Wills, Trusts, Guardianships, and Fiduciary Administration

by Mary F. Radford*

This Article describes selected cases and significant legislation from June 1, 2016 to May 31, 2017 that pertain to Georgia fiduciary law and estate planning.[1]

I. GEORGIA CASES

A. Year's Support and Marital Agreements

In Georgia, the surviving spouse of an individual who dies with or without a will is entitled to petition the probate court for an award of property from the decedent's estate in the form of "year's support."[2] However, the spouses, either before or during their marriage, can enter into a contract in which one or both agrees to waive the right to year's

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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*, 68 MERCER L. REV. 321 (2016).

2. O.C.G.A. § 53-3-1 (2017). Year's support, which is available both to the surviving spouse and to surviving minor children, is defined as "property for their support and maintenance for the period of 12 months from the date of the decedent's death." O.C.G.A. § 53-3-1(c) (2017). Year's support is discussed in depth in MARY F. RADFORD, REDFEARN: WILLS AND ADMINISTRATION IN GEORGIA ch. 10 (2017–2018 ed.).

support.[3] In order for such a contract to be valid, it must be shown that the spouse who purportedly waived the right had full knowledge of the right to claim year's support.[4] *In re Estate of Boyd*[5] involved an unusual fact situation, when the husband died within hours of filing his petition to divorce his wife. During the course of their marriage, the spouses briefly separated, then reconciled and entered into a post-nuptial agreement.[6] The agreement provided that if either spouse filed for divorce, the spouses would only receive certain specified property and each would "release the other from any further claims that each of them may have against the other."[7] When the husband died and the surviving wife filed for year's support, the deceased husband's son objected on the ground that the wife had waived her right in the post-nuptial agreement. Camden County Superior Court granted summary judgment for the son.[8]

The Georgia Court of Appeals reversed, stating that whether the wife knowingly waived her right to year's support was a question of fact and there was no evidence in the record the wife had been aware of her right to claim year's support.[9] This case serves as a reminder of the importance of documenting the fact that both parties to a marital agreement are fully aware of the rights they are waiving, such as the right to claim year's support if the parties are still married when one of them dies.[10]

B. Undue Influence and Will Revocation

In *Milbourne v. Milbourne*,[11] the Georgia Supreme Court affirmed the Gwinnett County Probate Court's refusal to grant summary judgment on the issue of whether the will was the product of undue influence, as well as the probate court's grant of summary judgment on a will revocation issue.[12] The testator, Edison Jamal Milbourne (Edison), suffered a traumatic brain injury in 1999. He was originally cared for at home by his wife, but was later moved to rehabilitation facilities. Ten years after his injury (and one month after his worker's compensation claim of

3. *See, e.g.*, Hiers v. Estate of Hiers, 278 Ga. App. 242, 628 S.E.2d 653 (2006) (upholding prenuptial agreement in which wife agreed to forego any claims against the husband's estate beyond what he bequeathed to her in his will).

4. Hubbard v. Hubbard, 218 Ga. 617, 619, 129 S.E.2d 862, 864 (1963).

5. 340 Ga. App. 744, 798 S.E.2d 330 (2017).

6. *Id.* at 744–45, 798 S.E.2d at 331.

7. *Id.* at 745 n.2, 798 S.E.2d at 331 n.2.

8. *Id.* at 747–48, 798 S.E.2d at 332.

9. *Id.* at 749, 798 S.E.2d at 334.

10. *See id.*

11. 301 Ga. 111, 799 S.E.2d 785 (2017).

12. *Id.* at 120, 799 S.E.2d at 793.

$726,000 was finalized), his sister, Vashti, was appointed his guardian.[13] An attorney was appointed to serve as his conservator.[14] Vashti decided to move Edison out of the facility, and asked the conservator to pay approximately $300,000 so she could buy a three or four-bedroom home for them (in which her daughter and husband would also live), $27,000 to furnish the home, and money to buy a Cadillac Escalade (even though Edison could not drive). Vashti also asked to be paid $30,000 in advance for her services as caregiver.[15]

The probate court appointed a guardian ad litem (GAL) to investigate the demands.[16] The GAL tried to explain to Vashti that Edison's projected life span (about twenty-six years) did not dictate lavish expenditures. The GAL reported Vashti repeatedly told Edison that people were going to put him in "one of those homes" and (in the GAL's opinion) Vashti induced and fed his fear of being in a nursing home. Vashti also told the GAL, "everybody else had gotten paid and it was her turn to get paid."[17] The GAL also opined that Vashti hindered Edison's relationship with his daughter, Janay, with whom he wanted to reestablish ties. When Janay called, Vashti would not let her speak to him. Further, Vashti called the police when Janay visited her father on his birthday. The GAL considered trying to have Vashti removed as Edison's guardian, but did not because Edison was "emotionally dependent" on Vashti.[18]

Soon after Vashti was appointed as his guardian, Edison decided he wanted to create a will. Vashti testified that the conservator refused to have a will created. However, the conservator testified a draft was in fact created, but he was told by Vashti that she had found another lawyer. Vashti drove Edison to see this other lawyer between two and five times. She filled out the information sheet at the beginning of the first visit.

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13. *Id.* at 112, 799 S.E.2d at 788. A guardian for an adult will be appointed by the probate court to handle the adult's personal matters upon a finding that "the adult lacks sufficient capacity to make or communicate significant responsible decisions concerning his or her health or safety." O.C.G.A. § 29-4-1 (2017).

14. *Milbourne*, 301 Ga. at 113, 799 S.E.2d at 788. Attorney John Tomlinson was appointed to serve as Edison's conservator. *Id.* A conservator is appointed by the probate court to handle an adult's property and financial matters upon a finding that "the adult lacks sufficient capacity to make or communicate significant responsible decisions concerning the management of his or her property." O.C.G.A. § 29-5-1 (2017).

15. *Milbourne*, 301 Ga. at 112, 799 S.E.2d at 788.

16. *Id.* "The court in its discretion may at any time appoint a guardian ad litem to represent the interests of a minor, a proposed ward, or a ward in proceedings relating to the guardianship or conservatorship of that individual." O.C.G.A. § 29-9-2(a) (2017). For a discussion of guardians ad litem, see MARY F. RADFORD, GEORGIA GUARDIANSHIP AND CONSERVATORSHIP § 9:2 (2017–18).

17. *Milbourne*, 301 Ga. at 113, 799 S.E.2d at 788.

18. *Id.* at 112–13, 799 S.E.2d at 788.

According to the lawyer's testimony, Vashti remained present during at least one of the meetings and met separately with the lawyer at other times. Vashti paid the lawyer's bills. Edison signed a will in January 2013 (the January will) that devised his property to Vashti with the exception of $50,000 bequests to both Janay and Vashti's daughter, Tiffany. In that will, Janay would take Edison's estate if Vashti predeceased him. Later that year, Edison signed a new will (the October will) that devised all of his property to Vashti, with Tiffany to take should Vashti predecease him.[19]

After Edison died, a jury found the October will was the product of undue influence and also was improperly executed. Following this trial, Tiffany sought to have the January will admitted to probate. Janay filed a caveat claiming undue influence, lack of testamentary capacity, fraud, and the fact that the will had been revoked. The probate court granted summary judgment to Tiffany on all grounds except the ground of undue influence. Tiffany appealed that ruling and Janay appealed the summary judgment on the revocation issue.[20]

On appeal, the supreme court addressed both the undue influence issue and the revocation issue.[21] The court began its discussion of the undue influence with the statement "the question of undue influence is generally for the factfinder."[22] The court noted that a rebuttable presumption of undue influence arises when a beneficiary is (1) in a confidential relationship with the testator; (2) is not a natural object of the testator's bounty; and (3) participates actively in the planning, preparation, or execution of the will.[23] The court then pointed out that while these factors may have been met in this case, the court need not engage in a burden-shifting analysis because a jury could have found undue influence even had the rebuttable presumption not been raised.[24] The court also pointed out Janay presented a wide variety of evidence that could have caused a jury to conclude that undue influence had, in

19. *Id.* at 113–14, 799 S.E.2d at 788–89.

20. *Id.* at 114, 799 S.E.2d at 789.

21. The supreme court first determined whether the probate court had properly considered during the hearing on the January will the GAL's testimony given during the trial of the October will. The supreme court, after determining neither party's arguments to be "completely correct," found that the probate court was acting within its discretion in considering the transcript of the GAL's testimony. *Id.* at 115, 799 S.E.2d at 789. For a discussion of undue influence, see RADFORD, WILLS AND ADMINISTRATION, *supra* note 2, at § 4:8.

22. *Milbourne*, 301 Ga. at 116, 799 S.E.2d at 790.

23. *Id.* at 117, 799 S.E.2d at 791.

24. *Id.*

fact, occurred.[25] The court, without opining on the truthfulness of the evidence, stated that the evidence did create a genuine dispute of material fact.[26] The court noted the evidence raised more than a "mere suspicion" of undue influence.[27]

As to the issue of whether the January will had been revoked, the court examined Janay's contention that Edison told Vashti he no longer wanted the January will and that Vashti, as his guardian, was therefore obliged to destroy the will.[28] A will may be revoked by "any destruction or obliteration of the will done by the testator with an intent to revoke."[29] The court pointed out, however, that Edison's statement he did not want the will, in itself, was not a sufficient revocatory act as required by law.[30] The court also noted the appointment of a guardian for a testator does not provide an exception to the physical act requirement, nor is the appointment determinative of testamentary capacity.[31] Finally, the court stated that the conservator, rather than the guardian, is the appropriate person to act on a ward's estate planning matters, and the guardian cannot do so independently of the conservator.[32]

C. Construction of Wills

Anderson v. Anderson[33] involves the dispute over the estate of Edwin B. "Burt" Anderson Jr. between Burt's three children from his first marriage (Charles, Arthur, and Kimberly Anderson), and Burt's second wife and widow, Donna Anderson. Burt's estate contained a substantial amount of real property, including land that his father, Edwin, bequeathed to him in 1962. Item Six of Edwin's will provided, in pertinent part: "I give, bequeath and devise to my son . . . the land . . . [description follows]. This land [is] to go to the surviving heir or heirs of [Burt] at his death."[34] In 1998, Burt executed a power of attorney naming Charles as his agent and giving him, among other things, the power to

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 118, 799 S.E.2d at 792.

29. O.C.G.A. § 53-4-44 (2017). For a discussion of the revocation of a will by destruction or obliteration, see RADFORD, WILLS AND ADMINISTRATION, *supra* note 2, at § 5:15.

30. *Milbourne*, 301 Ga. at 119, 799 S.E.2d at 792.

31. *Id.* at 119–20, 799 S.E.2d at 792.

32. *Id.* at 120, 799 S.E.2d at 792–93. As discussed in RADFORD, GEORGIA GUARDIANSHIP, *supra* note 16, at § 5:19, O.C.G.A. §§ 29-5-23(c)(10) and 29-5-36 set forth a procedure by which a conservator may request court permission to engage in estate planning for a ward.

33. 299 Ga. 756, 791 S.E.2d 40 (2016).

34. *Id.* at 756–57, 791 S.E.2d at 41.

administer Burt's property holdings. In 2010, Burt's wife died and Burt subsequently married Donna. On June 20, 2013, six days before Burt's death, Charles used his power of attorney to convey a substantial amount of Burt's real property to himself and his siblings.[35] This was not the same property that had been devised to Burt under his father's will.[36] After Burt's death, Donna filed an action to (1) set aside the 2013 conveyances and (2) construe Edwin's will as devising the 1962 land to Burt in fee simple, thus, placing the land in Burt's estate and preventing it from passing directly to his children. The Warren County Superior Court granted Donna's motion for summary judgment on the 2013 conveyances. The trial court construed the will as leaving the land devised to Burt in Item Six as a life estate with a remainder to Burt's children at his death. Burt's children appealed the decision relating to the June conveyances to the Georgia Supreme Court, and Donna filed a cross-appeal on the issue of the 1962 land.[37]

Donna claimed that Charles had no legal right to execute the 2013 deeds conveying the property to himself and his siblings and therefore breached his fiduciary duty to his father.[38] On appeal, Burt's children claimed the trial court erred when it concluded as a matter of law that Charles breached his fiduciary duty to his father. The supreme court noted that while there was evidence Charles acted unilaterally when he executed the deeds, there was also evidence that established Burt expressly directed Charles to execute the deeds.[39] Viewed in favor of Charles as the non-moving party, this evidence supported a finding that Charles acted on his father's express instructions when he executed the June 2013 conveyances.[40] Thus, there was a genuine issue of disputed fact regarding Charles' legal authority to execute the conveyances, and the trial court erroneously disregarded this evidence when it granted Donna's summary judgment motion.[41]

On cross-appeal, Donna challenged the trial court's finding that Edwin's will left the 1962 land to Burt as a life estate, rather than in fee simple.[42] The supreme court construed the provisions of Edwin's will by looking at the four corners of the will "and giving consideration to all of

35. *Id.* at 757, 791 S.E.2d at 41.
36. *Id.* at 757 n.1, 791 S.E.2d at 41 n.1.
37. *Id.* at 757, 791 S.E.2d at 41.
38. *Id.* at 757–58, 791 S.E.2d at 42.
39. *Id.* at 758, 791 S.E.2d at 42.
40. *Id.*
41. *Id.*
42. *Id.* at 759, 791 S.E.2d at 42.

its parts, the paramount objective being to determine his intent."[43] Although the first sentence of Item Six of Edwin's will seemed as though it conveyed to Burt a fee simple interest in the land, the sentence immediately following provided that the same land should go to Burt's heir or heirs upon Burt's death.[44] The supreme court agreed with the trial court that the "definite and certain" language of Item Six created a life estate for Burt with a remainder to Burt's heirs.[45]

D. Beneficiary Designation on Retirement Plans

Regardless of whether an individual executes a will, a variety of transfers of that individual's property may take place at death that are governed by laws other than the laws relating to wills and intestacy. The assets transferred in this way are often referred to as "nonprobate assets,"[46] and are typically transferred through a beneficiary designation made by the owner of an account or insurance policy during the owner's lifetime.[47] The case *Shoenthal v. Shoenthal*[48] illustrates the importance of ensuring that beneficiary designations meet all of the formalities required for the type of account at issue. In this case, Judge Shoenthal, shortly before his death, sought to change the beneficiary designation on his DeKalb County Employees Retirement System account so his daughters, rather than his wife, would share his pension benefits.[49] He filled out the change-of-beneficiary form that he acquired from the pension system board (the Board) and designated his two daughters to share his pension benefits equally. Additionally, he added a handwritten notation on the form that reflected his wishes. He appended a note with the Board's address on the form, but did not deliver or mail the form. Instead, he left it on his desk and continued to work in his office. Two days later, he entered the hospital and died from surgical complications within the week. His daughters found the form the following month and

43. *Id.* (citing Smith v. Ashford, 298 Ga. 390, 393, 782 S.E.2d 251, 253 (2016)).

44. *Id.*

45. *Id.*

46. *See* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1986).

47. Examples include naming a beneficiary on a life insurance policy or retirement plan or naming a "payable on death" designee on a bank account. For a discussion of nonprobate assets, see RADFORD, WILLS & ADMINISTRATION, *supra* note 2, at § 2:4.

48. 337 Ga. App. 515, 788 S.E.2d 116 (2016).

49. *Id.* at 516–17, 788 S.E.2d at 117. Before he died, Judge Shoenthal reduced the beneficiary designation on his employer-provided life insurance policies from 100% for his wife down to 50% and added his two daughters each as beneficiaries of 25% of the proceeds. *Id.* at 516, 788 S.E.2d at 117–18.

hand-delivered it to the Board, but the Board refused to honor the change and began making disbursements to the wife.[50]

The Georgia Court of Appeals affirmed the DeKalb County Superior Court's judgment that Judge Shoenthal had not effectuated the desired change because he had not complied with the proper formalities for changing a beneficiary designation.[51] The court of appeals cited the applicable pension code, which required "written notice to the pension board."[52] The court stated that the notice requirement included the requirement of actual communication with the Board.[53] The fact that the daughters later delivered the form did not meet that requirement because their father had not expressly directed them to do so and there was no evidence they were acting as their father's agent.[54]

E. Adult Guardianship Jurisdiction

Under Georgia law, the general rule is that a petition for the appointment of a guardian for an adult is required to be filed in the probate court of the county in which the proposed ward is domiciled.[55] Domicile is not merely a matter of where one resides; rather, the resident must also have the intent to remain in that place.[56] An individual who is "mentally incompetent" may lack the capacity to form the intent required to change domicile when he or she moves to another place.[57]

In the case *In the Interest of M.P.*,[58] the Georgia Court of Appeals examined whether an individual with autism had the capacity to change his domicile when he moved in with his father in Chatham County, Georgia.[59] This individual spent his youth living with his mother in North Carolina during the school year and lived with his father in Savannah, Georgia during the summers. When he turned age twenty, he refused to return to North Carolina and expressed an "adamant" intent

50. *Id.* at 517, 788 S.E.2d at 118.

51. *Id.* at 518, 788 S.E.2d at 119.

52. *Id.* at 517–18, 788 S.E.2d at 118 (citing PENSION CODE OF DEKALB COUNTY § 908).

53. *Id.* at 519–20, 788 S.E.2d at 119.

54. *Id.* at 520, 788 S.E.2d at 120.

55. O.C.G.A. § 29-4-10(a) (2017). For a discussion of domicile in the context of guardianship petitions, see RADFORD, GEORGIA GUARDIANSHIP, *supra* note 16, at § 1:11. As discussed in Radford, *Wills & Trusts*, *supra* note 1, at 326, in 2016, the Georgia General Assembly supplemented this general rule when it enacted the Uniform Guardianship and Conservatorship Proceedings Jurisdiction Act. The case discussed in this subsection was decided before the effective date of that act.

56. O.C.G.A. § 19-2-1 (2017).

57. Sorrells v. Sorrells, 247 Ga. 9, 12, 274 S.E.2d 314, 317 (1981).

58. 338 Ga. App. 696, 791 S.E.2d 592 (2016).

59. *Id.* at 696–97, 791 S.E.2d at 593–94.

that he wished to reside permanently with his father. The father petitioned for and was granted guardianship of his son. The mother claimed the Chatham County Probate Court lacked personal jurisdiction over the son because he lacked the mental capacity needed to change his domicile from North Carolina to Savannah.[60] When the father filed his guardianship petition, the probate court appointed an individual to act as "attorney/guardian ad litem" for the son.[61] The attorney/guardian ad litem reported to the court that, although the son was not capable of making or communicating significant responsible decisions about his own health and safety,[62] the son was able to articulate not only his decision to remain in Savannah, but also the reasons behind that decision.[63] The court agreed with the probate court that there was sufficient evidence the mental limitations that justified the imposition of the guardianship were not such that the son lacked the capacity to change his domicile.[64] Thus, the probate court properly exercised jurisdiction over the proceeding.[65]

The court also affirmed the appointment of the father as the son's guardian, despite the mother's argument that there was not clear and convincing evidence the father was a suitable guardian.[66] The court pointed out that the clear and convincing evidence standard is applicable not in the choice of a guardian, but rather in the initial decision of whether the proposed ward is in fact in need of a guardian.[67] If it is found that a guardian is needed, the probate court is then obliged to appoint the individual who will best serve the interests of the ward as guardian.[68]

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60. *Id.* at 696, 791 S.E.2d at 593.

61. *Id.* at 696, 791 S.E.2d at 594. The description "attorney/guardian ad litem" is somewhat confusing in this case. Whenever a petition for the guardianship of an adult is filed in Georgia, that adult is entitled to be represented in the proceeding by an attorney. O.C.G.A. § 29-4-11(c)(1)(D) (2017). In addition, the court, on its own motion or the motion of any interested party, may appoint a guardian ad litem to assist in the proceedings. O.C.G.A. § 29-4-11(c)(4) (2017). The guardian ad litem will not be the same person as the proposed ward's attorney. O.C.G.A. § 29-9-3 (2017). Thus, it is unclear from the court's description whether the described individual was acting as the son's attorney or his guardian ad litem. For a description of the different roles of the attorney and the guardian ad litem in a guardianship proceeding, see RADFORD, GEORGIA GUARDIANSHIP, *supra* note 16, at § 4:6.

62. This is the finding that the probate court must make before appointing a guardian for an adult. O.C.G.A. § 29-4-1(a) (2017).

63. *M.P.*, 338 Ga. App. at 700, 791 S.E.2d at 596.

64. *Id.* at 702, 791 S.E.2d at 597.

65. *Id.* at 698, 791 S.E.2d at 594.

66. *Id.* at 702, 791 S.E.2d at 597.

67. *Id.; see* O.C.G.A. § 29-4-12(d)(3) (2017).

68. O.C.G.A. § 29-4-12(d)(6) (2017).

The court noted that in this case, the attorney/guardian ad litem had agreed that appointment of the father would be in the ward's best interests and there was no evidence that the father was unfit to serve as guardian.[69]

F. Arbitration of Wrongful Death Claims

In the course of administering an estate, a personal representative and a decedent's survivors are often faced with the task of pursuing claims against third parties who may have caused the decedent's death in some way. For example, this may occur when the decedent was a resident of a nursing home and the decedent's estate and survivors believe that the nursing home's negligence caused the decedent's death. The survivors may bring actions for both pain and suffering and wrongful death. However, they will often find themselves faced with the fact that the decedent, or someone acting for her, signed an arbitration agreement upon admission to the nursing home.

The effect of such an agreement was examined in 2017 in *United Health Services of Georgia, Inc. v. Norton*.[70] In this case, a patient's agent signed an arbitration agreement under her general power of attorney when she entered the nursing home.[71] The agreement purported to bind Lola (the patient), her representatives, "or any person whose claim is derived through or on behalf of [Lola], including, in addition to those already listed in this Paragraph, any parent, spouse, child, executor, administrator, heir or survivor entitled to bring a wrongful death claim."[72] When Lola died in the nursing home one year later, her spouse brought a claim against the home for, among other things, wrongful death. The nursing home sought to compel arbitration, and the trial court granted its motion. The Stephens County Superior Court found the arbitration agreement to be binding on all parties for all claims, including the wrongful death claim, even though this claim was asserted by a party who had not signed the arbitration agreement.[73]

The Georgia Court of Appeals agreed with the spouse that he was not bound by the arbitration agreement to arbitrate his wrongful death claim.[74] The court noted the spouse conceded that the arbitration

69. *M.P.*, 338 Ga. App. at 703, 791 S.E.2d at 597–98.

70. 300 Ga. 736, 797 S.E.2d 825 (2017), *rev'd,* Norton v. United Health Servs. of Ga., Inc., 336 Ga. App. 51, 783 S.E.2d 437 (2016).

71. *United Health Servs. of Ga., Inc.*, 300 Ga. at 737, 797 S.E.2d at 826.

72. *Id.*

73. *Norton*, 336 Ga. App. at 52, 783 S.E.2d at 439.

74. *Id.* at 53, 783 S.E.2d at 439.

agreement would cover claims brought by Lola's estate,[75] but that a wrongful death claim is a distinct claim that belongs to the survivor and addresses not the injuries suffered by the decedent prior to death, but the injuries suffered by the survivor as a result of the decedent's death.[76] Noting that arbitration is a matter of consent and contract, the court refused to compel arbitration because the spouse had never entered into an arbitration agreement.[77]

The Georgia Supreme Court reversed the court of appeals in a unanimous opinion.[78] The supreme court cited *Southern Bell Telephone & Telegraph Co. v. Cassin*[79] and other older Georgia cases for the proposition that a wrongful death claim is wholly derivative of a decedent's right of action.[80] The supreme court noted these cases repeatedly indicated that settlements and waivers entered into by a decedent during his or her lifetime bound the decedent's beneficiaries even though the beneficiaries did not sign these agreements.[81] The supreme court also pointed out that all defenses that could be made against the decedent would also bind the beneficiaries.[82] As a duty to arbitrate has been recognized as a viable affirmative defense, it logically followed that the decedent's beneficiaries could be compelled to arbitrate the wrongful death claim.[83]

II. GEORGIA LEGISLATION

A. Georgia Power of Attorney Act

Individuals (principals) are authorized in Georgia to appoint agents to perform acts relating to the principal's property that the principal could perform. This appointment is accomplished through a form known as a "durable financial power of attorney."[84] The principal may appoint an agent either to perform specific acts for the principal or to perform

75. *Id.* at 54, 783 S.E.2d at 440.

76. *Id.*

77. *Id.* at 55, 783 S.E.2d at 440–41.

78. *See United Health Servs. of Ga., Inc.*, 300 Ga. at 736, 797 S.E.2d at 825.

79. 111 Ga. 575, 36 S.E.2d 881 (1900).

80. *United Health Servs. of Ga., Inc.*, 300 Ga. at 737–38, 797 S.E.2d at 827.

81. *Id.* at 738, 797 S.E.2d at 827.

82. *Id.*

83. *Id.* at 739, 797 S.E.2d at 828.

84. This power of attorney relates solely to the principal's property and should be distinguished from a power of attorney for health care decisions. Health care powers of attorney and financial powers of attorney are discussed in depth in RADFORD, GEORGIA GUARDIANSHIP, *supra* note 16, at §§ 1:14, 1:22, and 1:23.

basically all of the acts that are necessary to buy, sell, dispose of, and otherwise manage the principal's property.[85]

Prior to 2017, Georgia law contained a statutory form for a financial power of attorney, which was the non-exclusive means of creating a power of attorney in Georgia.[86] This form was replaced in 2017 when the Georgia General Assembly enacted Georgia's version[87] of the Uniform Power of Attorney Act (UPOAA)–the Georgia Power of Attorney Act (GPOAA).[88]

The GPOAA contains a list of standard powers that may be granted using the statutory power of attorney form. The breadth of each of these powers is described in detail in sections 10-6B-43 through 10-6B-56 of the Official Code of Georgia Annotated (O.C.G.A.).[89] The statutory form itself merely contains a list of descriptive terms of these powers. The powers relate to:

Real Property.[90]
Tangible Personal Property.[91]
Stocks and Bonds.[92]
Commodities and Options.[93]
Banks and Other Financial Institutions.[94]
Operation of an Entity or Business.[95]
Insurance and Annuities.[96]

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85. Generally, an agent under a power of attorney may not use the power of attorney to perform acts that are contrary to the principal's wishes nor to benefit the agent herself. *See* Bradshaw v. McNeill, 228 Ga. App. 653, 492 S.E.2d 568 (1997); Harris v. Peterson, 318 Ga. App. 382, 734 S.E.2d 93 (2012). However, as noted later in this section, the newly-enacted Georgia Power of Attorney Act (GPOAA) allows an agent to use a power to benefit herself under certain circumstances.

86. This form appeared in article 7 of chapter 6 of title 10 at former O.C.G.A. § 10-6-142 (2010). The newly added O.C.G.A. § 10-6B-6(b) provides that the 2017 GPOAA "shall not affect a power of attorney executed prior to July 1, 2017." O.C.G.A. § 10-6B-6(b) (2017).

87. Ga. H.R. Bill 221, Reg. Sess., 2017 Ga. Laws 106 (codified as amended at O.C.G.A. §§ 10-6B-1–23, 10-6B-40–56, 10-6B-70–71, 10-6B-80–81, 10-6-7, 16-8-10, and 16-5-105). The bill was signed by Governor on May 8, 2017, and became effective July on 1, 2017. The GPOAA adds Chapter 6B to Title 10 of the Georgia Code. The GPOAA is discussed at length in RADFORD, GEORGIA GUARDIANSHIP, *supra* note 16, at § 1:23.

88. UNIF. POWER OF ATT'Y ACT (NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 2006).

89. O.C.G.A. § 10-6B-43–56 (2017).

90. *See* O.C.G.A. § 10-6B-43.

91. *See* O.C.G.A. § 10-6B-44.

92. *See* O.C.G.A. § 10-6B-45.

93. *See* O.C.G.A. § 10-6B-46.

94. *See* O.C.G.A. § 10-6B-47.

95. *See* O.C.G.A. § 10-6B-48.

96. *See* O.C.G.A. § 10-6B-49.

Estates, Trusts, and Other Beneficial Interests.[97]
Claims and Litigation. [98]
Personal and Family Maintenance. [99]
Benefits from Governmental Programs or Civil or Military Service. [100]
Retirement Plans. [101]

There are certain powers (sometimes referred to as hot powers)[102] that mandate stricter requirements in that these powers would generally allow the agent to deplete the principal's estate without receiving any consideration in return.[103] The principal must expressly grant authority to an agent under a power of attorney to engage in any of these actions.[104] The "hot powers" include the power to:

> [make,] (1) create, amend, revoke, or terminate an inter vivos trust; (2) make a gift; (3) create or change rights of survivorship; (4) create or change a beneficiary designation; (5) delegate authority granted under the power of attorney; (6) waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan; (7) exercise fiduciary powers that the principal has authority to delegate; (8) exercise authority over the content of electronic communications . . . ; or (9) disclaim property including a power of appointment.[105]

Generally,

> an agent that is not an ancestor, spouse, or descendant of the principal, shall not exercise authority under a power of attorney to create in the agent, or in an individual to whom the agent owes a legal obligation of

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97. *See* O.C.G.A. § 10-6B-50.

98. *See* O.C.G.A. § 10-6B-51.

99. *See* O.C.G.A. § 10-6B-52. This authority allows the agent to provide not only for the principal, but also the principal's spouse, minor children, adult children under age twenty-five who are pursuing postsecondary education, the principal's or the principal's spouse's parents (if a pattern of such support had been established), and others who are legally entitled to be supported by the principal. O.C.G.A. § 10-6B-52(a)(1)(A)–(D).

100. *See* O.C.G.A. § 10-6B-53.

101. *See* O.C.G.A. § 10-6B-54.

102. *See, e.g.*, Andrew Hook & Lisa Johnson, *The Uniform Power of Attorney Act*, 45 REAL PROP. TR. & EST. L.J. 283, 308 (2010).

103. *See id.*

104. *Id.*

105. O.C.G.A. § 10-6B-40(a) (2017). Unless the power of attorney provides otherwise, the power to make a gift is further limited in O.C.G.A. § 10-6B-56. *See* O.C.G.A. § 10-6B-56.

> support, an interest in the principal's property, whether by gift, right of survivorship, beneficiary designation, disclaimer, or otherwise.[106]

The GPOAA sets out explicit requirements for the execution of the power of attorney.[107] A power of attorney is valid if signed by the principal and attested by at least one witness and a notary public who is not a witness.[108] All signatures and attestations must be made in the presence of all parties.[109]

Generally, a power of attorney is effective on the date that it is executed.[110] However, the principal may state in the power of attorney that the power becomes effective on a specific future date "or upon the occurrence of [an] event or contingency."[111]

The GPOAA codifies judicial intervention when there is a suspected abuse of the power by the agent.[112] O.C.G.A. § 10-6B-16[113] allows the following people to petition a court to interpret a power of attorney or to review an agent's conduct: "(1) the principal or the agent; (2) a guardian, conservator or other fiduciary acting for the principal; (3) a person authorized to make health care decisions for the principal; (4) the principal's spouse, parent or descendant; (5) an individual who would qualify as the principal's presumptive heir[;]" a named beneficiary of the principal's trust or estate; "(7) a governmental agency having authority to protect the welfare of the principal welfare; (8) the principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare; and (9) a person asked to accept the power of attorney."[114]

The GPOAA introduces acceptance requirements that are triggered if the power of attorney is a "statutory form power of attorney."[115] That term is defined as a power of attorney that follows the form set forth in the GPOAA, "[a] military power of attorney pursuant to 10 U.S.C. § 1044b," or "a document that substantially reflects the language in the

106. O.C.G.A. § 10-6B-40(b) (2017). The power of attorney may expressly override this general rule. *Id.*

107. O.C.G.A. § 10-6B-5 (2017).

108. O.C.G.A. § 10-6B-5(a)(2), (3) (2017).

109. O.C.G.A. § 10-6B-5(b) (2017).

110. O.C.G.A. § 10-6B-9(a) (2017).

111. *Id.* A power of attorney that does not become effective until the occurrence of an event or contingency is referred to as a "conditional" power of attorney. O.C.G.A. § 10-6-6 (2017).

112. O.C.G.A. § 10-6B-16 (2017).

113. O.C.G.A. § 10-6B-16(a) (2017).

114. *Id.*

115. O.C.G.A. § 10-6B-20 (2017).

form set forth in Code Section 10-6B-70, so long as it is witnessed as required by Code Section 10-6B-5."[116]

In lieu of immediately accepting a power of attorney, a person who is asked to accept a statutory form power of attorney may request and rely upon the following without further investigation: an agent's or co-agent's "certification under penalty of perjury of any factual matter concerning the principal, [the] agent, or the power of attorney[;] . . . [a]n English translation of the power of attorney[;]"[117] or an attorney's "opinion as to any matter of law concerning the power of attorney."[118] However, an English translation or opinion of an attorney must be provided at the principal's expense unless the request is made more than seven business days after the power of attorney is presented for acceptance.[119] If a person requests a certification, translation, or an opinion of an attorney, the power of attorney must be accepted within five business days after receipt of the certification, translation, or opinion.[120]

Under the GPOAA, a person is not required to accept a statutory form power of attorney if:

> (1) the person is not otherwise required to engage in a transaction with the principal in the same circumstances; (2) engaging in a transaction with the agent or the principal in the same circumstances would be inconsistent with federal law; (3) the person has actual knowledge of the termination of the agent's authority or of the power of attorney before exercise of the power; (4) a request for a certification, a translation, or an opinion of an attorney . . . is refused; the person in good faith believes the power is not valid . . . ; or (6) the person makes, or has actual knowledge that another person has made, a report to protective services . . . stating a good faith belief that the principal may be subject to physical or financial abuse, [or] neglect . . . A person that refuses to accept a power of attorney in violation of [the rules described above is] subject to a court order mandating acceptance of the power of attorney; and liability for reasonable attorney's fees and expenses . . . incurred in any action or proceeding that confirms the validity of the power.[121]

116. O.C.G.A. § 10-6B-20(a) (2017).

117. O.C.G.A. § 10-6B-19(c), (d) (2017). An optional certification form is included in the GPOAA. O.C.G.A. § 10-6B-71 (2017).

118. O.C.G.A. § 10-6B-19(d).

119. *Id.*

120. O.C.G.A. § 10-6B-20(b)(2) (2017).

121. O.C.G.A. § 10-6B-20(c), (d) (2017).