Wills, Trusts, Guardianships, and Fiduciary Administration

by Mary F. Radford*

This Article describes selected cases and significant legislation from the period of June 1, 2017 through May 31, 2018, that pertain to Georgia fiduciary law and estate planning. As the most important developments in this time period revolved around the new Georgia legislation, this Article contains only a brief summary of the holdings of significant cases.[1]

I. GEORGIA CASES

A. No Contest Clauses

In *Duncan v. Rawls*,[2] the Georgia Court of Appeals was asked to recognize an exception to the enforcement of a no-contest (or *in terrorem*) clause[3] in a trust if the challenge was brought in good faith or with

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1. For an analysis of Wills and Trusts during the prior survey period, see Mary F. Radford, *Wills, Trusts, Guardianships, and Fiduciary Administration*, *Georgia Survey*, 69 MERCER L. REV. 341 (2017).

2. 345 Ga. App. 345, 812 S.E.2d 647 (2018).

3. "In order to guard a will or trust against attack, a testator or settlor may include a clause that provides that, in the event any beneficiary attacks the validity of the will or trust, that beneficiary's interest in the will or trust shall be void." MARY F. RADFORD, GEORGIA TRUSTS AND TRUSTEES § 2:1 (2017). These clauses are governed by O.C.G.A. §§ 53-4-68 (2018) (wills) and 53-12-22 (2018) (trusts).

probable cause.[4] Although other states have allowed such an exception by statutory amendment or case law, the Georgia statute does not include this exception, so the majority refused to engraft one.[5] The case, which was decided by the full bench of the court of appeals, contained extensive opinions, both concurring and dissenting, that explored the different theories about the functions and duties of a court when faced with a statute that is silent on such a matter.[6]

B. Punitive Damages in Guardianship Cases

In *In re Estate of Gladstone*,[7] the Georgia Supreme Court reversed a court of appeals ruling and stated that the surety of a guardian could not be charged with punitive damages because there was no statutory basis for the recovery of such an award against a surety.[8]

C. Lack of Testamentary Capacity

In *Meadows v. Beam*,[9] the supreme court held that there was not sufficient evidence to support a jury verdict that the testator lacked testamentary capacity.[10] The court stated that, although the testator may have suffered from delusions, some of those delusions had no effect on her will and the others were not "insane delusions" because they were merely mistaken conclusions on her part that her children were trying to steal from her.[11]

D. Undue Influence

In *Slosberg v. Giller*,[12] the Georgia Court of Appeals confirmed that evidence of undue influence need not relate only to the time that the document in question was signed, but could include evidence from the times leading up to and following the action.[13]

4. *Duncan*, 345 Ga. App. at 345, 812 S.E.2d at 648.
5. *Id.* at 348, 812 S.E.2d at 650.
6. *Id.* at 352, 812 S.E.2d at 653.
7. 303 Ga. 547, 814 S.E.2d 1 (2018).
8. *Id.* at 549, 814 S.E.2d at 3.
9. 302 Ga. 494, 807 S.E.2d 339 (2017).
10. *Id.* at 499, 807 S.E.2d at 343.
11. *Id.*
12. 341 Ga. App. 581, 801 S.E.2d 332 (2017).
13. *Id.* at 582, 801 S.E.2d at 334.

E. Will Construction

In *Piccione v. Arp*,[14] the supreme court determined that a testator's use of the term "per capita," when describing the division of her property to her children, meant that the testator intended that a child must survive her in order to take a share.[15] In other words, the children of a predeceased child were not entitled to take their parent's share in her place.[16]

II. GEORGIA LEGISLATION

A. Revisions to the Georgia Trust Code

The Georgia General Assembly adopted a revised version of the Georgia Trust Code in 2010.[17] In 2018, the General Assembly adopted additional amendments and modifications to the 2010 Georgia Trust Code.[18] The major 2018 amendments to the Trust Code are described in this section.

The 2018 revision to the Georgia Trust Code expanded the number of persons who may accept notice, give consent for, and bind another person in all matters relating to the trust (such as trust modification and termination, or the granting of powers to a trustee).[19] Before the revision, Official Code of Georgia Annotated (O.C.G.A.) section 53-12-8 allowed a parent to represent and bind the parent's minor child if no guardian or conservator had been appointed for the child and there was no conflict of interest between the parent and child.[20] O.C.G.A. § 53-12-8(f),[21] as amended, allows the following to represent another person: a conservator for that person's estate; a guardian for a ward if no conservator has been appointed; an agent for the principal if the power of attorney gives the agent authority with respect to the matter in question; a trustee for the beneficiaries of the trust; a personal representative for the persons interested in the estate; and an ancestor for a minor or unborn descendant of the ancestor if no conservator or guardian has been

14. 302 Ga. 270, 806 S.E.2d 589 (2017).

15. *Id.* at 276, 806 S.E.2d at 594.

16. *Id.*

17. For an extensive description of the 2010 Trust Code revision, see RADFORD, *supra* note 3, at § 1:4; *see also* O.C.G.A. § 53-12-1 (2018).

18. Ga. H.R. Bill 121, Reg. Sess., 2018 Ga. Laws 262 (codified as amended at O.C.G.A. § 53-12-8 (2018)). This bill also contained the amendment to the Statutory Rule Against Perpetuities that is discussed in Section II.C. of this Article.

19. RADFORD, *supra* note 3, at § 1:4.

20. O.C.G.A. § 53-12-8(f) (2011).

21. O.C.G.A. § 53-12-8(f) (2018).

appointed for that descendant.[22] Under revised O.C.G.A. § 53-12-8(e),[23] a holder of a power of appointment may represent permissible appointees, takers in default, or other persons who are subject to the power.[24] Under revised O.C.G.A. § 53-12-8(h),[25] a trust beneficiary who would be eligible to receive trust income or the principal upon the termination of the current income or principal beneficiary's interest may represent successive contingent remainder beneficiaries.[26] In all these situations, there must exist no conflict of interest relating to the matter in question between the representative and the person who is represented.[27]

Amended O.C.G.A. § 53-12-8(g)[28] codifies a concept known as "virtual representation."[29] Under this amended Code section, if a person who is a minor, incapacitated, or unborn, or who is unknown or cannot be easily identified or located is not otherwise represented, that person may be represented and bound by another person who has no conflict of interest and who has "a substantially identical interest" in the matter in dispute.[30] Finally, amended O.C.G.A. § 53-12-8(i)[31] authorizes the court to appoint a representative for one or more persons who are not represented.[32]

New O.C.G.A. § 53-12-9[33] allows interested persons involved in a trust dispute to enter into a "binding nonjudicial settlement agreement," provided that the agreement does not violate a material purpose of the trust and only includes terms that otherwise could be approved by a court.[34]

Amended O.C.G.A. § 53-12-61[35] expands the circumstances in which a settlor and the beneficiaries (or the beneficiaries alone) may modify, terminate, consolidate, or divide a noncharitable trust even though that

22. *Id.*

23. O.C.G.A. § 53-12-8(e) (2018).

24. *Id.*

25. O.C.G.A. § 53-12-8(h) (2018).

26. *Id.*

27. *Id.*

28. O.C.G.A. § 53-12-8(g) (2018).

29. The Georgia Court of Appeals implicitly recognized virtual representation (although not applied to the case at bar) in *Morrow v. Vineville United Methodist Church*, 227 Ga. App. 313, 489 S.E.2d 310 (1997).

30. O.C.G.A. § 53-12-8(g).

31. O.C.G.A. § 53-12-8(i) (2018).

32. *Id.*

33. O.C.G.A. § 53-12-9 (2018).

34. *Id.*

35. O.C.G.A. § 53-12-61 (2018).

trust is otherwise "irrevocable."[36] Under amended O.C.G.A. § 53-12-61(b),[37] a settlor may modify or terminate an irrevocable trust if all the beneficiaries consent and the trustee has received notice.[38] A court is required to approve the petition to modify or terminate the trust in these circumstances even if the proposed modification or termination affects a material purpose of the trust.[39] Under amended O.C.G.A. § 53-12-61(c),[40] following the settlor's death, the court "shall approve" a petition to modify or terminate a trust if all of the beneficiaries have given consent, the trustee has received notice, and the court concludes either that the proposed modification is not inconsistent with any material terms of the trust or that the continuance of the trust is not necessary to achieve any material purpose of such trust.[41] The remainder of O.C.G.A. § 53-12-61 retains the previous Code provisions that authorize, but do not require, the court to approve a modification, termination, consolidation, or division under certain circumstances, with the addition of a modification of the trust to achieve the settlor's tax objectives.[42]

Amended O.C.G.A. § 53-12-62[43] codifies the ability of a trustee who has discretion over the distribution of the principal of the trust to "decant" trust assets by distributing them to a new trust.[44]

Amended O.C.G.A. § 53-12-261[45] expands the powers of trustees beyond those powers that were already enumerated in this Code section.[46] The new O.C.G.A. § 53-12-261(a)[47] provides as follows:

36. *Id.* An "irrevocable trust" is one that cannot be modified or terminated, either because it is, by its terms, irrevocable, or because the settlor has not retained the power to revoke or modify it. *Irrevocable Trust*, BLACK'S LAW DICTIONARY (10th ed. 2014). O.C.G.A. § 53-12-40(a) (2018) provides that a settlor must expressly reserve this power.

37. O.C.G.A. § 53-12-61(b) (2018).

38. *Id.*

39. *Id.*

40. O.C.G.A. § 53-12-61(c) (2018).

41. *Id.*

42. O.C.G.A. § 53-12-61(d)(4) (2018).

43. O.C.G.A. § 53-12-62 (2018).

44. *Id.* For an in-depth discussion of trust decanting, see RADFORD, *supra* note 3, at § 15:9.

45. O.C.G.A. § 53-12-261 (2018).

46. *Id.*

47. O.C.G.A. § 53-12-261(a) (2018).

> (a) A trustee of an express trust, without court authorization, shall be authorized to exercise:
>
> (1) Powers conferred by the trust instrument; and
>
> (2) Except as limited by the trust instrument:
>
> (A) All powers over the trust property that an unmarried competent owner has over individually owned property;
>
> (B) Any other powers appropriate to achieve the proper investment, management, and distribution of the trust property; and
>
> (C) Any other powers conferred by this chapter.[48]

This revised Code section also adds to the enumerated powers of trustees the power for the trustee to allocate and apportion trust receipts and expenses between principal and income.[49]

The 2018 revision to the Georgia Trust Code added a new Article 18 to Chapter 12 of Title 53 of the Georgia Code,[50] which incorporates provisions from the Uniform Directed Trust Act.[51] This Chapter allows the settlor of a trust to "provide for the office and function of a trust director," even if the term "trust director" is not expressly used in the trust instrument.[52] In such a trust, the trustee (a "directed trustee") will act at the direction of the trust director on certain matters.[53] The settlor may give to the trust director "power of direction," which includes

> a power over the administration of the trust or the investment, management, or distribution of the trust property; a power to consent to a trustee's actions, whether through exercise of an affirmative power to consent or through nonexercise of a veto power over a trustee's actions, when a trustee may not act without such consent; a power to represent a beneficiary, other than a power under Code Section 53-12-8; and, except as otherwise provided in the trust instrument, any further powers appropriate to the exercise or nonexercise of such powers.[54]

48. *Id.*

49. O.C.G.A. § 53-12-261(b)(28) (2018).

50. O.C.G.A. §§ 53-12-500 to -506 (2018).

51. UNIF. DIRECTED TR. ACT (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2017).

52. O.C.G.A. § 53-12-501(a) (2018).

53. O.C.G.A. § 53-12-500(1) (2018).

54. O.C.G.A. § 53-12-500(3) (2018). O.C.G.A. § 53-12-502(b) (2018) lists certain powers that will not be deemed to be a "power of direction," including the power of a settlor to amend or revoke the trust or the power to appoint or remove a trustee or trust director.

When exercising powers of direction, a trust director has the same fiduciary duties and liabilities as a trustee who is acting "in a like position and under similar circumstances."[55] The remainder of the new Article 18 elaborates upon and clarifies the duties, obligations, and liabilities of the trust director and the directed trustee.[56]

The General Assembly enacted one other bill which would have revised the Georgia Trust Code in 2018 but Governor Nathan Deal subsequently vetoed the bill.[57] If enacted, House Bill 441[58] would have allowed settlors to transfer their own property into a trust and give that property the same "spendthrift" protection against creditors that is allowed for non-settlor beneficiaries.[59] In his veto statement, Governor Deal described these "self-settled asset protection trusts" as trusts that "would allow a person to create, or settle, a trust naming the settlor as a beneficiary, while shielding the trust assets from certain creditors."[60] The Governor recognized that, while some states have enacted similar legislation, "[s]uch trusts have been subject to controversy and scrutiny due to the potential opportunity to shirk creditors while preserving the assets of the trust for distribution to the settlor/beneficiary."[61] The Governor expressed concern over the "possible unintended consequences presented by a complex new estate planning tool"[62] and concluded as follows:

> Though I do not dismiss the potential merit of these proposed trust instruments in comprehensive estate planning, I have not yet been convinced of the need for such trusts in Georgia. As a state, we want to ensure that the creditor-debtor relationship is an equitable one that facilitates economic prosperity and mobility, and self-settled spendthrift trusts—without proper safeguards—have the potential to negatively impact this balance.[63]

55. O.C.G.A. § 53-12-503(a)(1) (2018).

56. *See* O.C.G.A. §§ 53-12-504 to -506 (2018).

57. 2017-2018 Reg. Sess., H.B. 441, GA GEN. ASSEMBLY, www.legis.ga.gov/Legislation /en-US/display/20172018/HB/441 (last visited Nov. 11, 2018).

58. Ga. H.R. Bill 441, Reg. Sess. (2018) (unenacted).

59. *Id*. Spendthrift trusts are discussed in detail in RADFORD, *supra* note 3, at § 4:1.

60. *Deal Issues 208 Veto Statements*, GOVERNOR NATHAN DEAL OFF. OF THE GOVERNOR, https://gov.georgia.gov/press-releases/2018-05-08/deal-issues-2018-veto-statements (last visited Sept. 13, 2018).

61. *Id.*

62. *Id.*

63. *Id.*

B. Adoption of the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA)

As technology becomes increasingly prevalent in everyday life, planning for digital assets[64] is becoming considerably more important.[65] Digital assets may include social media accounts; photographs; personal, business, and banking accounts; customer rewards programs; music; movies; and a wide variety of other digital downloads. Digital assets are typically password protected and governed by agreements with the service providers.[66] Thus, after the original owner, the "user,"[67] of digital assets dies or becomes unable to manage his or her property, that individual's fiduciaries (including personal representatives,[68] conservators,[69] trustees, and agents under powers of attorney) may have a difficult time accessing and managing these assets. In 2014, the Uniform Laws Commission promulgated the Uniform Fiduciary Access to Digital Assets Act (UFADAA).[70] In 2015, the Uniform Laws Commission revised the original Act and promulgated the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA).[71] The

64. The new Georgia statute defines a "digital asset" as "an electronic record in which an individual has a right or interest." O.C.G.A. § 53-13-2(9) (2018). The term "electronic" is defined as "relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities." O.C.G.A. § 53-13-2(10) (2018).

65. For an overview of the current state of digital asset planning, see Gerry W. Beyer, *Digital Assets: The Basics of Cyberspace Estate Planning*, 81 TEX. B.J. 342 (2018).

66. The new Georgia statute refers to the service provider as the "custodian," which is defined as "a person that engages in the transmission of, maintains, processes, receives, or stores a digital asset or electronic communication of another person." O.C.G.A. § 53-13-2(7) (2018).

67. The new Georgia statute uses the term "user," which is defined as "a person whose digital asset or electronic communication is carried, maintained, processed, received, or stored by a custodian or to which a custodian provides services." O.C.G.A. § 53-13-2(25) (2018).

68. A "personal representative" is defined as "an executor, administrator, county administrator, administrator with the will annexed, or special administrator." O.C.G.A. § 53-13-2(17) (2018).

69. The new Georgia statute contains a broad definition of the term "conservator" that includes a person who is appointed to manage the property, not only of a minor or an incapacitated individual (*see* Chapters 2 & 4, Title 29 of the Georgia Code), but also of an individual who is missing or believed to be dead (*see* Article 2, Chapter 9, Title 53 of the Georgia Code). O.C.G.A. § 53-13-2(4), (20) (2018).

70. UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2014). For a description of UFADAA, see Victoria Blachly, *Uniform Fiduciary Access to Digital Assets Act: What UFADAA Know,* 29 PROBATE & PROPERTY, July/Aug. 2015.

71. REVISED UNIF. FIDUCIARY ACCESS TO DIG. ASSETS ACT (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2015). For a detailed description of the developments that

Georgia General Assembly enacted RUFADAA during the 2018 legislative session.[72] The Bill added a new Chapter 13 to Title 53 of the Georgia Code.[73]

The Georgia RUFADAA covers all types of digital assets but deals particularly with "electronic communications."[74] The new statute distinguishes between a "catalogue of electronic communications" ("information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person")[75] and the "[c]ontent of an electronic communication," which

> means information concerning the substance or meaning of the communication which: (A) Has been sent or received by a user; (B) Is in electronic storage by a custodian providing an electronic communication service to the public or is carried or maintained by a custodian providing a remote computing service to the public; and (C) Is not readily accessible to the public.[76]

The user may grant or prohibit access to the catalog or the contents of electronic communications (1) to any designated recipient, through the use of an "online tool"[77] (which takes priority) or (2) to a fiduciary, through a will, trust, power of attorney, or other record.[78] Directions in

led to the promulgation of the revised act, see MARY F. RADFORD, REDFEARN: WILLS AND ADMINISTRATION IN GEORGIA § 2:14 (2018-19 ed.).

72. Ga. S. Bill 301, Reg. Sess., 2018 Ga. Laws 1089 (codified at O.C.G.A. § 53-13-2 (2018)).

73. *Id.*

74. O.C.G.A. § 53-13-2(11) (2018) defines "electronic communication" by a cross-reference to a federal statute, 18 U.S.C. § 2510(12) (2002). That statute defines an "electronic communication" as

> any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce, but does not include—(A) any wire or oral communication; (B) any communication made through a tone-only paging device; (C) any communication from a tracking device (as defined in section 3117 of [this title]); or (D) electronic funds transfer information stored by a financial institution in a communications system used for the electronic storage and transfer of funds.

18 U.S.C. § 2510(12).

75. O.C.G.A. § 53-13-2(3) (2018).

76. O.C.G.A. § 53-13-2(5) (2018).

77. O.C.G.A. § 53-13-2(15) (2018) (This Code section defines an "online tool" as "an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person.").

78. O.C.G.A. § 53-13-2(13) (2018).

either of these contexts override the directions in a "terms-of-service agreement."[79]

The Georgia RUFADDA addresses access to the digital assets of both a user who is deceased and a user who is still alive. For a "deceased user," if so requested by the user or ordered by a court,[80] the custodian must divulge the contents of electronic communications to the user's personal representative.[81] If the deceased user has not consented to the disclosure of the contents of the electronic communications of the user (and assuming the deceased user did not prohibit disclosure of the catalog), the custodian need only disclose the catalog of electronic communications to the personal representative.[82]

New O.C.G.A. § 53-13-2(20)[83] of the Georgia RUFADAA contains the rules applicable to the access by conservators to a living minor's or ward's digital assets.[84] Under this Code section, after a hearing, the probate court may grant the conservator access to the catalog of the individual's electronic communications and other digital assets in which the user has a right or interest.[85]

New O.C.G.A. §§ 53-13-15[86] and 53-13-16[87] deal with the access of an agent to the user's (principal's) digital assets.[88] If the power of attorney under which the agent has been appointed contains an express grant of access to the content of the principal's electronic communications and there is no court order to the contrary, the custodian must grant the

79. O.C.G.A. § 53-13-10 (2018); O.C.G.A. § 53-13-2(23) (2018) defines a "terms-of-service agreement" as "an agreement that controls the relationship between a user and a custodian."

80. O.C.G.A. § 53-13-2(6) (2018) (defining the term "court" to mean the "probate court").

81. O.C.G.A. § 53-13-13 (2018). This Code section lists certain items that the personal representative must provide to the custodian before disclosure.

82. O.C.G.A. § 53-13-14 (2018).

83. O.C.G.A. § 53-13-2(20) (2018).

84. *Id.* The new Georgia statute uses the term "protected person," which is defined as "an individual for whom a conservator has been appointed, including a minor, as defined in Code Section 29-1-1, and a ward, as defined in Code Section 29-1-1. *Id.; see* also O.C.G.A. § 29-1-1 (2018). Such term shall include an individual for whom a petition for the appointment of a conservator is pending, including both a proposed ward, as defined in Code Section 29-1-1, and a respondent, as defined in Code Section 29-11-2." O.C.G.A. § 53-13-2(20); *see also* O.C.G.A. § 29-11-2 (2018).

85. O.C.G.A. § 53-13-20(a) (2018).

86. O.C.G.A. § 53-13-15 (2018).

87. O.C.G.A. § 53-13-16 (2018).

88. The new Georgia statute does not apply to an agent under a health care power of attorney or to an agent whose authority is conditioned upon the occurrence of a specific event or contingency that has not yet taken place. O.C.G.A. § 53-13-2(2) (2018).

agent access to this content.[89] On the other hand, if the power of attorney only grants the agent authority over the principal's digital assets or general authority to act on the principal's behalf, the custodian need only disclose to the agent the catalog of electronic communications and access to digital assets other than the content of electronic communications.[90]

New O.C.G.A. §§ 53-13-17,[91] 53-13-18,[92] and 53-13-19[93] apply to access to any digital asset that is held in trust. If the trustee is the "original user" of the electronic communication or other digital asset, the custodian must disclose to the trustee any digital asset, including both the catalog and content of electronic communications.[94] If the trustee is not the original user, but the digital asset has been transferred by the original user into the trust, the custodian must disclose the content of electronic communications sent or received by the original user only if the trust instrument includes a consent to the disclosure of this content to the trustee.[95] If the trustee is not the original user and there is no consent to disclosure of the content of electronic communications, the custodian need only disclose to the trustee a catalog of the electronic communications sent or received by the original user.[96] Under O.C.G.A. § 53-13-30(g),[97] a fiduciary may request the custodian to terminate a user's account.[98]

C. Extension of Rule Against Perpetuities Period

The common-law rule against perpetuities provides that a contingent future estate, whether created as an executory devise or as a contingent remainder, must vest, if at all, during the period comprised within a life or lives in being, and twenty-one years, and the usual period of gestation

89. O.C.G.A. § 53-13-15.

90. O.C.G.A. § 53-13-16.

91. O.C.G.A. § 53-13-17 (2018).

92. O.C.G.A. § 53-13-18 (2018).

93. O. C.G.A. § 53-13-19 (2018).

94. O.C.G.A. § 53-13-17. This requirement may be modified by a court order or a provision in the trust instrument.

95. O.C.G.A. § 53-13-18. The trustee must provide the custodian with essentially the same information as is required of a personal representative, and also include a copy of the trust instrument or a certification of the trust as well as a certification that the trust exists and that the trustee is the currently acting trustee. *Id.*

96. O.C.G.A. § 53-13-19. The provisions of O.C.G.A. §§ 53-13-18 and 53-13-19 may be modified by court order, user direction, or a provision in the trust instrument.

97. O.C.G.A. § 53-13-30(g) (2018).

98. *Id.*

thereafter.[99] Professor John Chipman Gray's classic articulation of the rule is that no interest is good unless it must vest, if at all, not later than "twenty-one years after some life in being at the creation of the interest."[100] This statement of the common law rule was codified in the early Georgia Code at former Code sections 85-707 and 85-801.[101]

In 1990, Georgia adopted the Uniform Statutory Rule Against Perpetuities (USRAP).[102] USRAP's primary feature, which was relatively new to Georgia law, was the introduction of a so-called "wait and see" approach to perpetuities.[103] Under the common law, an interest was invalid if, at its creation, it was possible that it might vest too remotely; the fact that events that would have caused it to vest actually happened well within the common law period was ignored.[104] Under USRAP, actual events are not ignored. An interest which is not valid after applying the common law rule may nevertheless become valid if it either vests or terminates within a certain number of years after its creation.[105] Under USRAP, as originally enacted in Georgia in 1990, the "wait and see period" was ninety years.[106] In 2018, the period was extended to 360 years.[107] The extended period of years applies only to a non-vested property interest or power of appointment that is created on or after July 1, 2018.[108]

D. Revision of the Georgia Power of Attorney Act

Last year, in the *Mercer Law Review*, this Author described the new Georgia Power of Attorney Act (GPOAA).[109] In 2018, the Georgia General Assembly enacted a bill that modified and clarified some of the issues

99. Murphy v. Johnston, 190 Ga. 23, 26, 8 S.E.2d 23, 26 (1940); Perkins v. Citizens & S. Nat'l Bank, 190 Ga. 29, 36, 8 S.E.2d 28, 32 (1940).

100. JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 201 (4th ed. 1942).

101. *Murphy*, 190 Ga. at 26, 8 S.E.2d at 26.

102. Ga. H.R. Bill 1349, Reg. Sess., 1990 Ga. Laws 1837 (codified at O.C.G.A. §§ 44-6-200 to -206 (2018)).

103. *Id.*

104. *See* HELEN S. SHAPO, GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 214 (2018).

105. O.C.G.A. § 44-6-201(a)(2) (2018).

106. O.C.G.A. § 44-6-201(a)(2) (1990).

107. O.C.G.A. § 44-6-201(a)(2) (2018). This extension was enacted in conjunction with the major revision of the 2010 Georgia Trust Code that is described in this Article. In 2018, the 360-year period had already been adopted in Georgia's neighboring states of Florida (Fla. Stat. 689.225(f) (2000)) and Tennessee (T.C.A. § 66-1-202(f) (2007)).

108. O.C.G.A. § 44-6-205(a) (2018).

109. *See* Radford, *Wills, Trusts, Guardianships*, *supra* note 1, at 351–56*; see also* O.C.G.A. § 10-6B-5 (2017).

that arose when that new Act was put into practice.[110] As amended, O.C.G.A. § 10-6B-5 conforms the execution and attestation requirements for a power of attorney to those requirements that are set forth in O.C.G.A. § 53-4-20[111] in relation to the execution and attestation of a will.[112] The amended Code section requires the power of attorney to be attested to by one witness who is not the named agent and an officer, such as a notary public.[113] As with a will, these individuals are required to sign in the presence of the principal but not in the presence of each other.[114]

The GPOAA, as enacted in 2017, encouraged the use of the form that was set forth in O.C.G.A. § 10-6B-70[115] by basically requiring third parties to accept a power of attorney that "substantially reflects the language" set forth in that form.[116] This left open the question of exactly how closely a power of attorney needed to mirror the wording of the statutory form. As amended, O.C.G.A. § 10-6B-20[117] provides that a form "substantially reflects the language" of the statutory form if it grants or withholds, either expressly by reference or in descriptive form, powers set forth in O.C.G.A. §§ 10-6B-40[118] and 10-6B-43[119] through 10-6B-56[120] and contains a provision that is substantially similar to this language[121]: "Any person, including my agent, may rely upon the validity of this power of attorney or a copy of it unless that person has actual knowledge it has terminated or is invalid."[122]

As enacted in 2017, O.C.G.A. § 10-6B-16[123] allowed several "interested persons" to petition the court for a review of the agent's conduct or a

110. Ga. H.R. Bill 897, Reg. Sess., 2018 Ga. Laws 412 (codified as amended at O.G.G.A. § 10-6B-5 (2018)) (signed by the Governor on May 7, 2018).

111. O.C.G.A. § 53-4-20 (2018).

112. O.C.G.A. § 10-6B-5.

113. O.C.G.A. § 10-6B-5(a) (2018).

114. O.C.G.A. § 53-4-20(b) (2018) (only requires the witnesses to a will to sign in the testator's presence and not in the presence of each other).

115. O.C.G.A. § 10-6B-70 (2017).

116. *Id.*

117. O.C.G.A. § 10-6B-20 (2018).

118. O.C.G.A. § 10-6B-40 (2018).

119. O.C.G.A. § 10-6B-43 (2018).

120. O.C.G.A. § 10-6B-56 (2018).

121. The 2018 amendment also made numerous changes to the provisions of O.C.G.A. §§ 10-6B-40 and 10-6B-43 through 10-6B-56 to expand and clarify the extent of the powers that a principal may grant to an agent.

122. O.C.G.A. § 10-6B-20(b) (2018).

123. O.C.G.A. § 10-6B-16 (2017).

construction of a power of attorney, and grant appropriate relief.[124] The 2018 amendment added the personal representative of the principal's estate to the list of interested persons.[125] The amendment also added a new subsection (b) to O.C.G.A. § 10-6B-16, which allows the court to order the principal to reimburse the attorney's fees and expenses of litigation incurred by those interested persons who brought a petition under this Code section if it turns out that the petition was in the principal's best interest, and the agent admitted (or is found by the court) to have violated a provision of the GPOAA.[126]

The 2018 amendment repealed the requirement that appeared in O.C.G.A. § 10-6B-10(a)(3)[127] of the 2017 GPOAA, which required a principal who wanted to revoke a power of attorney to notify the agent by certified mail and to file the notice with the clerk of the superior court of the county in which the principal is domiciled.[128]

124. *Id.*
125. O.C.G.A. § 10-6B-16(a)(2) (2018).
126. O.C.G.A. § 10-6B-16(b) (2018).
127. O.C.G.A. § 10-6B-10(a)(3) (2017).
128. O.C.G.A. § 10-6B-10(a)(3) (2018).