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## GUARDIAN AND WARD

***Guardians of Minors: Provide Authority to Settle Claims of Minors; Provide Jurisdiction to Probate Court Judges in Appointing Guardians and Temporary Guardians; Change Requirements and Procedures Relating to Appointment of Temporary Guardians; Provide for Bonds of Guardians Appointed by Probate Court***

**CODE SECTIONS:** O.C.G.A. §§ 10-6-140 to -142 (new), 29-2-16, 29-4-2, -4, -4.1, -12, 29-5-1, -6 (amended)

**BILL NUMBER:** SB 105

**ACT NUMBER:** 483

**GEORGIA LAWS:** 1995 Ga. Laws 1171

**SUMMARY:** The Act creates the Georgia Statutory Form for Financial Power of Attorney, but provides that it shall not be the exclusive method for creating such an agency.<sup>1</sup> The Act also allows that, in settling the claims of minors that do not exceed \$10,000, a natural guardian need not apply to become the legally qualified guardian. The Act requires that the trial court judge approve the settlement, when appropriate. The Act creates a presence test in addition to the domiciliary test for probate court jurisdiction over minors without guardians. The Act changes the requirements and procedures relating to the appointment of temporary guardians. The Act allows a

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1. This *Peach Sheet*<sup>™</sup> addresses only O.C.G.A. §§ 29-2-16, 29-4-2, -4, 4.1, and -12 (amended), all relating to guardians of minors. The other Code sections in SB 105, which this article does not discuss, were added in committee and address the Georgia Statutory Form for Financial Power of Attorney, O.C.G.A. §§ 10-6-140 to -142 (new), and guardians of incapacitated adults, O.C.G.A. §§ 29-5-1 and -6 (amended). Telephone Interview with Sen. Clay Land, Senate District No. 16 (Apr. 10, 1995) [hereinafter Land Interview]. Sen. Land was the lead sponsor of SB 105. *Id.*; see Quintus W. Sibley, *General Assembly Approves Bar Legislation*, GA. ST. B. NEWS, May 1995, at 1, 19.

probate court judge to exercise discretion in requiring a bond when a guardian receives no cash funds. Finally, the Act eliminates advanced age as a criterion for the appointment of guardians for adults.

EFFECTIVE DATE: July 1, 1995

### *History*

SB 105 was introduced to streamline the judicial process and provide uniformity among Georgia's probate courts in settling the claims of minors.<sup>2</sup> Historically, minors' claims primarily included personal injury actions and were addressed in a Code section specifically dealing with "personal injury" claims.<sup>3</sup> However, the previous Code section was too narrow because minors' claims were not limited to personal injury actions.<sup>4</sup> Prior to the Act, a minor's natural guardian<sup>5</sup> was required to become the minor's legally qualified guardian<sup>6</sup> when the settlement amount exceeded \$10,000.<sup>7</sup> Furthermore, statutory law provided no definition of "settlement." Probate courts were left to resolve a number of issues, including whether to utilize a net or gross settlement figure and whether and how to compute attorneys' fees and costs.<sup>8</sup> The Probate Judges' Council of Georgia proposed the statutory guidelines adopted in SB 105,<sup>9</sup> which are

2. Land Interview, *supra* note 1; Telephone Interview with Judge Floyd Propst, Probate Court of Fulton County (Apr. 18, 1995) [hereinafter Propst Interview]. Judge Propst was the legislative chairperson for traditional probate matters for the Probate Judges' Council of Georgia. *Id.*

3. See 1989 Ga. Laws 1155 (formerly found at O.C.G.A. § 29-4-2(d) (1993)), *repealed by* 1995 Ga. Laws 1171.

4. Propst Interview, *supra* note 2.

5. If both of a minor child's parents are living, the natural guardian is either parent. O.C.G.A. § 29-4-2(a) (Supp. 1995). If one parent is deceased, or if the parents are divorced or legally separated, the natural guardian is the parent who has custody of the child. *Id.*

6. See *id.* § 29-4-2(b)-(c).

7. 1989 Ga. Laws 1155 (formerly found at O.C.G.A. § 29-4-2(d)(3) (1993)). "In cases in which the settlement exceeds \$10,000.00 . . . , the natural guardian shall apply to become the legally qualified guardian . . . ." *Id.*; Land Interview, *supra* note 1.

8. Propst Interview, *supra* note 2.

9. Propst Interview, *supra* note 2.

consistent with guidance previously provided to probate courts on these matters.<sup>10</sup>

### *SB 105*

#### *Settlement of Claims*

The Act's most significant change<sup>11</sup> is the new requirement that "net settlement" be used in determining whether a minor's guardian must become legally qualified.<sup>12</sup> The Act defines net settlement as "the gross settlement less attorneys' fees, expenses of litigation, and medical expenses for the ward which will be paid from the settlement proceeds."<sup>13</sup> When determining whether a settlement must be approved by the court, "gross settlement" is defined to include "the present value of amounts received after majority."<sup>14</sup> When determining whether a guardian of the property is needed,<sup>15</sup> gross settlement and net

10. See Memorandum I from Judge Floyd Propst (undated) (providing "a list of commonly occurring questions concerning O.C.G.A. § 29-4-2") (on file in Georgia State University College of Law Library); see also Memorandum II from Judge Floyd Propst (undated) (providing "further clarification" of "questions and answers concerning O.C.G.A. § 29-4-2") (on file in Georgia State University College of Law Library).

11. Land Interview, *supra* note 1.

12. See O.C.G.A. § 29-2-16(a)-(k) (Supp. 1995). The Act changes settlement to net settlement by adding subsections (c) to (k) to Code section 29-2-16 and by striking subsection (d) in its entirety from Code section 29-4-2. The new subsections are similar to the stricken subsection, but were moved from chapter 4 to chapter 2 of title 29 of the Code to recognize that not all claims will be for tortious actions. Propst Interview, *supra* note 2. For example, contract actions also are intended to be covered by the Act. Propst Interview, *supra* note 2.

13. O.C.G.A. § 29-2-16(k) (Supp. 1995).

14. *Id.* § 29-2-16(k). Regarding "present value," the Act provides:

[T]he present value of any payments to be received in the future by or on behalf of the minor shall be deemed to be the cost paid by or on behalf of the alleged tort-feasor to purchase any annuity or other financial arrangement; and if the alleged tort-feasor or his or her insurer undertakes to make such future payments without purchasing an annuity or other financial arrangement, the present value shall be deemed to be the value in current dollars as calculated in good faith by the alleged tort-feasor or his or her insurer.

*Id.* This definition of present value was reflected in *Coleman v. Hicks*, 433 S.E.2d 621 (Ga. Ct. App. 1993), which was considered by the Probate Judges' Council of Georgia. Propst Interview, *supra* note 2.

15. O.C.G.A. § 29-2-16(c)-(g) (Supp. 1995).

settlement “shall not include amounts to be received after majority.”<sup>16</sup> These definitions were intended to reflect most accurately the amount of the settlement that will benefit the minor’s estate.<sup>17</sup> By allowing the use of a net settlement figure, more claims will qualify for settlement without requiring a guardian to become the legally qualified guardian, thereby streamlining the process.<sup>18</sup>

Specifically, the Act provides:

(1) If the gross settlement for a child’s claim is \$5000 or less, the natural guardian may compromise the claim without becoming the legally qualified guardian of the property and without seeking court approval.<sup>19</sup>

(2) If the gross settlement is more than \$5000 but the net settlement is less than \$10,000, whether or not legal action has been initiated, the natural guardian may, at the probate court’s discretion, compromise the claim without becoming the legally qualified guardian, provided that the guardian “hold[s] and use[s] such money for the benefit of the child and shall be accountable for same.”<sup>20</sup>

(3) If the net settlement is more than \$10,000 and legal action *has not been initiated*, the natural guardian must become the legally qualified guardian before compromising the claim and the settlement must be approved by the probate court.<sup>21</sup>

(4) If the net settlement is more than \$10,000 and legal action *has been initiated*, the natural guardian must become the legally qualified guardian before compromising the claim and the guardian must file an initial bond with the probate court in an amount set by the trial judge.<sup>22</sup>

Additionally, a guardian who is not a natural guardian must obtain approval from the appropriate court before compromising a claim.<sup>23</sup> In either situation, the appropriate judge “may

16. *Id.* § 29-2-16(k).

17. Land Interview, *supra* note 1.

18. Land Interview, *supra* note 1.

19. O.C.G.A. § 29-2-16(c) (Supp. 1995).

20. *Id.* § 29-2-16(d), (f).

21. *Id.* § 29-2-16(e).

22. *Id.* § 29-2-16(g).

23. *Id.* § 29-2-16(h). The appropriate court is the probate court if no legal action has been initiated or the trial court if legal action has been initiated. *Id.* § 29-2-16(h)-(i).

appoint a guardian ad litem to look into the best interests of the minor before approving" the claim.<sup>24</sup>

The Act also provides that, when a guardian settles a claim for which legal action has been initiated, the settlement must be approved by the trial court judge before it may be presented by the guardian to a probate court judge for approval.<sup>25</sup> Prior to the Act, it was unclear whether the trial court judge was required to approve the settlement.<sup>26</sup> This language was added because trial judges typically are more familiar with the facts of the case and can best determine whether a settlement is fair.<sup>27</sup>

### *Jurisdiction*

The Act extends the jurisdiction of the probate court over minors who do not have guardians.<sup>28</sup> Prior to this change, only the probate court judge of the county in which the minor was domiciled had the power to appoint a guardian of either the person or property, or both, of the child.<sup>29</sup> In addition to jurisdiction based on the minor's domicile, the Act provides for concurrent jurisdiction "where the minor is found."<sup>30</sup> This additional jurisdiction provides for "the situation in which the minor's parents live in one county and the minor still lives with them, but the new guardian resides in a different county."<sup>31</sup>

### *Temporary Guardians*

The Act addresses the rights of and procedure for appointing a temporary guardian<sup>32</sup> for a minor.<sup>33</sup> The Act increases the circumstances under which a probate judge has the power to appoint a temporary guardian of the person or property, or both,

24. *Id.* § 29-2-16(h).

25. *Id.* § 29-2-16(i).

26. Land Interview, *supra* note 1.

27. Land Interview, *supra* note 1.

28. O.C.G.A. § 29-4-4(a) (Supp. 1995).

29. 1972 Ga. Laws 193 (formerly found at O.C.G.A. § 29-4-4(a) (1993)).

30. O.C.G.A. § 29-4-4(a) (Supp. 1995); see *Lawmakers '95* (GPTV broadcast, Feb. 17, 1995) (remarks by Sen. Clay Land) (videotape available in Georgia State University College of Law Library).

31. Summary of SB 105, Judge Floyd Propst (undated) [hereinafter Summary] (available in Georgia State University College of Law Library).

32. See O.C.G.A. § 29-4-4.1 (Supp. 1995).

33. *Id.*

of a minor, by allowing such an appointment when "each living natural guardian signs a notarized relinquishment of guardianship rights."<sup>34</sup> A temporary guardianship may not be created if either parent objects, and it is terminable upon either parent's request.<sup>35</sup>

The Act provides for consideration of preferences in appointing temporary guardians.<sup>36</sup> If a natural guardian's preference is stated in a notarized relinquishment of parental rights, the probate judge *must honor* the preference if a temporary guardian is appointed.<sup>37</sup> Otherwise, the probate judge *must consider* the preference and may appoint a temporary guardian not designated as the preference "for good cause shown in writing."<sup>38</sup>

The Act eases the requirements for notice by publication when a temporary guardianship is to be created absent a relinquishment and when notice by personal service and first-class mail is unavailable.<sup>39</sup> Previously, such notification was required to be published once a week for four weeks in a two-month period.<sup>40</sup> The Act requires notice by publication "once a week for two weeks in the official county legal organ" and allows appointment of the temporary guardian if a natural guardian does not object within ten days after first publication or within fourteen days after mailing, if appropriate.<sup>41</sup> The decreased period of notice by publication was adopted because the temporary guardianship is terminable if a parent requests or objects.<sup>42</sup>

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34. *Id.* § 29-4-4.1(a)(1). The Act retains the previous power to appoint a temporary guardian when "one or both of the natural guardians fail to sign . . . a relinquishment of guardianship rights." *Id.*

35. *See id.* § 29-4-4.1(c); Summary, *supra* note 31.

36. O.C.G.A. § 29-4-4.1(a)(3) (Supp. 1995).

37. *Id.* This requirement was created because "most relinquishments are conditional upon the appointment of the person selected by the relinquishing parent." Summary, *supra* note 31. However, the judge may choose not to create a temporary guardianship. *See* O.C.G.A. § 29-4-4.1(a)(3) (Supp. 1995); Summary, *supra* note 31.

38. O.C.G.A. § 29-4-4.1(a)(3) (Supp. 1995).

39. *Id.* § 29-4-4.1(b).

40. *Compare* 1983 Ga. Laws 692 (formerly found at O.C.G.A. § 29-4-4.1(b) (1993)) *with* O.C.G.A. § 29-4-4.1(b) (Supp. 1995).

41. O.C.G.A. § 29-4-4.1(b) (Supp. 1995).

42. *See id.* § 29-4-4.1(c); Summary, *supra* note 31.

*Bond Requirement*

The Act allows a probate judge to exercise discretion in deciding whether to require a bond from an appointed guardian “when no cash funds will be received by the guardian during the ward’s minority or where the only assets are real estate.”<sup>43</sup> Previously, the guardian was required to give bond unless the guardian was for the person only.<sup>44</sup> The Act retains this exception.<sup>45</sup>

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43. O.C.G.A. § 29-4-12(b) (Supp. 1995).

44. 1958 Ga. Laws 673 (formerly found at O.C.G.A. § 29-4-12(b) (Supp. 1994)).

45. O.C.G.A. § 29-4-12 (Supp. 1995).