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## WILLS, TRUSTS, AND ADMINISTRATION OF ESTATES

### *Year's Support: Change Determination of Year's Support*

CODE SECTIONS:	O.C.G.A. §§ 53-5-2, -4 (amended)
BILL NUMBER:	HB 540
ACT NUMBER:	399
SUMMARY:	The Act clarifies what sources of support the court may consider available to an applicant for year's support, as well as clarifying who has the burden of proof in showing the amount of support necessary. The Act also removes the former requirement that all debts of the estate be paid before an applicant can receive year's support for subsequent years.
EFFECTIVE DATE:	July 1, 1991

#### *History*

The law has long favored the policy of setting aside a portion of a decedent's estate to take care of a widowed spouse and minor children.<sup>1</sup> Although the monetary amount and duration of this support vary according to jurisdiction, the statutes of all fifty states provide for a family allowance of some kind.<sup>2</sup> The Uniform Probate Code also specifies the payment of a "reasonable allowance" to a surviving spouse and minor dependents while an estate is being administered.<sup>3</sup>

Georgia's statutory family provision takes the form of a year's support,<sup>4</sup> which is "an allowance out of the estate for the support and maintenance of the family of the decedent for a period of twelve months."<sup>5</sup> The

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1. See 3 DANIEL H. REDFEARN, *WILLS AND ADMINISTRATION IN GEORGIA* 1 (Sarajane Love ed., 5th ed. 1988). See also *Blassingame v. Rose*, 34 Ga. 418, 421 (1866) ("What is the object of the law setting apart a year's support for the widow and minor children of the deceased? The law explains itself. It is to prevent a family being turned away houseless—a widow and children—and cast upon the world in their forlorn condition.").

2. See JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 394 (3d ed. 1984).

3. UNIF. PROB. CODE § 2-403, 8 U.L.A. 98 (1983).

4. 1986 Ga. Laws 1272 (formerly found at O.C.G.A. § 53-5-2 (Supp. 1990)).

5. Verner F. Chaffin, *A Reappraisal of the Wealth Transmission Process: The Surviving Spouse, Year's Support and Intestate Succession*, 10 GA. L. REV. 447 (1976). The family can consist of "a spouse, or a spouse and minor child or children, or minor child or children only." 1986 Ga. Laws 1272 (formerly found at O.C.G.A. § 53-5-2 (Supp. 1990)). The surviving spouse may be either male or female; however, widowers were not considered for year's support prior to 1979. 1979 Ga. Laws 1325 (formerly found at O.C.G.A. § 53-5-1 (1982)).

amount reserved for the family should be "sufficient to maintain the standard of living that the surviving spouse and each minor child had prior to the death of the testator or intestate."<sup>6</sup> Before the extensive 1986 amendments to the Code provisions relating to year's support, the initial determination of this amount was made by five independent appraisers.<sup>7</sup> After these amendments, the Code specified that the spouse or guardian of a minor child makes an application that includes "[a] schedule of the property or a statement of the amount of money or both which the applicant proposes to have set aside as year's support."<sup>8</sup> In setting the amount of year's support, the probate court was to take into account other sources of support available to the applicant, "including but not limited to any separate estate and earning capacity of that person."<sup>9</sup>

### HB 540

In order to conform this statute with actual probate court procedures in determining year's support, the Act added two clarifications proposed by the probate judges to Code section 53-5-2.<sup>10</sup> The first added the principal of any separate estate and income to the "other sources of support available to the applicant."<sup>11</sup> The second stated that the burden of proof in probate court proceedings is on the applicant to show the amount required for year's support.<sup>12</sup> Neither of these additions changes current probate procedures; they simply clarify what is already being done.<sup>13</sup>

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6. 1986 Ga. Laws 1272 (formerly found at O.C.G.A. § 53-5-2 (Supp. 1990)). The statute also specifies that the amount set aside for the family should not be less than \$1600, unless the value of the estate is less than that amount. *Id.* If the estate is worth less than \$1600, then the entire estate is used for year's support. *Id.*

7. REDFEARN, *supra* note 1, at 3. This requirement often worked a financial hardship on the surviving family members. Interview with Rep. Jim Martin, House District No. 26, in Atlanta (Apr. 1, 1991) [hereinafter Martin Interview].

8. 1986 Ga. Laws 1272 (formerly found at O.C.G.A. §§ 53-5-2, -6 (Supp. 1990)).

9. 1986 Ga. Laws 1272 (formerly found at O.C.G.A. § 53-5-2(c) (Supp. 1990)).

10. O.C.G.A. § 53-5-2 (Supp. 1991). Interview with the Honorable Floyd E. Propst, Judge, Fulton County Probate Court, in Atlanta (Apr. 3, 1991) [hereinafter Propst Interview].

11. O.C.G.A. § 53-5-2 (Supp. 1991).

12. *Id.* "This is the procedure now being followed by probate courts since appraisers are no longer appointed." The Honorable Floyd E. Propst, Explanation of House Bill 540 Concerning Year's Support (unpublished memorandum, available in Georgia State University College of Law Library) [hereinafter Explanation].

13. O.C.G.A. § 53-5-2(c) (Supp. 1991). The new subsection (c) provides:

(c) The amount to be set apart under subsection (b) of this Code section shall be an amount sufficient to maintain the standard of living that the surviving spouse and each minor child had prior to the death of the testator or intestate, taking into consideration the following:

The Act also reflects the need expressed by the probate judges for another, more substantial, change to the Code provisions for year's support in subsequent years.<sup>14</sup> Code section 53-5-4 allowed for an additional year's support when an estate was to be kept open beyond the initial twelve-month period "as long as there [were] no debts to pay."<sup>15</sup> Courts construe "debts" to include such expenses as executor's fees,<sup>16</sup> attorney's fees,<sup>17</sup> estate taxes,<sup>18</sup> and ad valorem taxes.<sup>19</sup> Using this definition, there are "always debts to pay,"<sup>20</sup> and an applicant would be barred from obtaining a subsequent year's support even when the estate has "sufficient assets to pay the year's support award and all debts and claims against the estate."<sup>21</sup> This anomaly had been noted earlier by a commentator,<sup>22</sup> who suggested that the statute "be amended to permit an additional year's support for each year the estate is held together, if the probate judge finds that the estate is sufficient to provide ample protection to creditors."<sup>23</sup> The probate judges recommended this same change,<sup>24</sup> which the Act accomplishes by replacing Code section 53-5-4 with a new Code section removing the necessity that "there are no debts to pay" before a year's support may be granted for subsequent years.

As introduced, HB 540 removed the debt satisfaction requirement of Code section 53-5-4, and changed the threshold inquiry of whether an

(1) The support available to the person, for whom the property or money is to be set apart, from sources other than year's support, including, but not limited to *the principal of any separate estate and the income and earning capacity of that person*;

(2) Such other relevant criteria as the court deems equitable and proper. *The applicant for a year's support shall have the burden of proof in showing the amount necessary for a year's support.*

O.C.G.A. § 53-5-2 (Supp. 1991) (emphasis added to show new language). *See also* Explanation, *supra* note 12.

14. Martin Interview, *supra* note 7; Propst Interview, *supra* note 10. *See* 1865-66 Ga. Laws 31 (formerly found at O.C.G.A. § 53-5-4 (Supp. 1990)).

15. 1865-66 Ga. Laws 31 (formerly found at O.C.G.A. § 53-5-4 (Supp. 1990)).

16. *See* Wolters v. Kennedy, 355 S.E.2d 665 (Ga. Ct. App. 1987); Woodall v. First Nat'l Bank, 164 S.E.2d 361 (Ga. Ct. App. 1968).

17. *See* Wolters v. Kennedy, 355 S.E.2d at 665; Woodall v. First Nat'l Bank, 164 S.E.2d at 361.

18. *See* Woodall v. First Nat'l Bank, 164 S.E.2d at 361.

19. *Id.*

20. Explanation, *supra* note 12.

21. *Id.*

22. Martin Interview, *supra* note 7; Propst Interview, *supra* note 10. *See* Chaffin, *supra* note 5. Dr. Chaffin's criticism and suggestions for improving this Code provision can also be found in VERNER F. CHAFFIN, STUDIES IN THE GEORGIA LAW OF DECEDENTS' ESTATES AND FUTURE INTERESTS 76-77 (1978).

23. *Id.*

24. Martin Interview, *supra* note 7.

estate is to be kept open for more than twelve months to whether it is to be kept together for a second or third year.<sup>25</sup> However, the Senate passed the Special Judiciary Committee substitute, which deleted the "second or third year" language and reinstated the "more than twelve months" threshold.<sup>26</sup>

The Act will enable the surviving spouse and minor children to obtain an additional year's support for each year an estate is kept together.<sup>27</sup>

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25. HB 540, as introduced, 1991 Ga. Gen. Assem. The change reflected the stipulation contained in subsection (d) of O.C.G.A. § 53-5-2 that an application for year's support had to be filed "within three years from the date of death of the decedent." Martin Interview, *supra* note 7.

The original bill also appended a qualifying clause to the end of O.C.G.A. § 53-5-4: provided that more than three months have elapsed since the last insertion of the notice to creditors required by Code Section 53-7-92 and that there are sufficient assets in the estate to award such additional year's support and to pay all unpaid claims which have been made against the estate. HB 540, as introduced, 1991 Ga. Gen. Assem. The only change in this clause of the new Code section came through a House floor amendment introduced by the bill's sponsor, Rep. Jim Martin, House District No. 26, which altered slightly the wording of the last line of the bill to "known unpaid debts and claims against the estate." HB 540 (HFA), 1991 Ga. Gen. Assem.

26. HB 450 (HFASCS), 1991 Ga. Gen. Assem. This change was proposed by Sen. Arthur B. "Skin" Edge, IV, Senate District No. 28, Chairman, Senate Special Judiciary Committee, who did not want to limit subsequent year's support to three years in the event an applicant could be entitled to more than three. Martin Interview, *supra* note 7.

27. See O.C.G.A. § 53-5-4 (Supp. 1991).