Wills, Trusts, Guardianships, and Fiduciary Administration

by Mary F. Radford*

This Article describes selected cases and significant legislation from the period of June 1, 2008 through May 31, 2009, that pertain to Georgia fiduciary law and estate planning.[1]

I. GEORGIA CASES

A. *Attestation of Will by Witnesses*

Georgia law requires that a will be attested and subscribed by at least two competent witnesses in the presence of the testator.[2] In 2006 the Georgia Supreme Court confirmed that the question of whether a witness is in the testator's presence is determined by applying the "line-of-vision" test.[3] Under the line-of-vision test, the testator must be able to see the witness from her location, should he or she so desire, without

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* Catherine C. Henson Professor of Law, Georgia State University College of Law. Newcomb College of Tulane University (B.A., 1974); Emory University School of Law (J.D., 1981). Former Visiting Professor of Law, Phoenix School of Law, University of Georgia Law School, University of Tennessee School of Law, and Emory University School of Law. Reporter, Probate Code Revision Committee, Guardianship Code Revision Committee, Trust Code Revision Committee of the Fiduciary Section of the State Bar of Georgia. Vice President, American College of Trust and Estate Counsel. Author, GUARDIANSHIPS AND CONSERVATORSHIPS IN GEORGIA (2005); REDFEARN: WILLS AND ADMINISTRATION IN GEORGIA (7th ed. 2008). The Author wishes to thank Lisamarie Bristol for her research assistance.

1. For analysis of Georgia fiduciary law and estate planning during the prior survey period, see Mary F. Radford, *Wills, Trusts, Guardianships, and Fiduciary Administration, Annual Survey of Georgia Law*, 60 MERCER L. REV. 417 (2008).

2. O.C.G.A. § 53-4-20(b) (1997). The rules for the execution and attestation of wills are discussed in MARY F. RADFORD, REDFEARN: WILLS & ADMINISTRATION IN GEORGIA §§ 5:2 to 5:4 (7th ed. 2008).

3. McCormick v. Jeffers, 281 Ga. 264, 266, 637 S.E.2d 666, 669 (2006). This case is discussed in Mary F. Radford, *Wills, Trusts, Guardianships and Fiduciary Administration, Annual Survey of Georgia Law*, 59 MERCER L. REV. 447, 450 (2007).

having to change his or her place.[4] In 2009 in *Chester v. Smith*,[5] the supreme court applied this test and decided that the will in question had not been validly attested.[6] The testator in this case was driven to her bank by a driver. When the driver of the car parked in the bank parking lot, the testator called a bank employee who then came out to the car. The employee read the will to the testator and watched her sign it. The employee then took the will into the bank, and two tellers signed as witnesses. The employee and the two tellers all testified at trial that the testator, who stayed seated in the car, would not have been able to see the tellers sign due to her place in the car and the structure of the bank.[7] The supreme court affirmed summary judgment against the propounders of the will on the ground that the witnesses had not signed the will in the testator's presence.[8]

B. Construction of Language Commonly Used in Wills and Trusts

Three cases decided during the survey period examined the meaning of clauses commonly used by lawyers in both wills and trusts. The first case involves the testator's tangible personal property and a clause that contains precatory language related to the distribution of this property.[9] The second case deals with a clause directing the payment of the testator's debts.[10] The third case addresses a clause that directs a testamentary trust distribution to the "children" of the testator's son.[11]

1. Distribution of Tangible Personal Property. Many testators own significant amounts of tangible personal property and are constantly acquiring more. They have specific recipients of some of these items of property in mind at the time they write their wills; however, they have not made up their minds about other items and, obviously, have no way of predicting what items they actually will own at death. One alternative for these testators is to list as many items as possible in the will, along with the intended recipients of these items, and then formally

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4. *McCormick*, 281 Ga. at 266, 637 S.E.2d at 669. Some jurisdictions use the "conscious presence" test, which requires only that the testator be conscious of the witness through any means; for example, if the testator and witness are within hearing distance of each other. *Id.* In *McCormick* the court expressly rejected this test. *Id.*

5. 285 Ga. 401, 677 S.E.2d 128 (2009).

6. *Id.* at 402, 677 S.E.2d at 130.

7. *Id.*, 677 S.E.2d at 129–30.

8. *Id.* at 402–03, 677 S.E.2d at 130.

9. *See* Kale v. Wilson, 284 Ga. 536, 668 S.E.2d 729 (2008).

10. *See* Manders v. King, 284 Ga. 338, 667 S.E.2d 59 (2008).

11. *See* Elrod v. Cowart, 284 Ga. 869, 672 S.E.2d 616 (2009).

amend the will every year or so to cover newly acquired items.[12] This alternative, however, is both inefficient and expensive. To deal with this issue, Georgia lawyers often insert a clause into wills that refers to a separate list the testator will make and update to state which items should go to whom.[13] This list is not a part of the will and thus is not legally binding,[14] but many testators are satisfied that their family members and executor will abide by their wishes as set out in the list.

The testator of the will at issue in *Kale v. Wilson*[15] devised all of her personal property to her niece but added that the niece was "honor bound to distribute items I have designated to my loved ones. It is my intention that she will be given a list before I die and I know I can trust her to carry out my wishes."[16] The individual who contested the will alleged, among other things, that the quoted language created a condition precedent to the vesting of the niece's interest in the estate and that this condition had not been fulfilled.[17] The supreme court determined that the testator's will did not contain any express intention to impose a condition precedent on the niece and thus would not construe those words as creating one.[18] The court noted that the law does not favor conditions precedent that result in forfeiture.[19]

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12. *See generally* RADFORD, *supra* note 2, § 5:10 (discussing codicils).

13. *Id.* § 5:11. For example, a will may include the following language:

> I may leave with my Will or among my personal papers at the time of my death a written memorandum setting forth certain items of tangible personal property which I wish to devise to certain persons. Although I realize that this list is not legally binding, I request my spouse or my descendants to respect my wishes as spelled out in this list and I direct my Executor to deliver the property on this listed to the designated individuals if my spouse or descendants should so consent.

Id. § 17:40(h).

14. The Uniform Probate Code contains a provision that codifies the concept of a separate memorandum or list and allows it to be admitted "as evidence of the intended disposition." UNIF. PROBATE CODE § 2-513 (1993). The Georgia probate code does not contain a similar statutory provision. *See* O.C.G.A. tit. 53 (1997 & Supp. 2009).

15. 284 Ga. 536, 668 S.E.2d 729 (2008).

16. *Id.* at 537, 668 S.E.2d at 730.

17. *Id.* at 536, 668 S.E.2d at 730. The original contest to the will stated that the testator lacked testamentary capacity and that the niece had subjected the testator to undue influence and fraud. *Id.* The contestant later orally moved to amend his petition to add the objection relating to the so-called condition precedent. *Id.* The supreme court agreed that the probate court should have denied the motion because it was not in writing; however, the supreme court then went on to address the merits of the motion. *Id.* at 536–37, 668 S.E.2d at 730.

18. *Id.* at 537, 668 S.E.2d at 730.

19. *Id.* The court cited O.C.G.A. § 44-6-41 (1991), which provides in part as follows: "The law favors conditions to be subsequent rather than precedent and to be remediable by damages rather than by forfeiture." *Id.*; *see Kale*, 284 Ga. at 537, 668 S.E.2d at 730.

2. Payment of Debts. Testators often include directions in their wills for the executor to pay all the testator's debts.[20] This clause is unnecessary because the law requires the executor to pay any debts owed by the testator before distributing property to the beneficiaries;[21] nevertheless, it is commonly used. If a beneficiary under a will is specifically devised property (usually real property) that is encumbered by a debt, such as a lien or mortgage, the question arises as to whether the beneficiary is entitled to receive the property free and clear (with the executor paying the encumbrance as a debt of the estate) or to receive the property subject to the encumbrance.[22] If a will is silent on this point, the common law doctrine of exoneration indicates that the debt is to be paid from the testator's estate and that the beneficiary is to receive the property without the encumbrance.[23] Many states have reversed this doctrine by adopting section 2-607 of the Uniform Probate Code,[24] which provides that "[a] specific devise passes subject to any mortgage interest existing at the date of death, without right of exoneration, regardless of a general directive in the will to pay debts."[25] Georgia has not enacted such a statutory provision, and little case law in this state has dealt with exoneration.[26]

In 2008 in *Manders v. King*,[27] the supreme court explained that Georgia still adheres to the common law doctrine; however, the court went on to hold that the doctrine of exoneration did not apply to the

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20. *See generally* RADFORD, *supra* note 2, § 3:4. For example, the will may contain the following clause:

> I direct my Executor, as soon as feasible, to pay out of the residue of my estate all of my debts, including any charitable pledges, whether or not enforceable; the expenses of my last illness, funeral and burial; any debts and claims duly allowed against my estate; the expenses of administration of my estate; and any taxes assessed or imposed with respect to my estate or any part thereof, whether or not passing under this will.

Id. § 17:30, Item I.

21. *See* O.C.G.A. § 53-7-40 (1997).

22. *See* RADFORD, *supra* note 2, § 12:6 (discussing payment of debts and claims).

23. *Id.*; *see also* J. Kraut, Annotation, *Right of Heir or Devisee to Have Realty Exonerated from Lien Thereon at Expense of Personal Estate*, 4 A.L.R.3d 1023 (1965 & Supp. 2009), *cited in* Manders v. King, 284 Ga. 338, 339, 667 S.E.2d 59, 60 (2008). The doctrine of exoneration takes various forms but generally applies to the payment of encumbrances on real property by the personal property of the decedent. *See* Kraut, *supra*.

24. UNIF. PROBATE CODE § 2-607 (1993).

25. *Id.*

26. *See Manders*, 284 Ga. at 339 & n.1, 667 S.E.2d at 60 & n.1 (citing Killingsworth v. First Nat'l Bank of Columbus, 237 Ga. 544, 228 S.E.2d 901 (1976); Raines v. Shipley, 197 Ga. 448, 29 S.E.2d 588 (1944)).

27. 284 Ga. 338, 667 S.E.2d 59 (2008).

particular facts of the case.[28] The testator's will directed that the executor should pay "all [her] just debts . . . without unnecessary delay."[29] One of the testator's sons owned a condominium with the testator as joint tenants with right of survivorship.[30] The testator executed a promissory note when she purchased the condominium and secured the loan with the real property. The son became the owner of the condominium upon his mother's death, but he insisted that the note was a debt of the estate that must be paid from the estate pursuant to the directive in his mother's will.[31] The supreme court disagreed.[32]

The court examined cases from other states and concluded that the common law doctrine of exoneration does not apply to property that passes outside probate,[33] and the directive in the will to pay the testator's debts did not evidence a clear intent on her part that her estate should be liable for the payment of the note.[34] The court also noted that the son would not be compelled to pay the outstanding indebtedness on the condominium, but he would have to do so if he wanted to retain title to the property.[35] Alternatively, he could sell the property, pay off the note, and redeem any remaining equity.[36]

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28. *Id.* at 339–40, 667 S.E.2d at 60.

29. *Id.* at 340, 667 S.E.2d at 60 (alteration in original) (internal quotation marks omitted).

30. *Id.* at 339, 667 S.E.2d at 60. See RADFORD, *supra* note 2, § 2:3, for a discussion of joint ownership of real property.

31. *Manders*, 284 Ga. at 339, 667 S.E.2d at 59–60.

32. *Id.* at 340, 667 S.E.2d at 60.

33. *Id.* "Non-probate assets" are assets whose transfer is governed by contract or statute and not by the terms of the testator's will or the laws of intestate succession. *See* RADFORD, *supra* note 2, §§ 2:3, 2:4 (discussing non-probate assets). The Georgia Supreme Court explained its rationale specifically as it pertained to property held in joint tenancy with right of survivorship as follows:

> A rationale for the exclusion from the doctrine of exoneration of property that is the subject of a joint tenancy with right of survivorship is that title to said property vests in the survivor immediately at the moment of the death of the joint tenant and is never a part of the estate. As a result, the decedent's personal representative never has title (compare [O.C.G.A.] § 53-8-15 with regard to property in the decedent's estate) and cannot use the property to discharge the debts of the decedent. Compare [O.C.G.A.] § 53-4-63, which authorizes the decedent's personal representative to sell both personalty and real property contained in an estate in order to pay the debts of the decedent.

Manders, 284 Ga. at 340 n.2, 667 S.E.2d at 60 n.2.

34. *Manders*, 284 Ga. at 340, 667 S.E.2d at 61.

35. *Id.* at 341, 667 S.E.2d at 61.

36. *Id.*

3. Construction of the Term *Children*. It is quite common for the settlor[37] of an inter vivos trust[38] or the testator, in the case of a testamentary trust,[39] to direct distribution of the trust property to a class of persons who are generically described, such as the class of "children" or "descendants."[40] Questions have arisen in many cases over whether these classes are intended to include children or descendants who were adopted[41] or born out of wedlock.[42]

In *Elrod v. Cowart*,[43] the testator's will created a trust that left property to, among others, the testator's son for life with the remainder to "any child or children" of that son.[44] The testator died in 1970.[45] The son, who had no biological children of his own, adopted Steven Cowart in 2004 and then died in 2005. Cowart was age thirty-two at the time of the adoption.[46] The other remainder beneficiaries objected to Cowart taking a portion of the trust property.[47]

The supreme court examined in depth the development of the Georgia adoption and inheritance laws and concluded that Cowart could take

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37. The person who creates a trust is a "settlor," "grantor," or "trustor." O.C.G.A. § 53-12-2(7) (1997).

38. An inter vivos (or "living") trust is one that is created by deed during the lifetime of the settlor. *See* RADFORD, *supra* note 2, § 14:4.

39. A testamentary trust is one that is created in a testator's will and thus becomes effective when the will becomes effective. *See id.*

40. *See* RADFORD, *supra* note 2, § 9:4. For example, a trust may include the following clause:

> Upon the grantor's death, the trustee shall divide the remainder of the trust estate into as many equal shares as the grantor has children then living and deceased children with descendants then living. The trustee shall distribute one such share to each child then living and one share, per stirpes, to the then living descendants of any deceased child.

Id. § 17:43, Item 4(b).

41. See RADFORD, *supra* note 2, §§ 7:7, 9:3, and 9:4 for a discussion of these cases.

42. *See, e.g.*, Sardy v. Hodge, 264 Ga. 548, 448 S.E.2d 355 (1994); RADFORD, *supra* note 2, § 9:5.

43. 284 Ga. 869, 672 S.E.2d 616 (2009).

44. *Id.* at 869–70, 672 S.E.2d at 617.

45. *Id.* at 869, 672 S.E.2d at 617.

46. *Id.* at 870, 672 S.E.2d at 617. The decree of adoption expressly stated that Cowart was to be the "adopted child" of the son "capable of inheriting his estate according to law." *Id.* Other than this statement, the case does not describe what relationship existed between Cowart and the son. *See id.* Gay and lesbian couples have been known to use adoption as a means of bringing their partners into the class of people who may inherit or take under the terms of a trust. *See* Deborah L. Jacobs, *Adult Adoption a High-Stakes Means to an Inheritance*, N.Y. TIMES, May 20, 2009, *available at* http://www.nytimes.com/2009/05/21/your-money/estate-planning/21ADOPT.html.

47. *Elrod*, 284 Ga. at 870, 672 S.E.2d at 617.

under the terms of the trust because the testator did not express intent that adult adoptees be excluded from the class of the son's "children."[48] The court applied Georgia law as it existed at the time of the testator's death.[49] The court noted that the adoption law of the state was amended in 1967 to provide that an adopted adult could inherit from and through the adopted parent in the same manner as someone who was adopted prior to reaching adulthood.[50] A later amendment of the law in 1975[51] (after the date of the testator's death) was viewed by the court merely as a clarification of the law already in existence.[52] This later amendment provided that an adopted individual "may also take as a 'child' of the adopting parent under a class gift made by the will of a third person."[53] The court stated that this law's effect is that extrinsic evidence cannot be considered; rather, only the four corners of the will can be considered in determining whether adopted individuals are expressly excluded from taking as beneficiaries of the testamentary trust.[54]

C. *Attorney Fees and the Slayer Statute*

Georgia law prohibits an individual who feloniously and intentionally kills another individual from benefiting from the slain individual's estate or serving as the personal representative of that individual's estate.[55] For the killing to be felonious and intentional, it must be shown that the killing would constitute murder, felony murder, or voluntary manslaughter under Georgia law.[56] A conviction or a guilty plea for one of these

48. *Id.* at 870–72, 672 S.E.2d at 618–19.

49. *Id.* at 870, 672 S.E.2d at 618. The court cited its holding in *Warner v. First National Bank of Atlanta*, 242 Ga. 661, 251 S.E.2d 511 (1978), to the effect that absent any contrary intent expressed in a will, a will is to be construed in accordance with the law in effect at the testator's death. *Elrod*, 284 Ga. at 870, 672 S.E.2d at 618 (citing *Warner*, 242 Ga. at 664, 251 S.E.2d at 513).

50. *Elrod*, 284 Ga. at 870–71, 672 S.E.2d at 618 (citing 1967 Ga. Laws 803, 804–05).

51. 1975 Ga. Laws 797, 797–99.

52. *Elrod*, 284 Ga. at 871–72, 672 S.E.2d at 618.

53. 1975 Ga. Laws at 799 (codified as amended at O.C.G.A. § 19-8-19(a)(2) (2004)).

54. *Elrod*, 284 Ga. at 872, 672 S.E.2d at 618–19.

55. O.C.G.A. § 53-1-5(a) (1997) (referring to probate passing by will or intestacy); *see* O.C.G.A. § 33-25-13 (2005) (referring to life insurance proceeds). These statutes are discussed in detail in RADFORD, *supra* note 2, § 2:10.

56. O.C.G.A. § 53-1-5(a); *see* O.C.G.A. § 33-25-13. These crimes are defined in O.C.G.A. § 16-5-1 (2007 & Supp. 2009) and O.C.G.A. § 16-5-2 (2007).

crimes is conclusive evidence that the killing was felonious and intentional.[57]

In *Levenson v. Word*,[58] the testator was murdered in October. In January of the following year, his wife qualified to serve as executor under his will. In September a grand jury indicted her for her husband's murder. The wife quickly retained a law firm to defend her. When she discovered that the state would seek the death penalty, she retained an additional firm to help with her defense. The wife agreed to pay a nonrefundable retainer that would be split between the firms. At that point, she had transferred to the first firm the life insurance proceeds and interest in real property. The first firm wrote the second firm a check for $125,000. After months of claiming her innocence, the wife finally pleaded guilty to murdering her husband.[59] Louis Levenson, who was appointed administrator of the estate, sought to recover the funds paid to the lawyers under the theory that the wife had forfeited these funds when she murdered her husband.[60]

The court of appeals affirmed a grant of summary judgment against Levenson.[61] First, the court pointed out that Levenson had not proved that the funds used to pay the attorneys' retainers had come from property the wife inherited from her husband.[62] Second, the court of appeals held that even if the funds were inherited from the husband, the wife had title to them at the time she paid the retainer to the attorneys.[63] The court noted that at the time the wife paid the fee, it had not yet been proved that she feloniously and intentionally killed her husband.[64] The forfeiture, according to the court, did not occur until the date she entered her guilty plea.[65] Certiorari has been granted in this case, and it is now pending before the supreme court.[66]

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57. O.C.G.A. § 53-1-5(d); *see* O.C.G.A. § 33-25-13.

58. 294 Ga. App. 104, 668 S.E.2d 763 (2008), *cert. granted.*

59. *Id.* at 105–06, 668 S.E.2d at 765. She entered her guilty plea approximately one year after the indictment. *See id.* at 106, 668 S.E.2d at 765.

60. *Id.* at 104, 668 S.E.2d at 764. Levenson brought his claim against the lawyers for conversion on the theory that they knew or should have known that the wife did not have title to the money when she paid the retainer to them. *Id.* at 106, 668 S.E.2d at 765.

61. *Id.* at 108, 668 S.E.2d at 766.

62. *Id.* at 106–07, 668 S.E.2d at 766.

63. *Id.* at 107, 668 S.E.2d at 766.

64. *Id.*

65. *Id.*

66. Supreme Court of Georgia, 2009 Granted Certioraris, http://www.ga.supreme.us/granted_apps/granted_certs/gc_09.php#S09G0336 (last visited Oct. 22, 2009). Levenson petitioned the supreme court for a writ of certiorari and that petition was initially denied; however, on a motion for reconsideration, certiorari was granted. *Id.*

D. Charitable Bequests and the Role of the Attorney General

Under Georgia law, the attorney general has the power and standing to enforce provisions in a trust created for a charitable purpose.[67] In *Cronic v. Baker*,[68] the supreme court clarified that the attorney general's authority applies only to property that is or should be held in trust and not to outright gifts made for charitable purposes.[69] In *Cronic* the testator's will directed that a trust fund be established for specified educational purposes and also devised certain sums of money to three private cemeteries.[70] The executor did not establish the educational trust but rather distributed the trust funds directly to the residuary beneficiaries under the will. After searching for representatives of the three cemeteries and finding only one, the executor also distributed the amounts designated for the other two cemeteries to the residuary beneficiaries. The attorney general sued the executor, claiming that both sets of testamentary gifts envisioned the creation of charitable trusts and that the executor had breached his fiduciary duty by not funding those trusts.[71]

The supreme court held that the attorney general had standing to enforce the creation of the educational trust but not the funding of the bequests to the cemeteries.[72] The court examined the wording of these bequests and found no evidence of an intent to create a trust, no named trustee, and no description of any active duties that the trustee should perform.[73] Determining that the words of the will were clear and unambiguous, the court also refused to consider extrinsic evidence that the testator intended to create trusts for the cemeteries.[74]

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67. O.C.G.A. § 53-12-115 (1997). "Subjects of charity" under Georgia law include the relief of poverty, education, the advancement of ethics and religion, health, the improvement or repair of cemeteries and tombstones, preventing cruelty to animals, governmental purposes, and "other subjects having for their purpose the relief of human suffering or the promotion of human civilization." O.C.G.A. § 53-12-110 (1997).

68. 284 Ga. 452, 667 S.E.2d 363 (2008).

69. *Id.* at 453–54, 667 S.E.2d at 365.

70. *Id.* at 452, 667 S.E.2d at 364–65. Note that the improvement or repair of cemeteries is considered a charitable purpose under Georgia law. O.C.G.A. § 53-12-110(5).

71. *Cronic*, 284 Ga. at 452–53, 667 S.E.2d at 364–65.

72. *Id.* at 453, 667 S.E.2d at 365.

73. *Id.* at 453–54, 667 S.E.2d at 365. The court noted that these are essential elements of a trust under Georgia law pursuant to O.C.C.A. § 53-12-20(b) (1997). *Cronic*, 284 Ga. at 453, 667 S.E.2d at 365.

74. *Cronic*, 284 Ga. at 454, 667 S.E.2d at 365–66. In so stating, the court followed its long-standing rule of refusing to admit extrinsic evidence of intent when the terms of a document are plain and unambiguous. *See* RADFORD, *supra* note 2, § 7:6 & n.6.

E. Access to Guardianship Records

In 2004 the Georgia General Assembly enacted a revised version of Title 29 of the Official Code of Georgia Annotated (O.C.G.A.)[75] that covers the guardianship and conservatorship of both minors and adults.[76] Among other changes, the new law codified provisions that previously appeared only in the Georgia Uniform Superior Court Rules[77] and Georgia Uniform Probate Court Rules[78] pertaining to the privacy of court files relating to guardianships and conservatorships.[79] The presumption is that court records are generally public and thus available for public inspection; however, the court rules and the new law recognize that guardianship and conservatorship records usually contain highly personal and private information about a vulnerable individual, and therefore, limiting access to these records is justified.[80] Consequently, O.C.G.A. § 29-9-18[81] restricts access to guardianship and conservatorship records for all but the minor, the minor's parents, the ward, the guardian and conservator, and the legal counsel of all these persons.[82] Access to the records by any other "interested parties" is subject to court order and will be granted only if "the public interest in granting access to the sealed records clearly outweighs the harm otherwise resulting to the privacy of the person in interest."[83]

Under O.C.G.A. § 29-9-18(b), the probate judge may limit the portion of the file to which access is granted "to meet the legitimate needs of the petitioner."[84] In *Sharpton v. Hall*,[85] a case of first impression, the court

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75. 2004 Ga. Laws 161 (codified as amended at O.C.G.A. tit. 29 (2007 & Supp. 2009)).

76. *See id.* The extent and effect of this revision of Title 29 is discussed in detail in MARY F. RADFORD, GUARDIANSHIPS AND CONSERVATORSHIPS IN GEORGIA (2005). Under the revised law, a "guardian" is an individual appointed by the court to make personal decisions for the minor or adult ward, such as where to live or whether to obtain medical treatment. *Id.* § 1-5; *see* O.C.G.A. § 29-1-1(7) (2007). A "conservator" is one who is appointed to handle the property of the minor or adult ward. RADFORD, *supra* § 1-5; *see* O.C.G.A. § 29-1-1(2) (2007).

77. GA. UNIF. SUPER. CT. R. 21.2.

78. GA. UNIF. PROB. CT. R. 17.

79. *See* 2004 Ga. Laws at 311 (codified as amended at O.C.G.A. § 29-9-18 (2007 & Supp. 2009)); Sharpton v. Hall, 296 Ga. App. 251, 252, 674 S.E.2d 105, 106 (2009) (discussing Uniform Superior Court Rule 21.2 and Uniform Probate Court Rule 17).

80. *See* O.C.G.A. § 29-9-18; GA. UNIF. SUPER. CT. R. 21.2; GA. UNIF. PROB. CT. R. 17.

81. O.C.G.A. § 29-9-18 (2007 & Supp. 2009).

82. *Id.* § 29-9-18(a).

83. *Id.* § 29-9-18(b).

84. *Id.*

85. 296 Ga. App. 251, 674 S.E.2d 105 (2009).

of appeals examined the limits of this new law.[86] In this case, the administrator of an estate petitioned for access to the guardianship records of the decedent's sister, who was an incapacitated adult. The administrator sought access to these files because he discovered that the sister's guardian (another sibling) had apparently defrauded the decedent during life by recording a deed the decedent had given to the sister's guardian with the understanding that it would not transfer property until after the decedent died. During the course of a suit to set aside that deed, the administrator discovered that the guardian also recorded a deed from his incapacitated sister at about the same time, and the administrator feared that the guardian may also have defrauded the sister and breached his fiduciary duty to her. The sister died before the time of the administrator's lawsuit.[87] The administrator petitioned for access to the sister's guardianship records under the theory that they might have "high evidentiary value" in the lawsuit, the result of which could have major tax consequences for the decedent's estate.[88]

The court of appeals affirmed the probate court's order allowing limited access to the sister's records.[89] The probate court refused to allow access to the sister's medical records, and the court of appeals agreed that the sister retained a privacy interest in those records even though she was dead.[90] However, the probate court allowed the administrator access to certain enumerated property records given their evidentiary value and the potential tax consequences.[91] The court of appeals held that the probate court did not abuse its discretion in granting this access, noting that "the public interest in protecting incompetent adults from chicanery on the part of their guardians outweighs any potential privacy interest of the ward."[92]

II. GEORGIA LEGISLATION

The only significant act relating to wills, trusts, and fiduciary administration passed by the General Assembly in 2009 was an act to authorize the appointment of "associate probate judges."[93] Each county in Georgia has one probate judge who is elected by the people of that

86. *See id.* at 251, 674 S.E.2d at 105.
87. *Id.*, 674 S.E.2d at 105–06.
88. *Id.* at 251–52, 674 S.E.2d at 106.
89. *Id.* at 253, 674 S.E.2d at 107.
90. *Id.*, 674 S.E.2d at 106.
91. *Id.*
92. *Id.*, 674 S.E.2d at 106–07.
93. Ga. H.R. Bill 495, § 1, Reg. Sess., 2009 Ga. Laws 827, 827–29 (codified at O.C.G.A. § 15-9-2.1 (Supp. 2009)).

county.[94] The new law, codified at O.C.G.A. § 15-9-2.1,[95] allows each probate judge to appoint one or more associate probate judges to serve on a full- or part-time basis at the pleasure of the probate judge.[96]

An associate probate judge will have the same powers as the probate judge, and any judgment issued by an associate probate judge will be considered a final judgment of the probate court for the purposes of appeal.[97] Although not required to be a resident of the county, an associate probate judge must otherwise meet the same qualifications required of a probate judge.[98] The new law also restricts the ability of an associate probate judge to practice law and serve as a fiduciary while serving as an associate judge.[99]

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94. GA. CONST. art. VI, § 1, para. 6; O.C.G.A. § 15-9-1 (2008). The Georgia probate court system is discussed in detail in RADFORD, *supra* note 2, § 6:1.

95. O.C.G.A. § 15-9-2.1 (Supp. 2009).

96. *Id.* § 15-9-2.1(a)(1). Compensation of the associate judge is to be determined by the probate judge and the governing authority of the county. *Id.* § 15-9-2.1(a)(4). The associate judge's term of office will run concurrently with that of the probate judge. *Id.* § 15-9-2.1(a)(5).

97. *Id.* § 15-9-2.1(b).

98. *Id.* § 15-9-2.1(c). A probate judge must be a United States citizen, a resident of the county for at least two years prior to election, a registered voter, and a high school graduate or its equivalent, and the judge must not have been convicted of any felony offense or crime of moral turpitude. O.C.G.A. § 15-9-2(a)(1)(A)–(C), (E)–(F) (2008). In most counties, the probate judge must be at least twenty-five years old. *Id.* § 15-9-2(a)(1)(D). In counties with populations of more than 96,000, the probate judge has the authority to hold jury trials and has expanded jurisdiction if the judge is at least age thirty and has been admitted to the practice of law for seven years preceding his or her election. O.C.G.A. § 15-9-4(b) (2008 & Supp. 2009); *see also* RADFORD, *supra* note 2, § 6:1 (discussing the difference in jurisdiction and authority of probate judges in smaller counties as opposed to those in counties with populations over 96,000).

99. O.C.G.A. § 15-9-2.1(e). A full-time associate judge may not engage in any practice of law while serving. *Id.* A part-time associate judge may not be involved, either directly or through a partner, in any case in that associate judge's own court or over which that court has or could have jurisdiction. *Id.* Associate judges may not give advice or counsel on any matter related to a case that has arisen in his or her own court. *Id.* As for service as a fiduciary, an associate probate judge is restricted in the same manner as a probate judge. *Id.* A probate judge may not

> during his term of office, be executor, administrator, or guardian, or other agent of a fiduciary nature required to account to his court. When any person holding such trust is elected judge of the probate court, his letters and powers immediately abate upon his qualification. However, a judge of the probate court may be an administrator, guardian, or executor in a case where the jurisdiction belongs to another county or in a special case where he is allowed by law and required to account to the judge of the probate court of another county.

O.C.G.A. § 15-9-2(b) (2008). The Georgia Code of Judicial Conduct prohibits all judges from acting as fiduciaries except for the estates, trusts, or persons of members of their families. GA. CODE OF JUDICIAL CONDUCT Canon 5D (2004).

Prior to the enactment of the new law authorizing the appointment of associate probate judges, the O.C.G.A. contained a complex scheme for filling any temporary vacancy in the office of probate judge.[100] Under the new law, the senior full-time associate probate judge is first in line to fill a vacancy and may hold the office for the remainder of the probate judge's unexpired term.[101] If the associate probate judge remains a resident of the county, the associate probate judge may run to succeed himself or herself indefinitely.[102]

100. *See* O.C.G.A. § 15-9-10 (2008); O.C.G.A. § 15-9-11 (2008 & Supp. 2009); O.C.G.A. § 15-9-11.1 (2008). In the event of a vacancy, if the chief clerk of the probate court met the qualifications for the office of probate judge, the chief clerk would fill the position and hold it until the next general election that occurred more than sixty days after the vacancy or the expiration of the judge's remaining term, whichever occured first. *Id.* § 15-9-11.1. If the chief clerk did not meet the qualifications for the office of a probate judge, the chief judge of the city or state court or, if none, the clerk of the superior court, would fill the vacancy. O.C.G.A. § 15-9-10. If the clerk could not serve, the chief judge of the superior court would appoint someone to fill the vacancy. *Id.* § 15-9-10(a). Whoever filled the vacancy was then required within ten days to order a special election. O.C.G.A. § 15-9-11. Further, if the vacancy occurred after January 1 of the last year of the probate judge's term of office, the individual who filled the vacancy would serve the remainder of the unexpired term of office. *Id.*

101. O.C.G.A. § 15-9-2.1(f).

102. *Id.* The associate probate judge who fills the vacancy need not be a resident of the county. *Id.* However, that individual must become a resident of the county if he or she wishes to run in an election to succeed himself or herself. *Id.*

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