Wills, Trusts, Guardianships, and Fiduciary Administration

by Mary F. Radford*

This Article describes selected cases and significant legislation from June 1, 2012 through May 31, 2013 pertaining to Georgia fiduciary law and estate planning.[1]

I. GEORGIA CASES

A. *Year's Support*

Under Georgia law, the spouse and minor children of a decedent are entitled to petition for a "year's support" from the decedent's estate.[2] The procedure for awarding year's support is set out clearly in the Georgia Probate Code[3] but is still the object of some confusion in the courts. Basically, the Probate Code provides that the surviving spouse or minor children must file a petition in which they list the property that they are requesting be awarded to them to provide the year's

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1. For an 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*, 64 MERCER L. REV. 325 (2012).

2. O.C.G.A. § 53-3-1 (2011). There is no requirement that all of these individuals file for year's support. O.C.G.A. § 53-3-5 (2011). The spouse alone, or the minor children alone, or both may file. *Id.* For an in-depth discussion of year's support see MARY F. RADFORD, REDFEARN: WILLS AND ADMINISTRATION IN GEORGIA ch. 10 (7th ed. 2008).

3. O.C.G.A. ch. 53-3 (2011).

support.[4] Notice is issued to the decedent's other children, spouse (if the spouse is not a petitioner), other heirs, beneficiaries under the decedent's will (if any), creditors, and any others who have claims against the estate that may be affected if year's support is awarded.[5] If no one objects to the petition, the probate judge must enter an order awarding the property requested in the petition.[6] Only if an objection is filed will the judge hold a hearing to determine whether the property requested is in fact needed "to maintain the standard of living that the surviving spouse and each minor child had prior to the death of the decedent."[7] If an objection is filed, the individuals petitioning for year's support have the burden of proving that the amount they requested is necessary.[8]

In *Garren v. Garren*,[9] the Georgia Court of Appeals held that the Superior Court of Fannin County erred because it required the surviving spouse to prove that the amount she requested was necessary for a year's support even though no objection had been raised.[10] When the spouse filed her petition in the Probate Court of Fannin County, no formal objection was filed; however, her son later testified that he had submitted a letter to the probate court signed by him and his mother withdrawing the petition. After the probate court granted his mother the property she requested, the son appealed to the superior court.[11] The superior court made a determination that the letter was not a properly-filed objection, but then set aside the grant of year's support to the mother. The superior court stated that the mother had not carried her burden of proving that she in fact needed the property that she had requested to maintain her standard of living. The mother responded that, because no objection to her petition had been filed, she was not required to provide any evidence or otherwise prove her need for the property she had requested.[12] The court of appeals agreed with the

4. O.C.G.A. § 53-3-5.

5. O.C.G.A. § 53-3-6 (2011).

6. O.C.G.A. § 53-3-7(a) (2011).

7. O.C.G.A. § 53-3-7(c) (2011). In making this determination, the judge must take into consideration the other sources of support of the petitioners, the solvency of the estate, and "[s]uch other relevant criteria as the court deems equitable and proper." *Id.*

8. *Id.*

9. 316 Ga. App. 646, 730 S.E.2d 123 (2012).

10. *Id.* at 649, 730 S.E.2d at 126.

11. *Id.* at 646, 730 S.E.2d at 124-25. For those Georgia probate courts in counties with populations under 90,000, appeals are taken to the superior court. O.C.G.A. § 5-3-2 (2013); O.C.G.A. § 5-3-20 (2013); O.C.G.A. § 15-9-120 (2012). The appeal is "de novo," which means that "[i]t brings up the whole record from the court below[,] and all competent evidence shall be admissible on the trial thereof, whether adduced on a former trial or not." O.C.G.A. § 5-3-29 (2013).

12. *Garren*, 316 Ga. App. at 646-47, 730 S.E.2d at 124-25.

mother, noting that the only issue before the superior court was whether the letter was a properly-filed objection.[13] Once the superior court had determined that it was not, there was no shifting of the burden of proof to the mother, and the property she requested should have been awarded to her as a year's support.[14]

B. No-Contest Clauses in Wills and Trusts

If a testator (the individual who makes a will) or the settlor of a trust wishes to discourage the beneficiaries from attacking the terms of the will or trust, the testator or settlor may include a "no-contest" or "*in terrorem*" clause in the governing document.[15] A no-contest clause typically provides that a beneficiary who contests the validity of the will or trust will forfeit any interest that the beneficiary would otherwise take under the will or trust.[16] Both the Georgia Probate Code[17] and the Georgia Trust Code[18] recognize the validity of such clauses provided that the will or trust contains a direction as to the disposition of the forfeited property in the event the clause is violated;[19] however, because these clauses result in the forfeiture of a beneficiary's interest, no-contest clauses are not favored in the law and must always be strictly construed.[20] Two cases decided during the reporting period illustrate that the courts will enforce these clauses, but if, and only if, the actual terms of the clause are violated.[21]

The no-contest clause in a will that was at issue in *Norman v. Gober*[22] involved the event that "any beneficiary" should "contest or initiate legal proceedings to contest the validity of this Will or any provision herein."[23] In an earlier phase of the litigation surrounding the testator's will, the eleven-year-old grandson of the testator filed a caveat to the will.[24] The Georgia Supreme Court determined that the

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13. *Id.* at 648-49, 730 S.E.2d at 126.

14. *Id.* at 649, 730 S.E.2d at 126.

15. See discussions of these clauses in RADFORD, WILLS AND ADMINISTRATION, *supra* note 2, at §§ 2:1, 8:7; MARY F. RADFORD, GEORGIA TRUSTS AND TRUSTEES § 2:1 (2011).

16. RADFORD, WILLS AND ADMINISTRATION, *supra* note 2, § 8:7.

17. O.C.G.A. § 53-4-68(b) (2011).

18. O.C.G.A. § 53-12-22(b) (2011).

19. O.C.G.A. § 53-4-68(b), O.C.G.A. § 53-12-22(b).

20. Preuss v. Stokes-Preuss, 275 Ga. 437, 438, 569 S.E.2d 857, 858 (2002); *see also* Linkous v. Nat'l Bank of Ga., 247 Ga. 274, 274 S.E.2d 469, 470 (1981).

21. Norman v. Gober (*Norman II*), 292 Ga. 351, 737 S.E.2d 309 (2013); Callaway v. Willard, 321 Ga. App. 349, 739 S.E.2d 533 (2013).

22. 292 Ga. 351, 737 S.E.2d 309 (2013).

23. *Id.* at 353 n.1, 737 S.E.2d at 310 n.1.

24. *Id.* at 351, 737 S.E.2d at 309. A caveat is an objection to the admission of the will to probate and may be filed by any person who would be injured were the will to be

grandson was not someone who would take if the will was found to be invalid, and thus, he did not have standing to file a caveat.[25] After the supreme court's decision was issued, the co-executors filed a petition for declaratory judgment in which they sought to determine who was responsible for filing the caveat. The co-executors reasoned that if the caveat had been instigated by one of the beneficiaries (that is, the caveator's mother), this may have constituted a violation by her of the no-contest clause. The caveator's mother and other beneficiaries moved to have the petition dismissed, alleging, among other things, that the action of the caveator was not a violation of the no-contest clause because the caveat had been dismissed for lack of standing.[26]

The Georgia Supreme Court disagreed, pointing to the language of the clause that spoke of a beneficiary contesting or initiating legal proceedings to contest the validity of the will.[27] The court held that "[the] initiation of legal proceedings triggered the *in terrorem* clause."[28]

The no-contest clause in a trust in *Callaway v. Willard*[29] applied should any of the settlor's four children

> seek or file a legal or equitable challenge to the management decisions made or proposed by my trustee *during the administration of this Trust*, or pertaining to the management of the Trust Estate, or in regards to the final distribution of the Trust Estate, *and be unsuccessful* in said legal or equitable challenge.[30]

After the trust was established, three of the settlor's four children engaged in litigation that involved the settlor. The settlor's daughter and two of her sons attempted unsuccessfully to have a guardianship imposed upon their mother. Those same two sons also filed an action in which they sought to have the trustee removed and sought to have the trust set aside due to the alleged undue influence, coercion, and duress of the third son. The trustee was the personal lawyer of that son. When the guardianship petition proved unsuccessful, the sons dropped the lawsuit. The trustee then sought a judgment declaring that all three children had violated the no-contest clause of the trust, and thus the only beneficiary who was still eligible to take trust benefits was the son who was the trustee's client.[31]

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admitted to probate. *See* RADFORD, WILLS AND ADMINISTRATION, *supra* note 2, § 6:16.

25. Norman v. Gober (*Norman I*), 288 Ga. 754, 755, 707 S.E.2d 98, 99 (2011).
26. *Norman II*, 292 Ga. at 353, 737 S.E.2d at 310-11.
27. *Id.* at 354, 737 S.E.2d at 311.
28. *Id.* (italics added).
29. 321 Ga. App. 349, 739 S.E.2d 533 (2013).
30. *Id.* at 350, 739 S.E.2d at 535.
31. *Id.* at 351-52, 739 S.E.2d at 535-36.

The court of appeals examined carefully the wording of the no-contest clause to determine whether the three children had violated it.[32] The court noted first that the daughter had not been party to any action brought against the trust or trustee.[33] When the trustee sought to have her declared a "de facto party" to the sons' action, the court of appeals construed the no-contest clause narrowly and declared that the daughter must have been an actual, named party to an action to run afoul of the clause.[34] As to the two sons, the court of appeals also held that they had not violated the no-contest clause.[35] The court pointed out that the types of actions prohibited by the clause related to the trustee's conduct in administering, managing, and distributing the trust assets, whereas the sons' cause of action revolved around the trustee's conduct in setting up the trust and having himself appointed as trustee.[36]

C. Transfer of Property to a Trust

A settlor establishes a trust by transferring his or her own property to the trustee for management and distribution of the property in accordance with the trust's terms.[37] When settlors name themselves as trustees, a question that arises is whether the mere declaring of oneself as trustee of specified property is adequate to transfer the property out of the ownership of the settlor and into the ownership of the trust. An extension of that question is whether the settlor must actually own the property at the time of declaring the trust or, alternatively, may declare a trust over property that the settlor expects to acquire in the future. Both of these questions were answered by the Georgia Court of Appeals in *Rose v. Waldrip*.[38]

The case of *Rose v. Waldrip* involved the type of contentious family situation that often occurs when a testator or settlor is married to a second spouse and has children from the first marriage.[39] The testator and settlor in this case, Lee Waldrip, died testate in March 2008 and was survived by his daughter, Linda Rose, his granddaughter, Joy Garcia, and his wife, Colleen, who was unrelated to either Linda Rose or Joy. Linda Rose and Joy were beneficiaries of Waldrip's will, which

32. *Id.* at 355, 739 S.E.2d at 358.
33. *Id.*
34. *Id.* at 355, 739 S.E.2d at 537-38.
35. *Id.* at 358, 739 S.E.2d 539-40.
36. *Id.*
37. *See* RADFORD, GEORGIA TRUSTS, *supra* note 15, § 1:1.
38. 316 Ga. App. 812, 730 S.E.2d 529 (2012).
39. *Id.* at 812, 730 S.E.2d at 531.

was executed in January 2008.[40] Several years earlier, Waldrip had established a revocable living trust that he later amended to make Colleen the primary beneficiary upon his death. In April 2002, Waldrip executed the trust agreement, creating the trust and naming himself as trustee and primary beneficiary.[41] The trust was intended to include all of Waldrip's assets: "all bank accounts, all stocks, all bonds, all accounts receivable, all business assets, all real estate, all motor vehicles, all personal property, and all assets of any kind and wherever located."[42] Additionally, the trust agreement was intended to bring into the trust "any and all properties of all kinds, whether presently owned or *hereafter acquired.*"[43] The agreement clarified this intent by saying that "[t]his declaration shall apply *even though record ownership or title*, in some instances, *may, presently or in the future, be registered in my individual name, in which event such record ownership shall hereafter be deemed held in trust.*"[44]

After executing the trust, Waldrip formally transferred some property to the trust, but not all of his property had been so transferred upon his death. Linda Rose and Joy contended that the property not transferred, including property acquired by Waldrip after the trust was created, remained part of his estate and thus should be used to fund the bequests in the will.[45] They based their argument on section 53-12-25 of the Official Code of Georgia Annotated (O.C.G.A.),[46] which states that a "[t]ransfer of property to a trust shall require a [formal] transfer of legal title to the trustee."[47] Colleen filed an action seeking a declaratory judgment as to which assets, if any, were in Waldrip's estate. The Superior Court of Hall County made two findings: (1) Waldrip had intended that all property acquired by him after the creation of the trust

40. *Id.* The will provided an annuity for Linda Rose and forgave a debt that Joy owed to the testator. *Id.*

41. *Id.* at 812-13, 730 S.E.2d at 531.

42. *Id.* at 813, 730 S.E.2d at 531.

43. *Id.* at 813, 730 S.E.2d at 532.

44. *Id.* (alteration in original). Contemporaneously with signing the Trust Agreement, Waldrip executed a "Comprehensive Transfer Document" that contained similar language about after-acquired property and the same language stating that assets held in his name individually were deemed to be held in trust. Finally, on the same day, Waldrip executed a Bill of Sale granting to himself as trustee his interest "in all tangible personal property . . . [that] [Waldrip] presently own[ed] or *hereafter acquire*[d] (*regardless of* the . . . *record title in which held*)." *Id.* at 813-14, 730 S.E.2d at 532 (second alteration in original).

45. *Id.* at 814, 730 S.E.2d at 532.

46. O.C.G.A. § 53-12-25 (2011).

47. O.C.G.A. § 53-12-25(a).

would be held in the trust, and (2) the provisions of the trust relating to "after-acquired property" were enforceable under Georgia law.[48]

The court of appeals agreed with the first finding but not with the second.[49] Although the trial court had limited its finding to the property that was acquired after the trust was created, the court of appeals engaged in an expanded examination of whether a formal transfer of property was needed for property owned by the settlor when the trust was created as well as property acquired by the settlor after the trust was created.[50] The court of appeals examined first whether O.C.G.A. § 53-12-25, which was enacted in 2010 as part of the Revised Georgia Trust Code, would be applicable to Waldrip's trust.[51] O.C.G.A. § 53-12-1[52] provides that the provisions of the Revised Georgia Trust Code of 2010 govern all existing trusts regardless of the date they are created "[e]xcept to the extent it would impair vested rights."[53] The court of appeals noted that Colleen's rights in the trust property vested when Waldrip died in 2008, and thus, the requirement of a formal transfer contained in O.C.G.A. § 53-12-25 of the 2010 Trust Code would not be applicable to her if it created a requirement that did not exist in prior Georgia trust law.[54] The court of appeals turned to a case from a nearby jurisdiction in Kentucky,[55] and to the Second and Third Restatements of Trusts because it found no pre-2010 Georgia statutory or case law on point.[56]

In the Kentucky case, *Ladd v. Ladd*,[57] the Kentucky Court of Appeals addressed whether a settlor's declaration of himself as trustee of property sufficed to transfer the property to the trust.[58] The court in *Ladd* determined that it did.[59] The Georgia Court of Appeals noted that this conclusion was reflected in the Second and Third Restatements of Trusts as well as in a leading treatise on trust law.[60] The court of

48. *Rose*, 316 Ga. App. at 812, 730 S.E.2d at 530-31.
49. *Id.* at 820-21, 730 S.E.2d at 535-36.
50. *Id.* at 816, 730 S.E.2d at 533.
51. *Id.* at 816-17, 730 S.E.2d at 533.
52. O.C.G.A. § 53-12-1 (2011).
53. O.C.G.A. § 53-12-1(b).
54. *Rose*, 316 Ga. App. at 816-17, 730 S.E.2d at 533-34 (interpreting O.C.G.A. § 53-12-25).
55. Ladd v. Ladd, 323 S.W.3d 772 (Ky. Ct. App. 2010).
56. *Rose*, 316 Ga. App. at 817-18, 730 S.E.2d at 534 (citing RESTATEMENT (SECOND) OF TRUSTS (1959), RESTATEMENT (THIRD) OF TRUSTS (2003)).
57. 323 S.W.3d 772 (Ky. Ct. App. 2010).
58. *Id.* at 776-77.
59. *Id.* at 778.
60. *Rose*, 316 Ga. App. at 817-18, 730 S.E.2d at 534. The treatise relied upon by the court of appeals was GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 141

appeals held that the requirement in O.C.G.A. § 53-12-25 of a formal transfer of property to a trust did not exist in Georgia prior to 2010, and thus, the rule could not be applied to the Waldrip trust, at least as it pertained to property owned by the settlor at the time the trust was established.[61]

The court of appeals next turned to the question of whether property acquired after the trust came into existence would be considered trust property by virtue of the broad language in the Waldrip trust documents.[62] The court again turned to the Restatements and determined that a settlor cannot transfer into trust any property that he does not own currently but merely expects to own at some time in the future.[63] The court stated that after-acquired property will not be held in the trust unless the settlor manifests an intent to hold that property in trust after the property comes into the ownership of the settlor.[64] The court remanded the case to the trial court for a determination of whether the settlor had shown such intent as to his after-acquired assets.[65]

D. Constructive Trusts

As early as 1848, Georgia has recognized that a court of equity may impose an "implied trust" when it is clear that a transferor's intention is that the property in question be held in trust rather than outright by the holder of title to the property.[66] There are two types of implied trusts: resulting trusts and constructive trusts.[67] "A constructive trust is a trust implied whenever the circumstances are such that the person holding legal title to property, either from fraud or otherwise, cannot

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(2d ed. 1979). The court of appeals noted in a footnote that Georgia appellate courts rely often on the Restatements of Trusts and the Bogert treatise when addressing issues of Georgia trust law. *Rose*, 316 Ga. App. at 818 n.6, 730 S.E.2d at 535 n.6.

61. *Rose*, 316 Ga. App. at 819, 730 S.E.2d at 535.

62. *Id.*

63. *Id.*

64. *Id.* The court of appeals quoted the black-letter law and commentary of RESTATEMENT (SECOND) OF TRUSTS § 86 and RESTATEMENT (THIRD) OF TRUSTS § 41. RESTATEMENT (SECOND) OF THE LAW OF TRUSTS § 86 (1959); RESTATEMENT (THIRD) OF THE LAW OF TRUSTS & TRUSTEES § 41 (2007).

65. *Rose*, 316 Ga. App. at 820, 730 S.E.2d at 535.

66. Miller v. Cotten, 5 Ga. 341 (1848). Section 2290 of the 1860 Georgia Code defined implied trusts as "such as are inferred by law from the nature of the transaction, or the conduct of the parties." RICHARD H. CLARK, T.R.R. COBB & DAVID IRWIN, 1860 CODE § 2290 (1861), *available at* http://digitalcommons.law.uga.edu/ga_code/18. Similar provisions relating to implied trusts have appeared in the Georgia Code ever since. Article 7 of the REVISED GEORGIA TRUST CODE of 2010 (O.C.G.A. §§ 53-12-130 to -133 (2011)) is devoted to implied trusts. *See generally* RADFORD, GEORGIA TRUSTS, *supra* note 15, ch. 6.

67. O.C.G.A. § 53-12-2(5) (2011).

enjoy the beneficial interest in the property without violating some established principle of equity."[68] Typically, a constructive trust is imposed on property belonging to a person who obtained title to the property by that person's own fraud or malfeasance.[69]

In *Reinhardt University v. Castleberry*,[70] the Georgia Court of Appeals examined a situation in which a constructive trust was sought to be imposed on a university that itself had not engaged in any fraud or other wrongdoing.[71] This case revolved around a trust that was established by a father to benefit his wife for her lifetime with the remainder to be paid to his children. One of his sons was the trustee of the trust and was also a trustee of Reinhardt University (then known as Reinhardt College, hereinafter, the "University"). Although the trust did not authorize distributions to anyone other than the wife during her life, the trustee made a donation of $1 million from the trust to the University. After the wife died, one of the other children brought an action against her brother (the trustee) for breach of fiduciary duty and a separate action against the University in which she sought to have a constructive trust imposed on the $1 million donation. The University moved to dismiss the claim against it for failure to state a cause of action, stating that the petition did not include any independent allegation of wrongdoing by the University.[72]

The court of appeals agreed with the Superior Court of Cherokee County's denial of the motion to dismiss.[73] The court of appeals cited a Georgia case, *Kelly v. Johnston*,[74] in which the Georgia Supreme Court held that a constructive trust could be imposed even if a third party, who was not a party to the action, had been the one who engaged in the wrongful acts that gave rise to the need for the constructive trust.[75] The court of appeals also did not find merit in the University's second argument, which was that its heavy reliance on charitable

68. O.C.G.A. § 53-12-132(a).

69. *See, e.g.*, Grant v. Hart, 192 Ga. 153, 14 S.E.2d 860 (1941). In early cases, this person was sometimes referred to as a "trustee ex maleficio." *See, e.g.*, Cordovano v. State, 61 Ga. App. 590, 7 S.E.2d 45 (1940).

70. 318 Ga. App. 416, 734 S.E.2d 117 (2012).

71. *Id.* at 417, 734 S.E.2d at 118.

72. *Id.* at 416-17, 734 S.E.2d at 117-18. The University argued that the complaint only sought the imposition of a constructive trust, and that a constructive trust is a remedy rather than an independent cause of action. *Id.* at 417, 734 S.E.2d at 118. The University relied on *St. Paul Mercury Insurance Co. v. Meeks*, 270 Ga. 136, 508 S.E.2d 646 (1998). *Reinhardt Univ.*, 318 Ga. App. at 418, 734 S.E.2d at 118.

73. *Reinhardt Univ.*, 318 Ga. App. at 418, 734 S.E.2d at 119.

74. 258 Ga. 660, 373 S.E.2d 7 (1988).

75. *Id.* at 661, 734 S.E.2d at 8.

donations would dictate against it investigating the sources of donated funds.[76] The court stated briefly that the University had "failed to demonstrate any merit in [this] assertion."[77]

E. Adult Guardianship

Article 4 of Title 29 of the O.C.G.A.[78] provides the procedure whereby a probate court may appoint a guardian for an adult who has been found incapable of making "significant responsible decisions concerning his or her health or safety."[79] The procedure requires notice to the proposed ward and others, appointment of legal counsel for the proposed ward, an evaluation of the proposed ward followed by the submission of an evaluation report, and a hearing.[80] These actions are spread out over a period of time, in part, due to time periods that are mandated by the O.C.G.A.;[81] however, if the need for the appointment of a guardian is so pressing that compliance with these time requirements would be detrimental to the proposed ward, the petitioner for the guardianship may ask for the appointment of an "emergency guardian" without giving notice to anyone other than the proposed ward.[82] The time periods set forth in the statutory procedure for the appointment of an emergency guardian are compressed so that the emergency guardian can be appointed as soon as possible.[83] To proceed under this expedited procedure, the petitioner must show "facts that establish an immediate

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76. *Reinhardt Univ.*, 318 Ga. App. at 417, 419-20, 734 S.E.2d at 117, 120.

77. *Id.* at 419, 734 S.E.2d at 120.

78. O.C.G.A. §§ 29-4-1 to -3 (2007 & Supp. 2013).

79. O.C.G.A. § 29-4-1(a). See MARY F. RADFORD, GEORGIA GUARDIANSHIP AND CONSERVATORSHIP ch. 4 (2013-2014 ed.), for an in-depth discussion of the guardianship of adults.

80. O.C.G.A. § 29-4-11 (2007); O.C.G.A. § 29-4-12 (2007). *See generally* RADFORD, GEORGIA GUARDIANSHIP, *supra* note 79, §§ 4:3 to 4:8 for a description of the procedure.

81. O.C.G.A. §§ 29-4-11, 29-4-12. For example, O.C.G.A. § 29-4-11(d)(3) requires a time lapse of at least five days between the time that the proposed ward receives notice of the petition and the time the court-appointed evaluator will be allowed to conduct the evaluation. O.C.G.A. § 29-4-11(d)(3). Also, O.C.G.A. § 29-4-12(c) requires a time lapse of at least ten days between notice of the hearing and the hearing itself. O.C.G.A. § 29-4-12(c).

82. O.C.G.A. § 29-4-16(b) (2007). The appointment of an emergency guardian is only temporary, as an emergency guardianship will be effective for a maximum of sixty days. O.C.G.A. § 29-4-16(b). See RADFORD, GEORGIA GUARDIANSHIP, *supra* note 79, § 4:11 for a discussion of emergency guardianships.

83. O.C.G.A. § 29-4-15(c) (2007). O.C.G.A. § 29-4-15(c)(3) requires the evaluation of the proposed ward to take place within seventy-two hours of the time the judge orders the evaluation. *Id.* Also, O.C.G.A. § 29-4-15(c)(2) requires the hearing on the emergency guardianship to be conducted between the third and fifth day after the petition is filed. *Id.*

and substantial risk of death or serious physical injury, illness, or disease unless an emergency guardian is appointed."[84]

In *In re Farr*,[85] the Georgia Court of Appeals made it clear that a petitioner cannot take advantage of the shortened time periods in the emergency guardianship statutes simply because the petitioner would prefer for the guardianship to be put into place as soon as possible.[86] The proposed ward in this case was a hospital patient who was suffering from end-stage Parkinson's disease, diabetes, and other ailments. The petitioner for the emergency guardianship was the hospital. The hospital contended that an emergency guardian should be appointed to facilitate the patient's discharge from the hospital to a nursing facility that the hospital deemed to be more appropriate for her care. The patient's son objected to the petition.[87] The Probate Court of Chatham County held a hearing at which it determined that the only "emergency" alleged by the hospital was its desire to have the patient discharged. The probate court dismissed the petition.[88]

The court of appeals agreed with the probate court that the hospital's desire to have a patient transferred to another facility was not an "emergency" within the meaning of the emergency guardianship statute.[89] The hospital did not allege any facts that showed that the patient was "threatened by an immediate and substantial risk of death, serious physical injury, illness, or disease necessitating such a discharge and transfer."[90]

II. GEORGIA LEGISLATION

A. *Probate Court Prosecuting Attorney*

In addition to matters relating to decedents' estates and the guardianships of minors and incapacitated adults, the Georgia probate courts have jurisdiction over a variety of criminal matters, some of which may require the prosecution of defendants for the violation of laws such as traffic laws or weapons-carry-license laws.[91] Unlike superior courts,

84. O.C.G.A. § 29-4-14(b)(4) (2007).

85. 322 Ga. App. 55, 743 S.E.2d 615 (2013).

86. *Id.* at 56-57, 743 S.E.2d at 616.

87. *Id.* at 55, 743 S.E.2d at 615-16. According to the court, the son did not dispute that his mother might eventually need a guardian but rather that she needed an emergency guardian immediately. *Id.* at 56 n.3, 743 S.E.2d at 616 n.3.

88. *Id.* at 55, 743 S.E.2d at 616.

89. *Id.* at 56-57, 743 S.E.2d at 616.

90. *Id.*

91. O.C.G.A. § 15-9-30 (2012); O.C.G.A. § 16-11-129 (2011).

municipal courts, and state courts, the probate courts do not have access to a staff of attorneys to prosecute cases in their courts on behalf of the state.[92]

In 2013, the Georgia General Assembly enacted new Article 8 of Chapter 9 of Title 15,[93] which authorizes the appointment of a "prosecuting attorney of the probate court" in those counties that have no state court.[94] The probate court is authorized to request the district attorney of the county to handle criminal cases that are subject to the jurisdiction of the probate court.[95] District attorneys may do so themselves or may appoint a member of their staff to do so.[96] The district attorney or the staff member will be compensated as authorized by the governing board of the county.[97] If for some reason the district attorney is unable to assist, the county is authorized, in its discretion, to appoint someone to the office of "prosecuting attorney of the probate court,"[98] who will serve at the pleasure of the governing authority of the county.[99]

The probate court prosecuting attorney must be a member of the State Bar of Georgia who is admitted to practice in the Georgia appellate courts.[100] An assistant district attorney of that county or another county may be appointed to the office provided the district attorney who employs the assistant district attorney consents.[101] An attorney who works full-time as the probate court prosecuting attorney may not engage in the private practice of law.[102] If the attorney is only working part-time in this position, the attorney may engage in private practice but may not practice in the probate court or appear in any court in any matter in which that attorney has exercised jurisdiction.[103]

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92. *See generally* Ga. S. Bill 120, Reg. Sess., 2013 Ga. Laws 565 (2013).
93. *Id.* (codified at O.C.G.A. §§ 15-9-150 to -158 (Supp. 2013)).
94. O.C.G.A. § 15-9-150(b).
95. O.C.G.A. § 15-9-150(a).
96. *Id.*
97. *Id.*
98. O.C.G.A. § 15-9-150(b).
99. O.C.G.A. § 15-9-150(d).
100. O.C.G.A. § 15-9-151(a).
101. O.C.G.A. § 15-9-151(b).
102. O.C.G.A. § 15-9-153(b).
103. O.C.G.A. § 15-9-153(c). The first sentence of the code section states: "Any part-time prosecuting attorney of a probate court and any part-time assistant prosecuting attorney of a probate court may engage in the private practice of law, but shall not practice in the probate court or appear in any matter in which that prosecuting attorney has exercised jurisdiction." *Id.* This Author assumes that this is a blanket prohibition against the part-time probate court prosecuting attorney practicing in any matter in the probate court. However, it would not be unreasonable to interpret the law as meaning that the part-time prosecuting attorney of the probate court is only prohibited from appearing in

The prosecuting attorney of the probate court will represent the state in cases within the jurisdiction of the probate court that involve violations of county laws or ordinances and that could result in confinement or the imposition of a fine or civil penalty under O.C.G.A. § 40-6-163[104] (which relates to overtaking and passing a school bus), offenses that are in violation of state laws over which the probate court has jurisdiction, and, pursuant to O.C.G.A. § 16-11-129,[105] in the prosecution of any denial or revocation of a weapons-carry license under O.C.G.A. § 16-11-129.[106] The prosecuting attorney of the probate court will also represent the state in any appeal from the probate court to the superior court or one of the Georgia appellate courts, or in any case in which a defendant who was convicted in probate court is challenging the conviction through habeas corpus.[107]

The prosecuting attorney of the probate court may also administer oaths to the bailiffs or other officers of the court and otherwise assist the probate judge in court organization.[108] The prosecuting attorney of the probate court may employ one or more assistant prosecuting attorneys and other employees as authorized by local law or the governing body of the county.[109] Additionally, assistance in the prosecution of cases in the probate court may be supplied by a law student or law graduate who is allowed to practice pursuant to O.C.G.A. § 15-18-22[110] or to the Georgia Supreme Court's rules.[111]

B. Expanded Notice in Adult Guardianship and Conservatorship Proceedings

In 2013, the Georgia General Assembly amended the 2005 Guardianship and Conservatorship Code[112] in an attempt to address the situa-

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the probate court in a matter that would involve work as the prosecuting attorney.

104. O.C.G.A. § 40-6-163 (2011).

105. O.C.G.A. § 16-11-129 (2011).

106. O.C.G.A. § 15-9-155(a).

107. O.C.G.A. § 15-9-155(a)(2)-(3).

108. O.C.G.A. § 15-9-155(a)(4).

109. O.C.G.A. § 15-9-157.

110. O.C.G.A. § 15-18-22 (2012). Section 15-18-22, which is known as the "The Law School Public Prosecutor Act of 1970," allows third-year law students or qualified staff instructors at law schools, as part of their legal intern training, to assist the district attorney in criminal proceedings. O.C.G.A. § 15-18-22.

111. O.C.G.A. § 15-9-158.

112. O.C.G.A. tit. 29 (2007 & Supp. 2013). The "guardian" of an adult is an individual who is appointed by a probate court to make personal decisions (e.g., give medical consents, choose place of residence) for an adult who has been found to be incapable of making "significant responsible decisions concerning his or her health or safety." O.C.G.A. § 29-4-1(a). See RADFORD, GEORGIA GUARDIANSHIP, *supra* note 79, ch. 4, for an in-depth

tion in which an adult lives in one state but has been transported by a relative or friend to another state so that the transporting individual may be appointed as the adult's guardian or conservator.[113] This situation usually occurs when there is a dispute among family members as to who should control the property and welfare of an elderly relative. An illustration of this situation would be if a widowed, elderly, incapacitated, and wealthy grandmother, whose children have all predeceased her, lives in Alabama with one of her granddaughters. Her grandson, a Georgia resident, decides to move her to Georgia and become her guardian and conservator even though he knows the granddaughter would object if she were to find out about these proceedings. Under the law prior to 2013, if there were at least two other grandchildren living in Georgia, the petitioning grandson would only be required to give notice to the Georgia grandchildren.[114] The granddaughter in Alabama would not be notified and thus would not have the opportunity to object to the appointment of the grandson as guardian.[115]

The 2013 legislation adds the requirement that a petitioner for the guardianship or conservatorship of an adult include in the petition the name of "[a]ny state in which the proposed ward was physically present, including any period of temporary absence, for at least six consecutive months immediately before the filing of the petition or ending within the six months prior to the filing of the petition."[116] In the event such a state is listed, amended O.C.G.A. § 29-9-7[117] directs the probate judge to issue notice of the filing of the guardianship petition to the individu-

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discussion of the guardianship of adults.

113. Ga. H.R. Bill 446, Reg. Sess., 2004 Ga. Laws 161 (codified at O.C.G.A. ch. 29-9). A conservator is a person appointed by a probate court to make financial decisions for an adult who has been found to be incapable of making "significant responsible decisions concerning the management of his or her property." O.C.G.A. § 29-5-1(a) (2007). See RADFORD, GEORGIA GUARDIANSHIP, *supra* note 79, ch. 5, for an in-depth discussion of the conservatorship of adults.

114. O.C.G.A. § 29-4-10(b)(7) (2007); O.C.G.A. § 29-4-11(c)(3); O.C.G.A. § 29-5-10(b)(8) (2007); O.C.G.A. § 29-5-11(c)(3) (2007). The person seeking guardianship or conservatorship must give notice of the petition to the proposed ward's spouse, adult children, and, if there are no adult children, then to at least two individuals in the following order of priority: lineal descendants, parents and siblings, or friends of the proposed ward. O.C.G.A. § 29-4-10(b)(7); O.C.G.A. § 29-4-11(c)(3); O.C.G.A. § 29-5-10(b)(8); O.C.G.A. § 29-5-11(c)(3).

115. Under O.C.G.A. § 29-4-12(c), the individuals who are entitled to notice of the filing of the petition are also entitled to receive notice of the hearing that will be held to determine whether a guardianship is necessary and who shall serve as guardian. O.C.G.A. § 29-4-12(c).

116. O.C.G.A. §§ 29-4-10(b)(17), 29-5-10(b)(19) (Supp. 2013).

117. O.C.G.A. § 29-9-7 (Supp. 2013).

als who reside in that state and who fall into the category of individuals to whom notice shall be given.[118] The notice is to be given in "such additional manner as . . . might be reasonably calculated to give actual notice to such persons" and may be given by publication.[119]

In the situation described above, the amended law would require the petitioning Georgia grandson to give notice to the Alabama granddaughter as well as to the Georgia grandsons, giving the granddaughter the opportunity to object to the petition. The 2013 legislation is loosely modeled after Article 2 of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act,[120] which was promulgated by the Uniform Law Commission in 2007.[121]

118. *Id.* In the situation described in the text, the grandmother has no surviving spouse or adult children, so two of the grandmother's lineal descendants in Alabama as well as two descendants in Georgia must be given notice of the petition.

119. *Id.*

120. UNIF. ADULT GUARDIANSHIP & PROTECTIVE PROCEEDINGS JURISDICTION ACT (2007), *available at* www.uniformlaws.org/Act.aspx?title=Adult#Guardianship#and#Protective#Proceeding#Jurisdiction#Act.

121. *Id.*

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