-day of your time this August to introduce the concept of professionalism to first-year students. ☐

Insurance Specialists pickup 2/00 p21

## 2000 Law School Orientations on Professionalism

### Attorney Volunteer Form

Full Name (Mr./Ms.) \_\_\_\_\_

Nickname: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Telephone: \_\_\_\_\_ Fax: \_\_\_\_\_

Area(s) of Practice: \_\_\_\_\_

Year Admitted to the Georgia Bar: \_\_\_\_\_

Bar#: \_\_\_\_\_

Reason for Volunteering: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Law schools	Date	Time	Reception/ Lunch
Emory I*	August, 2000	TBA	
Emory II*	October, 2000	TBA	
Emory III*	February, 2001	TBA	
Georgia State	August 15, 2000	TBA	
Mercer	August 18, 2000	2-4 p.m.	4- 5 p.m.
UGA	August 14, 2000	2-4 p.m.	4 -5 p.m.

\*Emory has expanded its Orientation to three sessions.

#### Please return to:

State Bar Committee on Professionalism  
Attn.: Terie Latala  
800 The Hurt Building  
50 Hurt Plaza  
Atlanta, Georgia 30303  
phone (404) 527-8768; fax (404) 527-8711

# Legal Clinic Aids Tornado Victims

ON SATURDAY, FEBRUARY 26, 2000, a free legal clinic was held from 10 a.m. to 1 p.m. in Omega, Georgia for victims of the recent tornado. The First Baptist Church in Omega was designated as the disaster relief headquarters, and storm victims gathered there to receive hot meals and assistance in restructuring their lives.

**Photo 1:** Tifton Judicial Circuit Bar Association volunteers gathered at the church headquarters to answer questions about: landlord/tenant issues; repair contracts; insurance settlements; unemployment insurance; and lost documents. Among the group of volunteers were two Spanish interpreters. **Photo 2:** (l-r) Herby Benson, David Bryan and Brent Hyde of the Tifton Bar volunteered their services. **Photo 3:** Tifton attorney David Bryan and Georgia Legal Services Program (GLSP) attorney Debra Jenkins go through files. **Photo 4:** Supplies were generously donated to assist storm victims. **Photo 5:** The GLSP staff including (l-r) Nancy Anderson (attorney for the Valdosta branch), Sylvia Camargo (paralegal for the Tifton branch), Debra Jenkins (attorney for the Valdosta branch) and Marc D'Antonio (Supervising Attorney for the Columbus branch) also came to the rescue. **Photo 6:** Storm victims, volunteers and FEMA representatives all shared lunch at the church. ☒



## N.GA Mediation pickup, 2/00 p83



## WHO'S WHERE

### InAtlanta

**Smith, Gambrell & Russell LLP** has elected **David J. Burge** and **Robert H.G. Lockwood** partners in the firm, which is located at Suite 3100, Promenade II, 1230 Peachtree Street, NE, Atlanta, GA 30309-3592; (404) 815-3500.

**Foltz, Martin LLC** has named three partner-level members: **Pamela R. Masters** and **Louis E. Bridges III**, currently associates, and **Jeff D. Woodward**, who has been of counsel to the firm since joining it last year. The office is located at 5 Piedmont Center, Suite 750, Atlanta, GA 30305; (404) 231-9397.

The Atlanta law firm of **Elrod & Thompson** has combined with **Parker, Hudson, Rainer & Dobbs LLP**. The joint firms will practice under the name of **Parker, Hudson, Rainer & Dobbs LLP**, with offices in Atlanta and Tallahassee.

Two Atlanta law firms, **Cohen Pollock Merlin Axelrod & Tanenbaum** and **Small, White & Marani**, have combined practices and will operate under the name of **Cohen Pollock Merlin Axelrod & Tanenbaum**. The three name partners of Small, White & Marani — **Gus Small**, **Karen White** and **Mark Marani** — have joined Cohen Pollock as partners. The office is located at 2100 Riveredge Parkway, Suite 300, Atlanta, GA 30328-4656; (770) 858-1288.

**Kilpatrick Stockton LLP** announces that **Randy Edwards**, **Carol R. Geiger**, **Mark Palmer** and **Mitchell G. Stockwell** have been elected to partnership in the firm's Atlanta office. Also, **Laura J. Fenn**

and **James Leonard** have joined the firm's litigation practice in the Atlanta office, the former as an associate and the latter as counsel.

Lastly, the firm welcomes 17 new associates to the Atlanta office:

**Christina J. Adams** (real estate), **Adrienne P. Ashby** (real estate), **Richard G. Boswinkle** (securities and franchise), **Michael Tad Carithers** (litigation), **Samuel S. Choy** (employee benefits), **Adam E. Crall** (intellectual property-patents), **Shawn Dansky** (litigation), **Antonio F. Doganiero III** (litigation), **Zachary M. Eastman** (business transactions), **Kyle M. Globerman** (intellectual property-patents), **Kristin D. Mallatt** (intellectual property-patents), **Christine M. Cason** (intellectual property-trade-marks), **Chad I. Michaelson** (litigation), **Catherine F. Munson** (litigation), **Sherry V. Neal** (litigation), **R. Joseph Parkey Jr.** (securities and franchise) and **Carolyn A. Sawyer** (labor). Visit the firm's Web site at [www.kilstock.com](http://www.kilstock.com).

In response to its continued growth, **Powell, Goldstein, Frazer & Murphy LLP** has hired **Robert S. Crowell** to serve as the firm's chief operating officer. Powell Goldstein is a national law firm with offices in Atlanta and Washington, D.C. Visit the firm's Web site at [www.pgfm.com](http://www.pgfm.com).

**Nelson Mullins Riley & Scarborough LLP** announces that **Han C. Choi** has joined the Atlanta office as of counsel and **Lance P. McMillian** has joined the firm as an associate. Choi will practice in the areas of municipal and corporate finance, while McMillian's practice

will focus in the areas of business and employment litigation. The Atlanta office is located at 999 Peachtree Street, NE, First Union Plaza, Suite 1400, Atlanta, GA 30309; (404) 817-6000.

**Gardner G. Courson** has been named to the **McGuire, Woods, Battle & Boothe LLP** board of partners. He will be replaced as managing partner of the firm's office by **George H. Heberton**. The Atlanta office is located at 285 Peachtree Center Avenue, NE, Marquis Tower Two, Suite 2200, Atlanta, GA 30303; [www.mwbb.com](http://www.mwbb.com).

**Paul, Hastings, Janofsky & Walker LLP** has elected **Nancy E. Rafuse**, of the firm's Atlanta office, to partnership. Visit the firm's Web site at [www.phjw.com](http://www.phjw.com).

**Hunter, Maclean, Exley, and Dunn PC** continues to expand its statewide practice with the addition of **James E. Blanchard** as partner and head of the firm's Atlanta office. Hunter Maclean is the largest Georgia law firm outside of Atlanta, with offices in Savannah, Atlanta and Augusta.

**Arnall Golden & Gregory, LLP** is pleased to announce that **Todd M. Campbell** and **Stefan C. Passantino** have been named partners. Also joining the firm as partner is **Darryl S. Laddin**, formerly of **Smith, Gambrell & Russell**. The Atlanta office is located 2800 One Atlantic Center, 1201 West Peachtree Street, Atlanta, GA 30309-3450; (404) 873-8500.

**Law Offices of Stanley M. Lefco PC** announces that **Michael J. Walker** has become associated with the firm, which is located at 4657

Roswell Road, Suite G-602, Atlanta, GA 30342; (404) 843-9666.

## In Augusta

**Kilpatrick Stockton LLP** announces that **Samantha Steffen** has joined the litigation group as an associate in the firm's Augusta office. Also, **David Anderson** of the Augusta office has been elected partner. Visit the firm's Web site at [www.kilstock.com](http://www.kilstock.com).

## In Decatur

The law office of **Morris L. Richman** has relocated to Suite 310, Executive Building, 125 East Trinity Place, Decatur, GA 30030-3360; (404) 377-3317, FAX (404) 377-3006.

## In Macon

**Anderson, Walker & Reichert** is pleased to announce that two new associates, **James M. Freeman** and **John B. Critchfield**, have joined the firm, which is located at Suite 404, SunTrust Bank Building, Macon, GA 31208-6497; (912) 743-8651.

## In Savannah

**James R. Gardner** and **D. Campbell Bowman Jr.** have formed the law firm of **Gardner & Bowman LLC**. The offices are located at 236 East Oglethorpe Avenue, Savannah, GA 31401; (912) 234-3155 and Three Executive Court, Richmond Hill, GA 31324; (912) 756-3688.

## In Thomasville

**Flowers Bakeries Inc.**, the fresh baked foods unit of Flowers Industries Inc., has promoted **Stephanie B. Tillman** to the position of associate general counsel. Headquartered in Thomasville, Flowers Industries

## Official Opinions

**First Offender Act.** The First Offender Act, O.C.G.A. § 42-8-60 *et seq.*, is applicable to misdemeanor offenses. (1/3/2000 No. 2000-1)

**Teachers Retirement System.** Under the provisions of O.C.G.A. § 47-3-92, only days of sick leave accrued while a member of the Teachers Retirement System may be credited towards retirement under the Teachers Retirement System. (1/7/2000 No. 2000-2)

**Elected officials; tenure.** A local law cannot extend the tenure in office of an elected official who



**Attorney General  
Thurbert Baker**

would otherwise immediately vacate that office, as required by the Georgia Constitution, when qualifying to run for another elected position. (1/14/2000 No. 2000-3)

## Unofficial Opinions

**Electronic records and signatures.** Under the "Georgia Electronic Records and Signatures Act," departments, agencies, authorities, and instrumentalities of the State of Georgia and its political subdivisions have the legal authority to determine how and the extent to which they will create, send, receive, store, recognize, accept, be bound by, or otherwise use "electronic records" and "electronic signatures," in situations where there is no other controlling law specifying a different type of record or signature. (1/28/2000 No. U2000-1) ☐

produces and markets a full line of fresh and frozen baked foods to retail and foodservice customers nationwide through its business units – Flowers Bakeries, Mrs. Smith's Bakeries and Keebler Foods. (912) 226-9110.

## In Chattanooga, TN

**Horton, Maddox & Anderson, PLLC** announces that **D. Brian Northcutt** and **James A. Hurst Jr.** have joined the firm as associates. The offices are located at One Central Plaza, Suite 600, 835 Georgia Avenue, Chattanooga, TN 37402; (423) 265-2560. ☐

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# A COMPELLING INSIDE LOOK AT DEATH ROW

**Joe Jackson and William F. Burke Jr. *Dead Run: The Untold Story of Dennis Stockton and America's Only Mass Escape from Death Row*. Times Books. 229 pp. \$25.00**

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**Reviewed by Joe D. Whitley**

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**DEAD RUN IS THE STORY OF DENNIS STOCKTON**, a convicted murderer sentenced to Virginia's Death Row in 1983, and put to death by lethal injection in 1995. Stockton was not your typical Death Row inmate. He chronicled his life in prison by keeping a diary, and later by writing articles and columns for Virginia newspapers. Because of his writing skills and his credibility in recounting in minute detail the mass escape of Death Row inmates from a southern Virginia prison, Stockton came to the attention of two newspaper reporters, Joe Jackson and William F. Burke Jr., both then with the *Virginian-Pilot*. Jackson and Burke are the authors of *Dead Run*, but the story is all Dennis Stockton's as developed from his diary and in face-to-face interviews with Jackson and Burke.

The great irony of Stockton's extended stay in prison was his refusal to participate in the escape of six Death Row prisoners in 1984. Stockton, a seasoned veteran of prison life, likely would have avoided recapture, unlike his colleagues who were later apprehended. But Stockton chose to stay and fight for his life through his lawyers, hoping for a new trial and ultimate freedom. He bet wrong. But as he remained on Death Row, he recorded in

his diary and journals a story of the triumph of human ingenuity and determination in the escape of his Death Row colleagues, who became known as the "Mecklenburg Six." Their remarkable and frightening efforts resulted in an asterisk in the heretofore unblemished record of the supposedly inescapable Mecklenburg Correctional Center.

The book also provides graphic and brutal detail of prison life — with the realism of *Saving Private Ryan*, but without the heroics of GI's facing a common enemy. Life with the prisoners on Death Row is a caged animal existence as described by Stockton. The full range of human personality strengths and weaknesses are reflected in the group of prisoners assembled on Virginia's Death Row during Stockton's long stay there. There are strong personalities, recluses, and "punks," (who are the property of the dominant for homosexual activity). The guards and prison personnel also reflect a divergence of character traits and attitudes toward the inmates. Some of them are sympathetic toward prisoners, while others are sadistic in their treatment of them.

*Dead Run* also examines the death penalty and its sometimes random and disparate application. The authors suggest from their review that Stockton's prosecution was partially politically motivated by prosecutors and law enforcement authorities in rural southern Virginia. The chief trial witness against Stockton later recanted his testimony. Numerous others supported this recantation in sworn affidavits. In addition, other facts uncovered by investigative reporters looking into the case suggested that Stockton's version of the facts was correct and that he had not been in the vicinity of the murder at the time it was committed. Years later, information was discovered supporting the "deal" that the government's key witness received. In subsequent hearings, however, both the government and the chief witness denied the existence of any deal or concession.

Throughout his tenure in prison, Stockton was a beneficiary of enthusiastic and talented lawyers, none of whom were successful in obtaining a

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reversal of his conviction. Despite their efforts to obtain leniency for him, Stockton refused an offer made by Virginia's Governor to receive a modified sentence of life without parole because of his belief in his own innocence.

The book provides a thoughtful examination of the application of the death penalty in the years following *Furman v. Georgia*. It will cause any reader, whether pro-death penalty or anti-death penalty, to ponder if the death penalty isn't sometimes applied to the innocent and sometimes not applied soon enough to those who are without redemption. As a result, it seems the public and political desire for a definitive end to death penalty appeals should be balanced against the occasional circumstance where there might be a potential wrongful application of the death penalty.

Victims and the general public would agree that prison conditions should not rival those of a Motel 6, but they certainly should not be at a level that is sub-human and cause health and safety concerns for both the inmates and correctional officers. Stockton's recounting of the health and safety problems he experienced and observed while in prison resulted in substantial reforms and improvements. A better than "third world" standard for the inmates in the Virginia prison system was accomplished as a result of Stockton's newspaper accounts.

Stockton's account of his experience in the Virginia prison system also sheds light on the potential inhumanity of the utilization of the electric chair. For example, based on his information from prison sources, he described an individual who had to be electrocuted twice before his full execution was achieved. Fortunately for Stockton, by the time of his execution, he had the option of choosing lethal injection. Certainly, the imposition of the death penalty in and of itself is enough, and it need not be compounded by the application of torture. Stockton's tale of the electrocution of numerous other inmates suggests that, at least in Virginia in the late-1980s and early-1990s, the electric chair approached a form of torture.

There are numerous other themes and issues explored in this very interesting book. It should be recommended reading for those who vocally oppose or support the death penalty, as well as for those attorneys who wish to pursue prosecution and criminal defense work. It is a good read. ☒

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*Joe D. Whitley is Chair of the white collar criminal defense practice group at Alston & Bird LLP, based in Atlanta, and is the former United States Attorney for the Northern and Middle Districts of Georgia. He also served as Deputy Assistant Attorney General for the United States Department of Justice in the Reagan administration, and as Acting Associate Attorney General during the Bush administration.*

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## DISCIPLINE NOTICES (As of March 6, 2000)

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### Disbarred

#### **James A. Nolan Madison, GA**

James A. Nolan (State Bar No. 545450) has been disbarred from the practice of law in the State of Georgia by Supreme Court order dated January 18, 2000. Nolan failed to respond to charges. Accordingly, the Court found that in three cases Nolan abandoned legal matters entrusted to him. In one case Nolan failed to return the client's phone calls, failed to appear in court, and failed to return the file. In a second matter, Nolan appeared as counsel subsequent to his suspension for failing to respond to the State Bar's Notice of Investigation in an unrelated disciplinary proceeding. Nolan failed to inform the Court that his license was suspended and the criminal case ended in a mistrial. In the third matter Nolan was paid \$250. He was to copy and return the client's documents. Nolan failed to return calls and subsequently denied having the file. Later, the client went to Nolan's office and was told by Nolan to come back later that day, but Nolan was not there.

#### **Marc W. Mendelson Atlanta, GA**

Marc W. Mendelson (State Bar No. 502041) voluntarily surrendered his license to practice law in the State of Georgia. The Supreme Court accepted Mendelson's surrender by order dated January 18, 2000. Another attorney associated

Mendelson to assist in representing two clients in automobile and slip and fall claims. Mendelson negotiated an insurance settlement in the collision claim and received a check, but failed to disburse the funds and make an accounting to the client. In the slip and fall claim, Mendelson received an insurance check for \$95,000 but did not tell the client or the other attorney.

#### **Willis Nelson Marshall Kennesaw, GA**

Willis Nelson Marshall (State Bar No. 471950) voluntarily surrendered his license to practice law in the State of Georgia. The Supreme Court accepted Marshall's surrender by order dated January 18, 2000. On May 7, 1999, Marshall was indicted for the felony offense of criminal solicitation to commit a crime in violation of the Georgia Controlled Substances Act. On September 4, 1999, Marshall pled guilty to the charge.

#### **John Earl Duncan Lexington, SC**

John Earl Duncan (State Bar No. 233455) voluntarily surrendered his license to practice law in the State of Georgia. The Supreme Court accepted Duncan's surrender by order dated February 14, 2000. Duncan pled guilty to the charge of making a false material declaration to a grand jury.

#### **Meredith Anne Bates Atlanta, GA**

Meredith Anne Bates (State Bar No. 049732) voluntarily surrendered her

license to practice law in the State of Georgia. The Supreme Court accepted Bates' surrender by order dated February 14, 2000. Bates represented a client in a divorce action, including child support, and in a contempt action to obtain child support. She filed the contempt action but, after learning that the opposing party had filed for bankruptcy, failed to take further action to obtain child support. Bates also filed the divorce action, but did not seek a temporary order to obtain child support. She failed to return calls and closed her practice without informing her client and without filing a motion to withdraw from the divorce action. Bates failed to file a timely response to the client's grievance.

#### **James L. Adams Atlanta, GA**

James L. Adams (State Bar No. 003500) voluntarily surrendered his license to practice law in the State of Georgia. The Supreme Court accepted Adams' surrender by order dated March 6, 2000. Adams violated Standard 66 (conviction of a felony or misdemeanor) in connection with his guilty plea in a felony matter.

### Suspended

#### **Harvey C. Brown Jr. Lindale, GA**

Harvey C. Brown Jr., (State Bar No. 087850) petitioned the Supreme Court for voluntary discipline. On January 18, 2000, the Court sus-



pendent Brown for two years running from September 1, 1998, with a condition for reinstatement being that he provide a certification from the Lawyer Assistance Program that he is fit to practice and that he poses no threat of harm to his clients or public. Brown was to handle a probate matter and the sale of property, for which he was paid a retainer of \$950. After the sale, he received a \$2,500 check from the buyer as a down payment. Brown failed to deliver the proceeds to his client and converted the funds to his own use. Brown did not respond to the State Bar's Notice of Investigation. He closed his practice on September 1, 1998, and was suspended by the Court on October 19. Since that time, he has made restitution.

**W. Bennett Gaff  
Fitzgerald, GA**

On January 18, 2000, the Supreme Court suspended W. Bennett Gaff (State Bar No. 281875) from the practice of law for one year with a condition of reinstatement being that he refund a client \$500. Gaff, who lived and had a law office in Canton, Georgia, opened another law office in Fitzgerald in 1996. Despite warnings from the State Bar, Gaff allowed a disbarred lawyer to work unsupervised as a paralegal in the Fitzgerald office. Gaff failed to take any action to insure that the paralegal had no contact with his clients and failed to inform his clients that the paralegal was a disbarred lawyer. Also, while working for Gaff, the disbarred lawyer engaged in criminal misconduct, including forgery and theft. Further, Gaff failed to deliver settlement proceeds to clients and failed to complete work.

**Richard W. Voss  
Medford, WI**

Richard W. Voss (State Bar No.

728992) petitioned the Supreme Court for voluntary discipline. On January 18, 2000, the Court suspended Voss for 18 months in connection with his representation of three clients in separate matters. Voss failed to follow through on the execution and filing of loan assumption documents and when the purchaser was delinquent in making mortgage payments, the mortgage company demanded payment from Voss client. In a bankruptcy matter, Voss failed to communicate with a client regarding her case, did not withdraw from the case, and the case was eventually dismissed by the bankruptcy court. In the third case, Voss failed to file a child support modification on behalf of his client until the client filed a grievance against him. Voss failed to file a sworn written response to the three State Bar Notices of Investigation.

**James J. Clinton  
Sylacauga, AL**

James J. Clinton (State Bar No. 170575) petitioned the Supreme Court for voluntary discipline. On January 18, 2000, the Court suspended Clinton indefinitely, *nunc pro tunc* to December 23, 1998, with the condition that he be reinstated to practice law in Alabama or be reinstated to practice in Georgia pursuant to Bar Rule 4-301 through 4-306. Clinton was disbarred in Alabama effective February 12, 1991. The State Bar of Georgia learned of his Alabama disbarment on December 23, 1998, from which date Clinton has not practiced law in Georgia.

**E. Herman Warnock  
McRae, GA**

E. Herman Warnock (State Bar No. 738100) has been suspended from the practice of law in the State of Georgia by Supreme Court order dated January 18, 2000. A client filed a grievance alleging that Warnock

received money from him while suspended and then refused to return it. The Bar filed a Notice of Investigation to which he failed to respond. In another case, a client filed a grievance alleging that Warnock had agreed to represent him and two other joint owners of real property destroyed by a fire. After the insurance company refused to pay for the loss, Warnock filed a proof of loss statement but failed to communicate with the clients in spite of their repeated attempts to talk to him. Warnock finally filed suit on behalf of his clients after they filed a grievance. Warnock acknowledged service of the Notice of Investigation but neglected to file an answer until seven months later. These two disciplinary cases follow prior discipline in 1987, 1989, January 1998, and December 1998, as well as an interim suspension in January and February 1998.

**Wayne P. Thigpen  
Augusta, GA**

Wayne P. Thigpen (State Bar No. 704525) petitioned the Supreme Court for voluntary discipline. On January 31, 2000, the Court suspended Thigpen indefinitely with the following conditions to be satisfied prior to seeking reinstatement: Thigpen must return all files to the clients who want them, reimburse all clients for unearned fees, obtain a report from his psychiatrist that he is able to responsibly resume his law practice, and obtain a favorable evaluation by the Lawyer Assistance Program. In one case Thigpen was paid a \$750 retainer to recover a fee owed for real estate appraisal and consulting services. Thigpen told the client that he would send a demand letter and file suit. After the client learned that Thigpen had not taken any action, he demanded the return of the retainer and file. Thigpen returned the retainer after the client

filed a grievance but failed to return the file. In another matter Thigpen filed pleadings and entered an appearance before the Superior Court of Richmond County while he was suspended from the practice of law.

**P. Russell Tarver  
Birmingham, AL**

P. Russell Tarver (State Bar No. 698425) petitioned the Supreme Court of Georgia for voluntary discipline. On February 14, 2000, the Supreme Court of Georgia suspended Tarver for 45 days. Tarver, who is a resident of Alabama and a member of the Alabama Bar, pled guilty in Alabama to conduct which would constitute a violation of Standard 12 (a lawyer shall not solicit professional employment as a private practitioner for himself, his partner or associate through direct personal contact with a non-lawyer who has not sought his advice regarding employment of a lawyer), and received a 45-day suspension in Alabama on November 16, 1999.

**Julius W. Williams  
Gainesville, GA**

Julius W. Williams (State Bar No. 762965) has been suspended from the practice of law in the State of Georgia by Supreme Court order dated February 29, 2000, for a period of three years. Williams agreed to represent a client in a workers' compensation matter. He told her that her former employer was prepared to settle and he was waiting to hear back from the employer. Eventually Williams told his client he was too ill to pursue her case, but that he had referred it to another lawyer. Williams did not update the client on the status of her case and did not return her file despite her request. He never referred her case to another lawyer, and failed to file a complaint on her behalf. As a result, the status of limitations expired on the client's claim.

**Douglas Harry Pike  
Atlanta, GA**

Douglas Harry Pike (State Bar No. 002960) petitioned the Supreme Court for voluntary discipline. On March 6, 2000, the Court suspended Pike from the practice of law in the State of Georgia for a period of one year effective January 1, 2000, with conditions for reinstatement. Pike filed his petition in response to two formal complaints. Pike agreed to represent a client in litigation involving alleged construction defects to the client's home. Pike failed to communicate with the client about developments in the litigation and did not properly and timely answer discovery. The trial court judge dismissed the client's case. Pike also failed to answer a Notice of Investigation in this matter, despite acknowledging service. In another matter, Pike agreed to represent a couple in a case arising out of an automobile accident in which the husband suffered serious injuries. He failed to communicate with his clients and did not file suit, or complete other work required. The clients discharged Pike and demanded their file. Pike did not surrender the file until two months later.

## Public Reprimand

**Matthew John Reubens  
Decatur, GA**

Matthew John Reubens (State Bar No. 601231) petitioned the Supreme Court for voluntary discipline. The Court accepted Reuben's petition on January 18, 2000, and ordered him to receive a public reprimand. Reubens loaned a client money on three occasions during his representation of the client in a workers' compensation and personal injury case. The loans were to be repaid in part from any proceeds from the case.

**Charles E. Bagley Jr.  
Douglas, GA**

Charles E. Bagley Jr. (State Bar No. 005440) petitioned the Supreme Court for voluntary discipline. The Court accepted Bagley's petition on January 19, 2000, and ordered him to receive a public reprimand. Bagley failed to respond to disciplinary authorities during the investigation of a grievance (Standard 68) alleging that he willfully abandoned or disregarded a legal matter entrusted to him (Standard 44). In his timely response to the formal complaint, he admitted he violated Standard 68 but denied a violation of Standard 44. The maximum sanction for a violation of Standard 68 is a public reprimand.

## Review Panel Reprimand

**Iyabo Onipede Johnson  
Fitzgerald, GA**

Iyabo O. Johnson (State Bar No. 553825) petitioned the Supreme Court for voluntary discipline. The Court accepted Johnson's petition on January 18, 2000, and ordered her to receive a Review Panel reprimand. Johnson closed a real estate transaction on uncollected funds under pressure from a client. Johnson's escrow account was in a deficit for a 12-day period until the client gave her sufficient funds to cover the entire amount of the purchase price and closing costs. When the Internal Revenue Service later interviewed Johnson in connection with an investigation of her client, Johnson was untruthful on two occasions, stating that she had received all the money from her client on the date of the closing. Later she admitted she was not truthful with the IRS because she wanted to avoid disclosure that her escrow account had been in a deficit because of this transaction.

**Janice L. Hughes**  
**Decatur, GA**

Janice L. Hughes (State Bar No. 376050) petitioned the Supreme Court for voluntary discipline. The Court accepted Hughes' petition on January 18, 2000, and ordered her to receive a Review Panel reprimand. Hughes violated Standard 44 by accepting fees from two clients, but not performing their work, not responding to their calls or letters, and not returning records upon request.

**Kevin F. Forier**  
**Atlanta, GA**

Kevin F. Forier (State Bar No. 269180) petitioned the Supreme Court for voluntary discipline. The Court accepted Forier's petition on January 19, 2000, and ordered him to receive a Review Panel reprimand. Forier failed to meet the Mandatory Continuing Legal Education requirements for 1996, and although he attended two seminars to remedy the deficiency, he failed to pay the registration fees despite notification that certification of attendance would be withdrawn if he did not. He was suspended from practice due to the deficiency but entered an appearance for a client. When the Court found out he was not authorized to practice, the client had to proceed *pro se*. Forier took a leave of absence from his employment and attended seminars to comply with the requirements.

**Robert A. Wilkinson**  
**Chamblee, GA**

Robert A. Wilkinson (State Bar No. 760050) petitioned the Supreme Court for voluntary discipline. The Court accepted Wilkinson's petition on February 11, 2000, and ordered him to receive a Review Panel reprimand. After being hired by three different clients to represent them before the United States Immigration and Naturalization Service, he failed to do the work or file petitions on their behalf. He repeatedly assured

the clients that their proceedings with the INS were progressing. Subsequently, each client terminated his employment and were forced to hire new counsel. In one instance, Wilkinson failed to forward the client's files to the new attorney.

**Harry L. Trauffer**  
**Marietta, GA**

Harry L. Trauffer (State Bar No. 715750) petitioned the Supreme Court for voluntary discipline. The Court accepted Wilkinson's petition on March 3, 2000, and ordered him to receive a Review Panel reprimand. Trauffer violated the standards by not reducing to writing a contingency fee agreement with a client, by paying the client from his attorney trust account out of his personal funds on deposit in the trust account, and by designating the trust account as a "Deposit Account."

## **Reinstatement**

**David Edward Betts**  
**Atlanta, GA**

David Edward Betts (State Bar No. 055850) filed a petition for reinstatement to the practice of law. The Supreme Court approved his petition by order dated February 14, 2000, conditioned upon his satisfaction of all the requirements of the Rules Governing Admission of the Practice of Law including taking and passing the Georgia Bar Examination and achieving a scale score of 75 on the Multi-state Professional Responsibility Examination.

## **Interim Suspensions**

Under State Bar Disciplinary Rule 4-204.3(d), a lawyer who receives a Notice of Investigation and fails to file an adequate response with the Investigative Panel may be suspended from the practice of law until an adequate response is filed. Since January 2000, five lawyers have been suspended for violating this Rule. ☐

# **Creative Legal Resource new**

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ing citation research

The Lawyers Foundation of Georgia Inc. sponsors activities to promote charitable, scientific and educational purposes for the public, law students and lawyers. Memorial contributions may be sent to the Lawyers Foundation of Georgia Inc., 800 The Hurt Building, 50 Hurt Plaza, Atlanta, Georgia 30303, stating in whose memory they are made. The Foundation will notify the family of the deceased of the gift and the name of the donor. Contributions are tax deductible.

Allen, Jr., Roy B. Tifton	Admitted 1964 Died February 2000	Matthews, John P. Smyrna	Admitted 1938 Died January 2000
Blackburn, Jr., Oris D. Valdosta	Admitted 1955 Died January 2000	Miller, Henry J. Atlanta	Admitted 1929 Died February 2000
Bruton, Charles C. Carlsbad, NM	Admitted 1983 Died January 1999	Ranitz Jr., John F. M. Savannah	Admitted 1948 Died December 1999
Bullock, Darrion Pam Monroe Marietta	Admitted 1986 Died December 1999	Smith, Frank G. Smyrna	Admitted 1971 Died September 1999
Daniel, Peter K. Atlanta	Admitted 1987 Died January 2000	Thompson, Robert T. Greenville, SC	Admitted 1951 Died January 2000
Edwards, R. J. Atlanta	Admitted 1949 Died February 2000	Twyman-Williams, Yvonne Angela Avondale Estates	Admitted 1990 Died February 2000
Endicott, Mary C. Brunswick	Admitted 1953 Died December 1994	Vaughn, Ralph D. Mableton	Admitted 1969 Died December 1999
Finkel, Jane Ellen Atlanta	Admitted 1995 Died February 2000	Vickrey, Jack Houston, TX	Admitted 1963 Died October 1997
Holton, Elie L. Douglas	Admitted 1949 Died August 1999	Wardlow, Jr., Floyd H. Ashburn	Admitted 1961 Died 2000
Ladson Jr., William F. Macon	Admitted 1974 Died November 1999	Wilkerson, John P. Leesburg, FL	Admitted 1948 Died December 1998
Lange, Robert H. Savannah	Admitted 1959 Died November 1999	Yancey Jr., Howard E. Adel	Admitted 1971 Died December 1999
Llop, Joseph L. Atlanta	Admitted 1952 Died January 2000		

## Memorials and Tributes

A meaningful way to honor a loved one or to commemorate a special occasion is through a tribute and memorial gift to the Lawyers Foundation of Georgia. An expression of sympathy or a celebration of a family event that takes the form of a gift to the Lawyers Foundation of Georgia provides a lasting remembrance. Once a gift is received, a written acknowledgement is sent to the contributor, the surviving spouse or other family member, and the Georgia Bar Journal. A gift to the Lawyers Foundation of Georgia will endure beyond an individual's lifetime. It can serve to extend a helping hand to the community and those in need for years to come. Please contact the Lawyers Foundation of Georgia for more information. 800 The Hurt Building, 50 Hurt Plaza, Atlanta, GA 30303. 404-526-8617 or [lauren@gabar.org](mailto:lauren@gabar.org).





# ALI: Restitution, Unjust Enrichment Revisited

**THE AMERICAN LAW INSTITUTE** (ALI) and the State Bar Judicial Procedure and Administration Committee presented their 18th Annual ALI Breakfast in Atlanta.

Senior Judge Dorothy Toth Beasley, Executive Director/International Program at the National Center for State Courts and former Georgia Court of Appeals Judge, welcomed the group of approxi-

mately 35 attendees representing cities from around the state.

State Bar Judicial Procedure & Administration Committee Chair Thomas William Malone introduced the morning's keynote speaker, Emory Law School Professor Andrew Kull, who has returned to Georgia after serving as Visiting Professor of Law at the University of Texas. Kull teaches contracts, restitution, sales and

negotiable instruments, and his accomplishments include an American Bar Association Silver Gavel Award, which he earned for his principal work in legal history, *The Color-Blind Constitution* (Harvard U.P. 1991).

Kull's presentation was titled, "Where Do Restatements Come From? The New Restatement of Restitution (and Unjust Enrichment)." ☞

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# Notice of Filing of Proposed Formal Advisory Opinion in Supreme Court

## Second Publication of Proposed Formal Advisory Opinion Request No. 99-R2

Members of the State Bar of Georgia are hereby NOTIFIED that the Formal Advisory Opinion Board has made a final determination that the following Proposed Formal Advisory Opinion should be issued. Pursuant to the provisions of Rule 4-403(d) of Chapter 4 of the Rules and Regulations of the State Bar of Georgia, this proposed opinion will be filed with the Supreme Court of Georgia on or after April 15, 2000. Any objection or comment to this Proposed Formal Advisory Opinion must be filed with the Supreme Court within twenty (20) days of the filing of the Proposed Formal Advisory Opinion, and should make reference to the request number of the proposed opinions.

## Proposed Formal Advisory Opinion Request No. 99-R2

### QUESTIONS PRESENTED:

#### I. Disclosure of Billing Statements to Non-Clients.

May a lawyer whose professional services are paid by a person other than the client disclose to the person paying the bill, or to third-parties such as an insurer's outside audit service, client confidences or secrets contained in detailed, narrative billing statements which describe the professional services rendered?

#### II. Request by Non-Client to Obtain Client's Consent to Disclose Billing Statements.

May a lawyer ethically comply with a request by a person who pays the lawyer's billings, other than the client, to seek or obtain the client's consent for the lawyer to disclose client confidences or secrets contained in billing statements to be submitted to an outside audit service?

#### III. Guidelines for Professional Services Imposed by Non-Client.

May a lawyer whose professional services are paid by a person other than the client ethically comply with detailed guidelines regarding billings or services rendered as imposed by a person other than the client who is paying the bill for legal services?

### SUMMARY ANSWERS:

#### I. Disclosure of Billing Statements to Non-Clients.

A lawyer may not disclose to a person who pays the lawyer's billings other than the client, or to third-parties such as an insurer's outside audit service, confidential information concerning the client without the client's consent, except for disclosures that are impliedly authorized to carry out the representation.

#### II. Non-Client Request to Obtain Client's Consent to Disclose Billing Statements.

A lawyer should not comply with the requirement of a person who pays the lawyer's billings, other than the client, that the lawyer seek or obtain the client's consent to disclosure of client confidences or secrets in billing

statements to be submitted to an outside audit service.

#### III. Guidelines for Professional Services Imposed by Non-Client.

A lawyer whose professional services are paid for by a person other than the client can ethically comply with guidelines of the person paying the bill, provided the guidelines do not require disclosure of confidential or secret information of the client, without the client's consent, or interfere with the attorney's independent professional judgment in rendering legal services to the client or with the attorney-client relationship.

### OPINION:

#### I. Disclosure of Billing Statements to Non-Clients.

*"Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him."*<sup>1</sup>

It is the duty of every lawyer to maintain inviolate the confidences and, at every peril to themselves, to preserve the secrets of their clients. Standards 28 and 29; O.C.G.A. §15-19-14(3); see also, Rule 1.6, ABA Model Rules of Professional Conduct. The attorney/client privilege is for the benefit of the client, not the lawyer. *Marriott Corp. v. American, Academy of Psychotherapists Inc.*, 157 Ga. App. 497, 277 S.E.2d 785 (1981). Therefore, a lawyer cannot disclose to a person who pays the lawyer's

billing, such as an insurer, or to third parties such as an insurer's outside audit service, confidential information concerning the client without the client's consent, except for disclosures that are impliedly authorized to carry out the representation. Standard 28(b); EC 4-2. The exception for disclosures that are impliedly authorized is to be narrowly construed and does not allow the attorney's disclosure, without specific client consent, of confidential client information to a third-party hired by the person or entity paying the fee other than the client.

An insurance carrier that has undertaken a contractual obligation to furnish legal services on behalf of an insured would have implied authorization to receive and review the billing statements for professional services in order to satisfy those contractual obligations. However, if counsel discloses client confidences and secrets to a third party, such as a fee auditor, this can result in a waiver of the attorney-client privilege or contravene the lawyer's professional ethics, or both. *Griffin v. Williams*, 179 Ga. 175, 175 S.E. 449 (1934).

The very nature of detailed narrative billing statements for the services rendered by a lawyer will normally contain client confidences and secrets. Ethical considerations which define client confidences and secrets are broader than the attorney-client privilege. EC 4-4 provides:

*The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, he should avoid professional discussions in*

*the presence of persons to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.*

The definition of client "confidence" or "secret" is expansive and would include much of the kind of information that might normally be found in detailed narrative billing statements. Rule 3-104, DR 4-101.<sup>2</sup> A client's secret is not only anything that might be embarrassing to the client but also anything that relates to the representation. *See, In the Matter of T. Edward Tante*, 264 Ga. 692, 453 S.E.2d 688 (1994). This body has recognized that the mere identification or location of a client may be a confidence or secret. *See, State Disciplinary Board Advisory Opinion Nos. 17 and 42.*<sup>3</sup>

Must a lawyer consult with the client to determine what is a confidence or secret (and therefore not to be disclosed to the auditors) or can the decision be made unilaterally? In the absence of actual full disclosure and consultation with the client, prudence dictates that counsel should assume that any information about the client and the representation is confidential.

What obligation does a lawyer have upon discovering that a statement for legal services has been produced to an unauthorized third party without his client's consent? A lawyer should object upon learning that a payer of his fee other than his client is forwarding bills for legal services to an outside auditor. *See, Standard 29; see also, Maryland State Bar Association, Ethics Advisory Opinion 99-7* (December 18, 1998). No additional detailed bills may be sent by the lawyer to the non-client payer without the client's consent after the lawyer learns that the bills are being forwarded to an outside auditor. Vermont Bar Association,

Opinion 98-7.

## II. Request by Non-Client to Obtain Client's Consent to Disclose Billing Statements.

A lawyer may not ethically comply with the requirement of a person other than the client who pays the lawyer's billings that the lawyer seek or obtain the client's consent to potential disclosure of client confidences or secrets contained in billing statements to be submitted to an outside audit service. Such a requirement would put the attorney in an ethical dilemma, precluding the attorney from representing the client.

It is fundamental that a lawyer should exercise independent judgment on behalf of a client. Standard 41; Rule 3-105. This requires that the professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the lawyer's client, free of the compromising influences of either his personal interests, the interests of other clients, or the desires of third persons. EC 5-1. The Ethical Considerations under Rule 3-105 related to the "Desires of Third Persons" are directly on point:

EC 5-21 *The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to his client, and if he or his client believes that the effectiveness of his representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of his client.*

EC 5-22 *Economic, political, or social pressures by third persons are less likely to impinge upon the independent judgment of a lawyer in a matter in which he is compensated directly by his client. On the other hand, if a lawyer is compensated from a source other than his client, he may feel a sense of responsibility to someone other than his client.*

EC 5-23 *A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong pressures against the independent judgment of those lawyers. Some employers may be interested in furthering their own economic, political, or social goals without regard to the professional responsibility of*

*the lawyer to his individual client. Others may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client. On some occasion, decisions on priority of work may be made by the employer rather than by the lawyer with the result that prosecution of work already undertaken for the clients is postponed to their detriment. Similarly, an employer may seek, consciously or unconsciously, to further its own economic interests through the actions of the lawyers employed by it. Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the*

*lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom.*

An unacceptable ethical dilemma would be created in situations where a person other than the client pays the lawyer's billings and requests that the attorney seek or obtain the client's consent to

potential disclosure to third parties of client confidences or secrets contained in billing statements. A lawyer cannot disclose client confidences without the informed consent of the client, and in this scenario, fully and fairly informing the client is fraught with danger in the form of subtle influences on the manner and method used by the lawyer to inform the client. A benign written disclosure is not likely to "fully inform" the client, since the client's consent to release of confidential information must be completely informed, based upon more than the mere fact that his or her billing records will be released to the auditors. *See, Vermont Opinion 98-7.* The more prudent approach would arguably require that the client be informed that releasing the billing statement to an outside party could lead to a waiver of the attorney-client privilege, as well as any other adverse impact that the lawyer knew or should have known. The dilemma for the lawyer in providing the client with the veritable "list of horrors" lies in the potential chilling effect that might result from even a subconscious desire to avoid offending the person responsible for payment of the lawyer's services.

However, the most troubling dilemma in this situation can occur when the client asks the lawyer for advice on whether or not to consent to disclosure, and this request for advice would be a normal and automatic reaction to any efforts to fully inform. In order to avoid both the subtle and obvious influences which may come into play in situations where a person other than the client pays the lawyer's billings and requests that the attorney seek or obtain the client's consent to potential disclosure of client confidences or secrets contained in billing statements, the situation must be analyzed from the perspective of any other independent lawyer whose fees are not being paid by a person other

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than the client. Where disclosure of the billing statements interjects the slightest risk that the client could be prejudiced by agreeing to disclosure, and the client gains nothing in return, a truly disinterested lawyer would not conclude that the client should agree and would advise the client accordingly. *See, e.g.*, 98 Formal Ethics Opinion 10, North Carolina State Bar Association; Washington State Bar Association, Formal Opinion 195 (January 12, 1999).

Prudence dictates that a lawyer avoid situations which create a substantial potential for undermining the attorney/client relationship. Our Rules of Ethics require that a lawyer shall not permit a person who recommends, employs or pays him to render legal services for another to direct or regulate his professional judgment. Standard 41; Rule 3-105 and DR5-107. Therefore, a lawyer may not ethically comply with the requirement of a person other than the client who pays the lawyer's billings that the lawyer seek or obtain the client's consent to potential disclosure of client confidences or secrets contained in billing statements to be submitted to an outside audit service.

### III. Guidelines for Professional Services Imposed by Non-Client.

**Standard 41** A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services. A violation of this standard may be punished by disbarment.

A lawyer whose professional services are paid by a person other than the client can ethically comply with guidelines of the person paying the bill, provided the guidelines do not require disclosure of confidential or secret information of the client, without the client's consent, or interfere with the attorney's indepen-

dent professional judgment in rendering legal services to the client or with the attorney-client relationship. *See*, Rule 3-105, DR 5-107; *see also*, Rule 1.8(f), 2.1 and 2.3, ABA Model Rules of Professional Conduct.

Guidelines cannot be followed if they interfere with the lawyer's exercise of the lawyer's professional judgment, and the lawyer must inform the client about any guidelines. Any guideline which arbitrarily and unreasonably limits or restricts compensation for the reasonable time spent on task necessary to the representation is to be avoided. Billing guidelines that impose a *de facto* or arbitrary rate for certain services, such as compensating a lawyer at paralegal rates, are also to be avoided. *See* Washington State Bar Association, Formal Opinion 195 (January 12, 1999).

A lawyer must obtain the informed consent of the client before complying with any restrictions on representation of the client that are imposed by a party other than the client, such as the payer of the attorney's legal services. Vermont Bar Association, Opinion 98-7. *See also* Alabama State Bar, RO-98-02. ☒

## Endnotes

1. EC 4-1
2. Rule 3-104, DR 4-101  
*Preservation of Confidences and Secrets of a Client*  
(a) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client.
3. Ethics bodies have recognized instances where the mere fact that a client has sought legal assistance may be a confidence or secret. *See*, Vermont Opinion 98-7; Maryland Ethics Advisory Opinion 99-7; Washington Formal Opinion 195.



**Bar President Rudolph Patterson presents a new membership ID card to Patrise Perkins-Hooker.**

## Membership Cards for All

**THIS PAST WINTER, FOR THE** first time in a number of years, the State Bar of Georgia distributed new membership cards to all 31,500 of its members. The project was initiated by Bar President Rudolph N. Patterson and implemented by the Bar's Membership Department.

Each member received an easy-to-read, laminated card featuring an architectural rendering of what will be the Bar's new headquarters in 2002, as well as a handy, quick-dial reference Rolodex® insert.

According to Bar Membership Director Gayle Baker, the entire operation went very smoothly, from production to distribution. A supplemental mailing of an additional 300 cards was sent out in March to newly admitted attorneys or others that, for whatever reason, had a problem with their original card.

Members are asked that they keep their new cards handy and refer to their Bar number in all communications with the Bar. Photo identification cards are still available for purchase from the Membership Department at a cost of \$10 each. ☒

# N O T I C E S

## Board of Governors Meeting Attendance

4-99	6-99(Fri)	6-99(Sat)	8/99	11-99	1-00	
Lanier	Savannah	Savannah	Amelia	Brasstown	Atlanta	
*	*		*	*	*	Ross Adams
*	*	*	*	*	*	Anthony B. Askew
*	*	*	*			William Steven Askew
				*	*	Thurbert E. Baker
	*	*	*	*	*	Donna Barwick
		*	*	*	*	William D. Barwick
*	*	*		*	*	Robert L. Beard, Jr.
n/a	n/a	*		*		J. Lane Bearden
			*	*	*	James D. Benefield III
*	*	*		*	*	Barbara B. Bishop
		*	*			Joseph A. Boone
*	*	*	*		*	Wayne B. Bradley
*	*	*	*	*	*	Jeffrey O. Bramlett
	*	*		*		Sam L. Brannen
*			*	*	e	James C. Brim, Jr.
n/a	n/a	*	*	*	*	William K. Broker
n/a	n/a	n/a	*	*	*	James Michael Brown
*		*	*	*	*	Thomas R. Burnside, Jr.
n/a	n/a		*	*	*	S. Kendall Butterworth
*	*	*	*	*	*	William E. Cannon, Jr.
*	*	*	*	*	*	Edward E. Carriere, Jr.
	*	*	*	*	*	Paul Todd Carroll, III
*	*	*	*	*	*	Bryan M. Cavan
*	*	*	*	*	*	Thomas C. Chambers, III
		*	*	*	*	F. L. Champion, Jr.
	*	*	*	*	*	John A. Chandler
*	*	*	*	*	*	Joseph D. Cooley, III
*	*	*	*	*	*	Delia T. Crouch
*	*	*	*	*	*	William D. Cunningham
*	*	*	*	*	*	William V. Custer, IV
*	*	*	*	*	*	David P. Darden
*	*	*	*	*	*	Dwight J. Davis
*	*	*	*	*	*	Joseph W. Dent
*	*	*	*	*	*	Ernest De Pascale, Jr.
*	*		*	*	*	Foy R. Devine
*	*	*	*	*	*	Charles J. Driebe
*	*	*	*	*	*	C. Wilson DuBose
*	*	*	*	*	*	James B. Durham
*	*	*	*	*	*	Myles E. Eastwood
*	*	*	*	*	*	Gerald M. Edenfield
	*			*	*	J. Franklin Edenfield
*	*	*	*	*	*	O. Wayne Ellerbee
*	*	*	*	*	*	Michael V. Elsberry
*	*		*	*	*	J. Daniel Falligant
*	*	*	*	*	e	B. Lawrence Fowler
*	*	*	*	*	*	James B. Franklin
*	*		*	*	*	Gregory L. Fullerton
	*	*	*	*	*	Gregory A. Futch
*	*	*	*	*	*	H. Emily George
*	*	*	*	*	*	Adele P. Grubbs
n/a	n/a	*	*	*	*	Robert R. Gunn, II
	*	*	*	*	*	John P. Harrington
*	*	*	*	*	*	Walter C. Hartridge
n/a	n/a	*	*	*	*	Steven A. Hathorn
*	*	*	*	*	*	James A. Hawkins
*	*	*	*	*	*	Joseph J. Hennesy, Jr.
*	*	*	*	*	*	Phyllis J. Holmen
	*	*		*	*	Roy B. Huff
	*	*	*	*	*	Donald W. Huskins
*	*	*	*	*	*	Robert D. Ingram
*	*	*	*	*	*	James Irvin
	*	*	*	*	*	Rachel K. Iverson
	*	*	*	*	*	Michael R. Jones, Sr.
	*	*	*	*	*	William Alan Jordan
n/a	n/a	*	*	*	*	J. Benjamin Kay, III
n/a	n/a	*	*			Dow (Kip) N. Kirkpatrick
*	*	*	*	*	*	William P. Langdale, Jr.
e	e	*	*	e		Earle F. Lasseter
*		*	*	*	*	J. Alvin Leaphart
*	*	*	*	*	*	Francis Marion Lewis
*	*	*	*	*	*	David S. Lipscomb

4-99	6-99(Fri)	6-99(Sat)	8/99	11-99	1-00	
Lanier	Savannah	Savannah	Amelia	Brasstown	Atlanta	
*	*	*	*	*	*	Hubert C. Lovein
*	*	*	*	*	*	Leland M. Malchow
n/a	n/a	*	*	*	*	Edwin Marger
*	*	*	*	*	*	H. Fielder Martin
*	*	*	*	*	*	C. Truitt Martin, Jr.
n/a	n/a	*	*	*	*	Johnny W. Mason, Jr.
*		*	*	*	*	William C. McCalley
*	*	*	*	*	*	William C. McCracken
*	*	*	*	*	*	Ellen McElyea
*	*	*	*	*	*	Joseph Dennis McGovern
*	*	*	*	*	*	Larry M. Melnick
*	*	*	*	*	*	C. Patrick Milford
	*	*	*	*	*	J. Brown Moseley
*	*	*	*	*	*	A. L. Mullins
*	*	*	*	*	*	George E. Mundy
*	*	*	*	*	*	Asia Mustakeem
		*		*	*	John A. Nix
*	*	*	*	*	*	Dennis C. O'Brien
*	*	*	*	*	*	Bonnie C. Oliver
*	*	*	*	*	*	Rudolph N. Patterson
*		*	*	*	*	Matthew H. Patton
*		*	*	*	*	Carson Dane Perkins
*	*	*	*	*	*	Patrise Perkins-Hooker
*	*	*	*	*	*	J. Robert Persons
*	*	*	*	*	*	R. Chris Phelps
*	*	*	*	*	*	John C. Pridgen
*	*	*	*	*	*	Thomas J. Ratcliffe, Jr.
*	*	*	*	*	*	George Robert Reinhardt
*	*	*	*	*	*	Jeffrey P. Richards
n/a	n/a	*	*	*	*	Robert V. Rodatus
*	*	*	*	*	*	Tina Shadix Roddenbery
	*	*	*	*	*	Joseph Roseborough
*	*	*	*	*	*	William C. Rumer
n/a	n/a	*	*	*	*	Dennis C. Sanders
*	*	*	*	*	*	Thomas G. Sampson
n/a	n/a	*	*	*	*	Robert L. Shannon, Jr.
*	*	*	*	*	*	Michael M. Sheffield
n/a	n/a	*	*	*	*	Kenneth L. Shigley
*	*	*	*	*	*	M.T. Simmons, Jr.
*	*	*	*	*	*	Lamar W. Sizemore, Jr.
*	*	*	*	*	*	William L. Skinner
n/a	n/a	*	*	*	*	Philip C. Smith
*	*	*	*	*	*	R. Rucker Smith
*	*	*	*	*	*	S. David Smith
n/a	n/a	n/a	*	*	*	Hugh D. Sosebee
e	*	*	*	*	*	Huey Spearman
*	*	*	*	*	*	Lawrence A. Staggs
*	*	*	*	*	*	John Stell
*	*	*	*	e	*	Frank B. Strickland
	*	*	*	*	*	Richard C. Sutton
*	*	*	*	*	*	Jeffrey B. Talley
*	*	*	*	*	*	John J. Tarleton
*	*	*	*	*	*	S. Lester Tate, III
*	*	*	*	*	*	Henry C. Tharpe, Jr.
*	*	*	*	*	*	Dwight L. Thomas
*	*	*	*	*	*	Edward D. Tolley
*	*	*	*	*	*	Christopher A. Townley
*	*	*	*	*	*	Carl A. Veline, Jr.
*	*	*	*	*	*	Joseph L. Waldrep
*	*	*	*	*	*	J. Henry Walker
					*	J. Tracy Ward
				*	*	George W. Weaver
*	*	*	*	*	*	N. Harvey Weitz
*	*	*	*	*	*	A. J. Welch
*	*	*	*	*	*	Andrew J. Whalen, III
*	*	*	*	*	*	James L. Wiggins
*	*	*	*	*	*	William N. Withrow, Jr.
*	*	*	*	*	*	Gerald P. Word
*	*	*	*	*	*	Anne Workman
*	*	*	*	*	*	Gordon R. Zeese
*	*	*	*	*	*	Marvin H. Zion

\* - attended; e - excused; **blank**- did not attend; **n/a** - not on Board; For a list of the Board of Governors by circuit, see the Directory pg. 9.

# 1999-2000 Election Results

## State Bar of Georgia Officers

President-Elect	James B. Franklin, Statesboro
Secretary	William D. Barwick, Atlanta
Treasurer	James B. Durham, Brunswick

## Younger Lawyers Division Officers

President-Elect	Peter J. Daughtery, Columbus
Secretary	Andrew W. Jones, Marietta
Treasurer	Derek J. White, Savannah

## ABA Delegates from Georgia

Post 1	Allan Jay Tanenbaum, Atlanta
Post 3	Cubbedge Snow Jr., Macon
Post 5	S. Kendall Butterworth, Atlanta
Post 7	Linda A. Klein, Atlanta

## New Board of Governors Members

Chattahoochee Post 3	Richard A. Childs, Columbus
Cobb Post 5	J. Stephen Schuster, Marietta
Douglas	Barry R. Price, Douglasville
South Georgia Post 1	George C. Floyd, Bainbridge
Southern Post 1	James E. Hardy, Thomasville
Southern Post 3	William E. Moore Jr., Valdosta
Stone Mountain Post 3	Lynne F. Borsuk, Decatur

## Current Board of Governors Members who will not serve after June 2000

Chattahoochee, Post 3	F. L. Champion Jr., Columbus
Cobb, Post 5	Robert L. Beard Jr., Marietta
Douglas	Jeffrey P. Richards, Douglasville
South Georgia Post 1	J. Brown Moseley, Cairo
Southern Post 1	O. Wayne Ellerbee, Valdosta
Southern Post 3	William P. Langdale, Valdosta
Stone Mountain 3	Marvin H. Zion, Decatur

**All newly-elected Board of Governors members and officers will begin their term at the June 2000 Annual Meeting.**

## Board Approves Dues Increase

The State Bar's Board of Governors approved a dues increase at their Spring Meeting on March 25, 2000. The \$25 increase to the license fees will be effective for the 2000-2001 Bar year, and appears on the dues notice which were mailed in April.

The new fee structure is \$175 for active and \$87 for inactive members. This is the first increase to the membership dues in five years.

Payment is due July 1 and must be postmarked by the U.S. Postal Service on or before August 1, 2000. After August 1, a \$75 late fee will be assessed. After September 1, members are no longer in good standing and will not appear in the *Bar Directory*. After January 1, a \$175 late fee will be assessed.

Members will receive only one dues notice. If you have not received yours, please call the membership department at (404) 527-8777 or (800) 334-6865 ext. 777.

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## **Continued from Page 15**

constitute a *prima facie* case, shifting the burden of evidence.”<sup>47</sup> When combined with the judicial silence on the relationship of *Trustees II* to Section 44-5-86, the *Armour* opinion confirms that, in the eyes of the judiciary, the statutory provision and the presumption of undue influence are simply two separate issues.

Although in theory a challenger to a gift may attempt to proceed under either the rule of *Trustees II* or Section 44-5-86, the case law has tended to limit the statute’s utility — or at least make its application unclear. Regarding the evidentiary burden imposed by the statute, Georgia courts have held contradictory opinions. Use of the term “slight evidence” suggests that the statute reduces the burden of evidence required to prevail on a claim of undue influence in a confidential relationship. Such an interpretation comports with the treatment of “slight evidence” in other judicial contexts.<sup>48</sup> Moreover, the *Armour* court seemed to interpret the statute as reducing the burden of proof from a preponderance of the evidence to “slight evidence.”<sup>49</sup> Yet in a different opinion, the Georgia Supreme Court cast doubt on the validity of this interpretation. Despite a showing of a confidential relationship between the grantee and grantor, the Court in *Daniel v. Etheredge*<sup>50</sup> approved a jury instruction requiring it to find evidence of undue influence by a preponderance of the evidence.<sup>51</sup>

Similarly, one Georgia decision has limited the expanse of the statute by defining the quality of evidence required by the statute. In *Jones v. Hogans*<sup>52</sup> the Supreme Court significantly limited the phrase “persuasion or influence.” There, the plaintiff sought to invalidate two deeds she gave to her nephew. The plaintiff had granted the first deed to her nephew

after he promised to take care of her in exchange for leaving him in her will. Prior to an operation she was having, he presented her with a deed that she believed to be a will and asked her to sign it. She signed the second deed some time after the operation when she was “in a weak and enfeebled condition incapable of understanding the nature of any transaction.”<sup>53</sup> The lower court instructed the jury on O.C.G.A. § 44-5-86.<sup>54</sup> Ignoring the literal language of the statute, the Georgia Supreme Court upheld the trial court’s limitation on the instruction which stated that “a person standing in a confidential relation to another is not prohibited from exercising any influence whatever to obtain benefit to himself. The influence must be what the law regards as undue influence.”<sup>55</sup> Hence, the Court effectively placed on the plaintiff the need to demonstrate the presence of “undue influence” rather than simply “influence.”

Thus, while the statute remains “on the books,” the courts’ contradictory and restrictive interpretations of it caution against its application.

## **Evidentiary Rules Regarding Undue Influence in Georgia**

As the foregoing analysis suggests, Georgia law indicates that the presumption of undue influence, as articulated in *Trustees II*, represents the most coherent approach to resolving claims of undue influence in the context of gift-making. Determining how the presumption will apply, however, necessarily raises a number of difficult evidentiary questions. For instance, the challenger to a gift must demonstrate a “confidential relationship,” a “position of dominance,” and

“weakened mentality” to receive the benefit of the presumption. While such inquiries are fact-based, Georgia courts have articulated certain principles that affect the treatment of evidence. The following section sets forth the most prominent evidentiary principles regarding undue influence in Georgia.

### **A. Establishing the Presumption of Undue Influence**

#### **1. Confidential Relation**

In litigating an undue influence case, counsel may wish to turn first to the statutory definition of “confidential relation” to determine whether the challenging party might receive the benefit of the presumption of undue influence. O.C.G.A. § 23-2-58 states:

[a]ny relationship shall be deemed confidential, whether arising from nature, created by law, or resulting from contracts, where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners, principal and agent, etc.<sup>56</sup>

Despite the significant body of case law interpreting this statute, however, courts addressing undue influence claims have frequently departed from this statutory definition. For instance, several courts have found that a gift between relatives — a relationship “arising from nature” — did not necessarily imply a confidential relationship.<sup>57</sup> More relevant for purposes of undue influence in gift-making and wills appears to be the grantor’s placement of trust or special confidence in the beneficiary. Thus, Georgia courts and juries have found



confidential relationships where the beneficiary was the friend and caretaker of the grantor;<sup>58</sup> the drafter and executrix of the grantor's will;<sup>59</sup> or the grantor's pastor.<sup>60</sup>

## **2. A Position of Dominance**

Counsel also will need to consider the connection between the parties' disparity of power and the transaction in question. Early Georgia cases suggested that there was no need for a challenger to establish that the beneficiary used his or her position of dominance to effectuate the transaction. As noted above, in *Trustees II*, the Georgia Supreme Court rejected the rule that the jury had to find that Mr. Nisbet exercised influence over Mrs. Williams "about this matter"; the existence of a general confidential relationship between the parties, and Mrs. Williams' weakened mentality, was sufficient to warrant a presumption of undue influence.<sup>61</sup> Recent cases, however, indicate that a challenger must demonstrate a more substantial nexus between the beneficiary's position of dominance and the disputed gift. In particular, Georgia courts would most likely require that a challenger show that a beneficiary used his or her dominant position in procuring the gift.<sup>62</sup>

## **3. Weakened Mentality**

As noted above, a party seeking to receive the presumption of undue influence also must establish by a preponderance of the evidence that the grantor suffered from a "weakened mentality."<sup>63</sup> Traditionally, a challenging party need not show imbecility; rather, the requisite mental deficiency to receive the presumption must be such "as would prevent the grantor from understanding the nature of her act at the time the [gift] was executed . . . ."<sup>64</sup> Many cases have suggested that significantly less than actual imbecility may satisfy this legal standard. In particular, courts have upheld a

finding of weakened mentality in a variety of cases involving both old age and associated infirmities.<sup>65</sup> Yet, as in the case of proving a "position of dominance," it appears that Georgia courts are imposing a heightened standard for receiving the presumption of undue influence. Indeed, in a recent case the Georgia Supreme Court approved a jury instruction that required a showing of virtual imbecility to satisfy the "weakness of mind" requirement.<sup>66</sup>

## **B. Establishing Undue Influence**

Should the challenger to a gift receive the presumption, the beneficiary may rebut it by demonstrating that the gifts were free from any undue influence. As noted above, the beneficiary is not prohibited from exercising any influence.<sup>67</sup> Rather, he must show that the gifts were free from influence amounting to duress or coercion.<sup>68</sup> In the context of undue influence in wills, this showing has turned on factors including: the existence of a confidential relationship; the grantor's dealings and associations with the beneficiary; the grantor's habits, motives, or feelings and her strength or weakness of character; the grantor's family, social and business relations; and the manner and conduct of the grantor.<sup>69</sup>

On the other hand, should the challenger fail to raise the presumption or should the beneficiary produce evidence rebutting the presumption, the challenger would have the burden of proving undue influence. Generally, courts have been lenient in admitting circumstantial evidence.<sup>70</sup> Nonetheless, proving undue influence by a preponderance of the evidence will likely be difficult for the challenger. Despite permitting circumstantial evidence, courts have required a specific showing of undue influence; the mere opportunity to influence is insufficient.<sup>71</sup> Courts also have

upheld gifts where evidence indicates a rational purpose for them. In *Daniel v. Etheredge*,<sup>72</sup> for instance, the Georgia Supreme Court upheld a jury instruction stating the following regarding mental capacity:

If one should have mind and reason sufficient to have a decided and rational desire as to what disposition he wishes to make of his property and to clearly understand and appreciate the nature and consequences of his act in making a deed of gift, and he should make such a deed of conveyance of his property, having at the time such decided and rational desire to do so, and mind and reason to clearly understand that the nature of his act was to execute a deed to his property and that the consequences of his act was to divest him or deprive him of his title and convey it or invest it in another, he would be capable of making a deed of gift under the laws of this State though he might not have had greater mental capacity than that.<sup>73</sup>

Thus, if evidence indicates that the grantor made the gifts for a specific purpose — however peculiar or unnecessary — there would appear to be a sufficient rational basis for the gifts to withstand challenge.

## **Conclusion**

Challenging gifts because of undue influence poses a difficult endeavor. The law of undue influence appears in many ways to favor upholding gifts absent a showing that the grantor lacked all free agency in the transaction. As a matter of public policy, Georgia courts have attempted to regulate gifts made in confidential relations by establishing a presumption of undue influence in

certain classes of gifts. To receive the benefit of the presumption, a challenger must demonstrate a confidential relationship, the grantor's "weakened mentality," and a position of dominance abused by the beneficiary. Alternatively, if the challenger fails to establish the presumption, the burden remains on him or her to prove by a preponderance of the evidence that the beneficiary coerced the grantor into making the gift. In either situation, the burden of persuasion will remain on the plaintiff, suggesting that disputed facts will generally be resolved in favor of the beneficiary of the gift. ■



*Bertram L. Levy is a partner in the Atlanta firm of Arnall Golden & Gregory LLP where he heads the firm's private wealth group. He is an honors graduate of Vanderbilt University and The University of Michigan Law School. He*

*is a frequent author and lecturer on estate planning. Levy is a past chairman of the State Bar's Fiduciary Law Section, a fellow of the American College of Trusts and Estate Counsel and has been selected for inclusion in The Best Lawyers in America.*



*Robert P. Bartlett III was a 1999 summer associate in the Atlanta firm of Arnall Golden & Gregory. He is currently a third-year student at Harvard Law School, where he serves as a Note Editor on the*

*Harvard Law Review. Prior to law school, he earned his B.A. magna cum laude from Harvard in 1996 and was a member of Phi Beta Kappa.*

## Endnotes

1. Tidwell v. Critz, 248 Ga. 201, 206, 282 S.E.2d 104, 109 (1981) (quoting Burroughs v. Reed, 150 Ga. 724, 725, 105 S.E. 290 (1920)).
2. See generally 10 Ga. Jur. Decedents' Estates and Trusts §§ 1:50-1:55 (1999) (discussing Georgia law of undue influ-

ence in will).

3. O.C.G.A. § 53-4-12 (1999) governs an individual's testamentary capacity. It provides that "[a] will is not valid if anything destroys the testator's freedom of volition, such as . . . undue influence whereby the will of another is substituted for the wishes of the testator." *Id.* The statutory provisions governing undue influence in gift-making are discussed *infra* at page 15.
4. See Burroughs v. Reed, 150 Ga. 724, 725, 105 S.E. 290, 291 (1920).
5. See *id.*
6. See, e.g., Banks v. Todd, 184 Ga. App. 681, 682, 362 S.E.2d 410, 411 (1987).
7. See text accompanying notes 8-16.
8. See text accompanying notes 34-56.
9. See Trustees of Jesse Parker Williams Hosp. v. Nisbet, 191 Ga. 821, 844, 14 S.E.2d 64, 76 (1941); Wheelless v. Gelzer, 780 F. Supp. 1373, 1383 (N.D. Ga. 1991); Spikes v. Spikes, 89 Ga. App. 139, 147, 79 S.E.2d 21, 26 (1953); Myers v. Myers, 195 Ga. App. 529, 531, 394 S.E.2d 374, 377 (1990).
10. 191 Ga. at 844, 14 S.E.2d at 76 (hereinafter *Trustees II*).
11. See Trustees of Jesse Parker Williams Hospital v. Nisbet, 189 Ga. 807, 808, 7 S.E.2d 737, 739 (1940) (hereinafter *Trustees I*).
12. See *Trustees II*, 191 Ga. at 844, 14 S.E.2d at 78.
13. *Id.*
14. *Id.* at 841, 14 S.E.2d at 77. The presumption of fraud applied as follows: "upon proof of weak mind, and that the instrument was executed without consideration, or was improvident or profuse, fraud would be inferred, and to rebut it, proof must be made that it was the voluntary act of the party himself, unmoved by the words or conduct of the party taking the benefit under it." *Id.* at 843, 14 S.E.2d at 77 (quoting Causey v. Wiley Banks & Co., 27 Ga. 444 (1859)).
15. *Id.* at 842, 14 S.E.2d at 77 (quoting Causey, 27 Ga. 444).
16. *Id.* at 841, 14 S.E.2d at 76 (citing Eldridge v. May, 129 Me. 112, 150 A. 378 (1930)).
17. See *id.* at 844, 14 S.E.2d at 78.
18. *Id.* at 843, 14 S.E.2d at 77 (quoting Frizzell v. Reed, 77 Ga. 724, 729 (1886)).
19. 268 Ga. 158, 486 S.E.2d 356 (1997).
20. *Id.* at 161, 486 S.E.2d at 358.
21. *Id.* at 161, 486 S.E.2d at 358-59.
22. See, e.g., Daniel v. Etheredge, 198 Ga. 191, 200, 31 S.E.2d 181, 188 (1944) (refusing to apply the presumption absent a showing of a confidential relationship, superior mental capacity of the grantee, and great disparity of bounty); Wheelless v. Gelzer, 780 F. Supp. 1373, 1383 (N.D. Ga. 1991) (refusing to apply the presumption in a grant of stock from husband to wife despite evidence that the wife had the dominant mental position in the relationship).
23. See *Trustees II*, 191 Ga. at 841, 14 S.E.2d at 77 ("[W]henver a fiduciary or confidential relation exists between the parties to a deed, gift, contract or the like, the law implies a condition of superiority held by one of the parties over the other . . .") (citing Eldridge v. May, 129 Me. 112, 150 A. 378 (1930)).
24. See *id.* at 841, 14 S.E.2d at 77.
25. See, e.g., Glenn v. Mann, 234 Ga. 194, 203, 214 S.E.2d 911, 918 (1975).
26. See *Wheelless*, 780 F. Supp. at 1383 ("[S]imply because two individuals have a confidential relationship, the use of some influence by one to gain a benefit for himself is not prohibited as long as the influence is not undue.").
27. 206 Ga. 876, 59 S.E.2d 371 (1950).
28. *Id.* at 878, 59 S.E.2d at 373 (emphasis added).
29. See *Trustees II*, 191 Ga. at 840, 14 S.E.2d at 75.
30. See Boyce v. Murray, 195 Ga. App. 746, 747, 395 S.E.2d 255, 257 (1990) (directing verdict against grantee where the only evidence that grantor desired for the grantee to receive the gift consisted of the grantee's own testimony to that effect).
31. See *Wheelless*, 780 F. Supp. at 1384 (citing Miller v. Miller, 258 Ga. 168, 366 S.E.2d 682 (1988)).
32. See *id.* In *Wheelless*, the judge concluded in a bench trial that the parties challenging the grant of stock had failed to satisfy their burden of persuasion because the evidence regarding the grantor's mentality and the presence of undue influence was conflicting. See *id.* at 1387-88.
33. O.C.G.A. § 44-5-86 (1991).
34. 73 Ga. 275 (1884).
35. *Id.* at 281.
36. 129 U.S. 663, 9 S. Ct. 420 (1889).
37. *Id.* at 673, 9 S. Ct. at 424.
38. 87 Ga. 634, 13 S.E. 806 (1891).
39. *Id.* at 640, 13 S.E. at 807.
40. *Id.* at 641, 13 S.E. at 808.
41. Since *Hadden*, thirteen courts have subsequently addressed O.C.G.A. § 44-5-86 or its predecessor provisions. See Hill v. Fourth Nat'l Bank, 156 Ga. 704, 120 S.E. 1 (1923); Dollar v. Griffin, 170 Ga. 87, 152 S.E. 252 (1930); Ball v. Moore, 181 Ga. 146, 182 S.E. 28 (1935); Simmons Hardware Co. v. Timmons, 180 Ga. 531, 179 S.E. 726 (1935); Barron v. First Nat'l Bank & Trust Co., 182 Ga. 796, 186 S.E. 847 (1936); Davis v. Liberty Co., 183 Ga. 286, 188 S.E. 344 (1936); Armour v. Lunsford, 192 Ga. 598, 15 S.E.2d 886 (1941); Hadaway v. Hadaway, 192 Ga. 265, 14 S.E.2d 874 (1941); Jones v.



- Hogans, 197 Ga. 404, 29 S.E.2d 568 (1944); *Vinson v. Citizens & S. Nat'l Bank*, 208 Ga. 813, 69 S.E.2d 866 (1952); *Harrison v. Harrison*, 214 Ga. 393, 105 S.E.2d 214 (1958); *Johnson v. Hutchinson*, 217 Ga. 489, 123 S.E.2d 551 (1962); *Scoggins v. Strickland*, 265 Ga. 417, 456 S.E.2d 208 (1995). The vast majority of these decisions focused on determining whether the five year statute of limitations applied to a wife who sought to void a gift that she granted to her husband, who then used it as security for a loan.
42. It is somewhat peculiar that the plaintiff in *Trustees* did not raise § 44-5-86 in her complaint, as many of the challenged gifts fell within the five year statute of limitations. *See Trustees II*, 191 Ga. at 823, 14 S.E.2d at 70.
  43. 192 Ga. 598, 15 S.E.2d 886 (1941).
  44. *See id.* at 601, 15 S.E.2d at 889.
  45. The instruction stated, "if you should find there was great disparity between the ages of Mrs. L. M. Armour and Mrs. Estelle Armour; that the parties occupied a confidential relation to each other; that the deeds were without any consideration at all; or if there was a consideration and the consideration was grossly inadequate; then I charge you that only slight evidence would be necessary to set the deeds aside." *Id.* at 602-03, 15 S.E.2d at 888.
  46. The Court held that the instruction should not have mentioned consideration or adequacy of consideration. *See id.*
  47. *Id.* at 599, 15 S.E.2d at 889; *cf.* *Hadden v. Larned*, 87 Ga. 634, 641, 13 S.E. 806, 808 (1891) (holding that the statute "throws the eight of the legal presumption in favor of the gift and not against it").
  48. *See, e.g., Stinson v. State*, 215 Ga. App. 12, 13, 449 S.E.2d 544, 545 (1994) (noting that slight evidence will justify a jury charge even where the preponderance of the evidence tends to show the non-existence of a disputed fact); *see generally* *In re R.L.Y.*, 181 Ga. App. 14, 16 n.5, 351 S.E.2d 243, 246 n.5 (1986) (ranking "slight evidence" as the second lowest of ten evidentiary burdens in Georgia).
  49. *See supra* note 46.
  50. 198 Ga. 191, 31 S.E.2d 181 (1944).
  51. *See id.* at 195, 31 S.E.2d at 184.
  52. 197 Ga. 404, 29 S.E.2d 568 (1944).
  53. *Id.* at 405, 29 S.E.2d at 569.
  54. Though decided three years after *Trustees II*, the Court's opinion made no mention of whether the presumption should apply in the case.
  55. *Hogans*, 197 Ga. at 413-14, 29 S.E.2d at 574. *But see* *Scoggins v. Strickland*, 265 Ga. 417, 418, 456 S.E.2d 208, 209 (1995) (upholding directed verdict because the transcript reveals "not 'the slightest evidence of persuasion or influence'" (citing O.C.G.A. § 44-5-86)).
  56. O.C.G.A. § 23-2-58 (1982).
  57. *See, e.g., Thomas v. Garrett*, 265 Ga. 395, 397, 456 S.E.2d 573, 575 (1995) (finding that aunt and her nieces did not have a confidential relationship because the aunt "conducted all of her own busi-

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- ness affairs independently of, rather than through, [her nieces]"); *cf.* *Crumbley v. McCart*, 271 Ga. 274, 276, 517 S.E.2d 786, 787 (1999) ("The fact that Propounder and Testator were brothers does not demonstrate the existence of such a confidential relationship."). *But see* *Mathis v. Hammond*, 268 Ga. 158, 160, 486 S.E.2d 356, 358-59 (1997) (confidential relationship arose between mother and daughter); *Childs v. Shepard*, 213 Ga. 381, 382, 99 S.E.2d 129, 130 (1957) (confidential relationship arose where grantees were cousins of the grantor who was 95 years old).
58. *See, e.g., McGahee v. Walden*, 216 Ga. 352, 353, 116 S.E.2d 559, 560 (1960) (finding confidential relationship between grantor and beneficiary where the beneficiary cared for the grantor in her illness, took care of her personal business, hired nurses for her and changed her bank account into a joint one with the beneficiary); *Banks v. Todd*, 184 Ga. App. 681, 362 S.E.2d 410 (1987) (finding a confidential relationship between an "old friend" of grantor who moved to the grantor's city to assist her); *cf. Dean v. Morsman*, 254 Ga. 169, 327 S.E.2d 212 (1985) (find-
  - ing confidential relationship between testator and beneficiary of will who lived in the testator's home, kept house for him, paid his bills, and attended to his personal and business affairs).
  59. *See Hudson v. Abercrombie*, 255 Ga. 376, 338 S.E.2d 667 (1986) (finding evidence of a confidential relationship in testator's reliance upon the beneficiary to draft her will).
  60. *See Bryan v. Norton*, 245 Ga. 347, 348, 265 S.E.2d 282, 283 (1980) (finding pastor to be in a confidential relationship with testator where testator was a heavy drinker, advanced in age, and in ill health).
  61. *See supra* text accompanying note 17. *But see Lewis v. Foy*, 189 Ga. 596, 600, 6 S.E.2d 788, 791 (1940) ("[T]he protection of law in reposing this confidence . . . is applicable only to the parties while the relationship exists and with reference to the matter involved in that relationship.").
  62. *See, e.g., Scoggins v. Strickland*, 265 Ga. 417, 456 S.E.2d 208 (1995) (upholding the trial court's determination that there was no evidence that the beneficiary "had a hand in" the disputed inter vivos transfer); *cf. Crumbley*, 271 Ga. at 275, 517 S.E.2d at 787 ("[I]n the context of a will contest, evidence showing only that the deceased placed a general trust and confidence in the primary beneficiary is not sufficient to trigger the rebuttable presumption that undue influence was exercised.") (citing *King v. Young*, 222 Ga. 464, 150 S.E.2d 631 (1966)).
  63. *See Jones v. Hogans*, 197 Ga. 404, 411, 29 S.E.2d 568, 572 (1944).
  64. *Id.*
  65. *See, e.g., McGahee v. Walden*, 216 Ga. 352, 352-53, 116 S.E.2d 559, 560 (1960) (evidence showed grantor "was an infirm and aged woman, suffering from a brain tumor, whose mental and physical condition declined during the last years of her life, weakened by the damage to her brain by the illness from which she died"); *Johnson v. Hutchinson*, 217 Ga. 489, 489, 123 S.E.2d 551, 552 (1962) (evidence showed grantor to be "72 years of age, blind, suffering from
  - physical and mental conditions affecting her mental processes such as loss of memory, loss of concentration, and senile dementia . . ."); *Parker v. Spurlin*, 227 Ga. 183, 187, 179 S.E.2d 251, 254 (1971) (evidence showed that grantor was 80 years old, practically blind, feeble, suffered from heart trouble, high blood pressure and a lack of memory); *Bradshaw v. McNeill*, 228 Ga. App. 653, 655, 492 S.E.2d 568, 571 (1997) (evidence showed that grantor lived in a nursing home, suffered from general mental weakness and also "occasionally appeared confused, disoriented, and agitated").
  66. *See Coile v. Gamble*, 270 Ga. 521, 522, 510 S.E.2d 828, 829 (1999) (The jury instruction stated "'weakness of mind not amounting to imbecility is not sufficient mental incapacity to justify setting a deed aside.'"); *see also Wheelless v. Gelzer*, 780 F. Supp. 1373, 1377 (N.D. Ga. 1991) (rejecting claim of weakened mentality despite grantor's advanced age, increased alcohol consumption, failure to recognize neighbors and children, and inappropriate dress).
  67. *See Scurry v. Cook*, 206 Ga. 876, 879, 59 S.E.2d 371, 373 (1950) ("Nor can all influence be said to be undue, since a person is not prohibited from exercising proper influence to obtain a benefit to himself.").
  68. *See id.* (noting that influence must be "of that potency which substitutes somebody else's will power for that of the donor").
  69. *See, e.g., Bowman v. Bowman*, 205 Ga. 796, 797, 55 S.E.2d 298, 299 (1949).
  70. *See Scurry*, 206 Ga. at 876, 59 S.E.2d at 371; *cf. Bryan v. Norton*, 245 Ga. 347, 349-50, 265 S.E.2d 282, 284 (1980) (permitting caveator to introduce evidence as to bad character of the propounder of a will to prove undue influence).
  71. *Cf. Perkins v. Edwards*, 228 Ga. 470, 475, 186 S.E.2d 109, 113 (1971) ("[T]he mere opportunity to exert undue influence by the propounder was not sufficient to invalidate the will sought to be propounded.").
  72. 198 Ga. 191, 315 S.E.2d 181 (1944).
  73. *Id.* at 196, 315 S.E.2d at 186.

## Continued from Page 11

mary judgment to the defendant stating that the plaintiff need not show how long a substance had been on the floor unless the defendant had established that reasonable inspection procedures were in place and were followed at the time of the incident.<sup>30</sup> The court reasoned that the defendant had the evidence of inspection procedures in its power and the failure to produce such evidence created a negative presumption in favor of the plaintiff.<sup>31</sup>

Since *Straughter*, the court has held that reasonable inspection procedures can be established by a manager's affidavit testifying that the defendant had a policy of inspecting its store every thirty minutes and that the area was inspected thirty minutes prior to plaintiff's fall, and such evidence shifts the burden to the plaintiff to show that the substance was on the floor for a length of time sufficient for knowledge to be imputed to the defendant.<sup>32</sup> On the other hand, testimony that the floor is usually swept every hour is not sufficient to require the plaintiff to prove the amount of time the foreign substance had been present on the floor.<sup>33</sup>

## Conclusion

In *Robinson v. Kroger Co.*, the Supreme Court of Georgia picked up the slip and fall plaintiff, dusted him off, and elevated him to the same status as any other personal injury plaintiff. Slip and fall cases are no longer subject to summary adjudication on the issue of the plaintiff's exercise of ordinary care for his own safety. Furthermore, a claimant does not have to prove the amount of time the substance was on the floor unless the defendant business owner demonstrates that a reasonable inspection procedure was in place and followed on the day of the

accident. With greater access to a jury, the slip and fall plaintiff's best days are yet to come. ■

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## Endnotes

1. Queen v. Kroger Co., 191 Ga. App. 249, 381 S.E.2d 413 (1989).
2. Mazur v. Food Giant, Inc., 183 Ga. App. 453, 359 S.E.2d 178 (1987).
3. Kitchens v. Restaurant Management Servs., Inc., 192 Ga. App. 313, 385 S.E.2d 11 (1989).
4. Clemons v. Piggly Wiggly, Inc., 193 Ga. App. 309, 387 S.E.2d 600 (1989).
5. Robinson v. Kroger Co., 268 Ga. 735, 493 S.E.2d 403 (1997).
6. Alterman Foods, Inc. v. Ligon, 246 Ga. 620, 272 S.E.2d 327 (1980).
7. *Id.* at 623, 272 S.E.2d at 330.
8. *Robinson*, 268 Ga. at 743, 493 S.E.2d at 410.
9. Foodmax v. Terry, 210 Ga. App. 511, 436 S.E.2d 725 (1993); Bruno's, Inc. v. Pendley, 215 Ga. App. 108, 449 S.E.2d 637 (1994); Vermont Amer. Corp. v. Day, 217 Ga. App. 65, 436 S.E.2d 618 (1995).
10. *Alterman Foods*, 246 Ga. at 623, 272 S.E.2d at 330.
11. *Robinson*, 268 Ga. at 735, 493 S.E.2d at 405.
12. *Id.* at 743, 493 S.E.2d at 410.
13. *Id.* at 740, 493 S.E.2d at 408.
14. *Id.* at 740-41, 493 S.E.2d at 409.
15. *Id.* at 748, 493 S.E.2d at 414.
16. *Id.*
17. *Id.*
18. *Id.* at 748-49, 493 S.E.2d at 414.
19. *Id.* at 748, 493 S.E.2d at 414.
20. Kroger Co. v. Brooks, 231 Ga. App. 650, 500 S.E.2d 391 (1998); Watson v. Kroger Co., 231 Ga. App. 741, 500 S.E.2d 631 (1998); Smith v. Toys 'R' Us, Inc., 233 Ga. App. 188, 504 S.E.2d 31 (1998).
21. *Robinson*, 268 Ga. at 748-49, 493 S.E.2d at 414.
22. Newman v. Ruby Tuesday, Inc., 184 Ga. App. 827, 363 S.E.2d 26 (1987).
23. Hardee's Food Sys., Inc. v. Green, 232 Ga. App. 864, 502 S.E.2d 738 (1998).
24. "Constructive knowledge can only be inferred where there is evidence that an employee was in the immediate vicinity

of the dangerous condition and could have easily discovered and removed the hazard. The fact that Rodriguez admitted that the alleged dangerous substance was not visible precludes finding that the City's employee could have easily noticed and corrected it." *Id.* at 867, 502 S.E.2d at 741; see also Haskins v. Piggly Wiggly S., Inc., 230 Ga. App. 350, 496 S.E.2d 471 (1998).

25. Sharfuddin v. Drug Emporium, Inc., 230 Ga. App. 679, 498 S.E.2d 748 (1998).
26. "Although our Supreme Court in *Robinson v. Kroger Co.* modified the burden on the parties on the second prong of the elements of a foreign substance slip and fall case, the Supreme Court did not revise the contents of the first element nor modify the burden of proof on this element." *Id.* at 685, 498 S.E.2d at 753.
27. *Id.* at 684, 498 S.E.2d at 752.
28. *Id.*
29. *Straughter v. J. H. Harvey Co. Inc.*, 232 Ga. App. 29, 500 S.E.2d 353 (1998), cert. denied (Ga. Sept. 11, 1998).
30. *Id.* at 30, 500 S.E.2d at 355.
31. *Id.* at 31, 500 S.E.2d at 355.
32. Hopkins v. Kmart Corp., 232 Ga. App. 515, 502 S.E.2d 476 (1998).
33. Ingles Mkts., Inc. v. Martin, 236 Ga. App. 810, 513 S.E.2d 536 (1999).

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