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Mary F. Radford

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Wills, Trusts, Guardianships, and Fiduciary Administration

by Mary F. Radford*

This Article describes selected cases and significant legislation from the period of June 1, 2018 through May 31, 2019 that pertain to Georgia fiduciary law and estate planning.¹

I. GEORGIA CASES

A. *Setting Aside Probate*

In *In re Estate of Jones*,² the Georgia Court of Appeals interpreted the interplay between provisions of the Georgia Probate Code³ and the Georgia Civil Practice Act⁴ so as to allow individuals who have not been notified of a petition to probate a will in solemn form the ability to petition later to have the probate set aside.⁵ The 2013 will of Robert Ellsworth Jones, Jr. was admitted to probate in solemn form. Swygert, who was Mr. Jones' stepson, filed a petition to set aside the probate of

*Marjorie Fine Knowles Professor of Fiduciary Law, Georgia State University College of Law. Newcomb College of Tulane University (B.A., 1974); Emory University (J.D., 1981). Member, State Bar of Georgia. Reporter, Probate Code Revision Committee, Guardianship Code Revision Committee, Trust Code Revision Committee of the Fiduciary Section of the State Bar of Georgia. Past President, American College of Trust and Estate Counsel (ACTEC). Author, *GEORGIA GUARDIANSHIPS AND CONSERVATORSHIPS* (West, 2019–2020 ed.); *REDFEARN: WILLS AND ADMINISTRATION IN GEORGIA* (West, 2019–2020 ed.); *GEORGIA TRUSTS & TRUSTEES* (West, 2019–2020 ed.). The Author is grateful to Georgia State University College of Law students Laura Shoop and Daylan Green for their valuable research assistance.

1. For an analysis of wills and trusts during the prior survey period, see Mary F. Radford, *Wills, Trusts, Guardianships, and Fiduciary Administration, Annual Survey of Georgia Law*, 70 *MERCER L. REV.* 275 (2018).

2. 346 Ga. App. 877, 815 S.E.2d 599 (2018).

3. O.C.G.A. §§ 53-5-50–53-5-51 (2019).

4. O.C.G.A. § 9-11-1–9-11-133 (2019).

5. *In re Jones*, 346 Ga. App. at 878, 815 S.E.2d at 599.

the 2013 will along with a petition to probate an earlier will instead.⁶ Swygert claimed that Mr. Jones had lacked testamentary capacity and had been unduly influenced to make the 2013 will, of which Swygert was not a beneficiary. The probate court denied Swygert's attempt to set aside the 2013 will and have the earlier will admitted to probate.⁷ The two sets of statutes that the probate court applied were O.C.G.A. §§ 53-5-50 and 53-5-51 (which appear in the Georgia Probate Code) and O.C.G.A. § 9-11-60 (which appears in the Georgia Civil Practice Act).⁸ O.C.G.A. § 53-5-50(a)⁹ provides in part: "The probate court shall have original jurisdiction over any action to vacate, set aside, or amend its order admitting a will to probate which alleges: (1) That another will is entitled to be admitted to probate."¹⁰ O.C.G.A. § 53-5-50(b)¹¹ requires that any such action be accompanied by a petition to probate the other will in solemn form.¹² O.C.G.A. § 53-5-51 sets forth the procedure (service, notice, etc.) for such actions.¹³ O.C.G.A. § 9-11-60(d)¹⁴ provides:

(d) Motion to set aside. A motion to set aside may be brought to set aside a judgment based upon: (1) Lack of jurisdiction over the person or the subject matter; (2) Fraud, accident, or mistake or the acts of the adverse party unmixed with the negligence or fault of the movant; or (3) A nonamendable defect which appears upon the face of the record or pleadings. Under this paragraph, it is not sufficient that the complaint or other pleading fails to state a claim upon which relief can be granted, but the pleadings must affirmatively show no claim in fact existed.¹⁵

The probate court stated that the reason it denied Swygert's motion was that he had not set out any of the grounds for a set-aside that are listed in O.C.G.A. § 9-11-60(d) and that no separate basis exists for

6. *Id.* at 877–78, 815 S.E.2d at 599. After a will has been admitted to probate in solemn form, it is conclusive upon all parties notified and beneficiaries of the will. O.C.G.A. § 53-5-20 (2019). Originally, Swygert sought to have a 2004 will admitted to probate. Later in the proceeding, he replaced that petition with a petition to have a copy of a 2005 will admitted to probate. *Id.* at 879, 815 S.E.2d at 600.

7. *Id.*

8. *Id.* at 880, 815 S.E.2d at 601. Georgia probate courts, as "courts of record," are subject to the Georgia Civil Practice Act. O.C.G.A. § 9-11-1 (2019); *Greene v. Woodard*, 198 Ga. App. 427, 428, 401 S.E.2d 617, 618 (1991).

9. O.C.G.A. § 53-5-50(a) (2019).

10. O.C.G.A. § 53-5-50(a)(1) (2019).

11. O.C.G.A. § 53-5-50(b) (2019).

12. *Id.*

13. O.C.G.A. § 53-5-51 (2019).

14. O.C.G.A. § 9-11-60(d) (2019).

15. *Id.*

obtaining relief under O.C.G.A. § 53-5-50.¹⁶ The court of appeals disagreed with the probate court.¹⁷ The court of appeals observed that the “[p]rovisions of [the Civil Practice Act, such as OCGA § 9-11-60] apply . . . unless there are special rules of practice or procedure which are conflicting and have been expressly prescribed by law.”¹⁸ The court of appeals then declared that the “proceedings for the probate of a will are special proceedings.”¹⁹ The court of appeals stated that the plain language of the Probate Code provisions (O.C.G.A. §§ 53-5-50 and 53-5-51) set forth a procedure for setting aside the probate of a will that is broader than the procedure set forth in the Civil Practice Act and that the “constraints” of the “more restrictive” O.C.G.A. § 9-11-60 thus do not apply in a procedure to set aside the probate of a will.²⁰ The court of appeals also concluded that Swygert was not precluded from filing his set-aside petition because, as he was neither an heir nor a beneficiary nor a person who was otherwise required to be notified of the petition to probate the will, he had not received notice of the petition to probate.²¹ For this conclusion, the court of appeals cited O.C.G.A. § 53-5-20,²² which states that a probate in solemn form is conclusive “upon all parties notified and upon all beneficiaries under the will who are represented by the executor.”²³ The court of appeals reversed the probate court’s ruling on the set-aside petition and remanded that case to the probate court for the court “to consider the petition’s merits.”²⁴ A petition for reconsideration was denied by the court of appeals on July 13, 2018, and the Georgia Supreme Court denied the petition for certiorari on April 29, 2019.²⁵

The ruling in this case creates a troubling anomaly in Georgia probate law. Under the Georgia Probate Code, the only persons who are required to receive notice when a petition to probate a will in solemn form²⁶ is filed are the heirs of the testator and, if there is another will

16. *In re Jones*, 346 Ga. App. at 879, 815 S.E.2d at 600.

17. *Id.*

18. *Id.* at 881, 815 S.E.2d at 601 (quoting *Greene*, 198 Ga. App. at 428, 401 S.E.2d at 618 and O.C.G.A. § 9-11-81 (2007)).

19. *Id.*

20. *Id.*

21. *Id.* at 881, 815 S.E.2d at 602.

22. O.C.G.A. § 53-5-20 (2019).

23. *Id.*; *In re Jones*, 346 Ga. App. at 881, 815 S.E.2d at 602.

24. *In re Jones*, 346 Ga. App. at 881, 815 S.E.2d at 601–02.

25. *Id.* at 877, 815 S.E.2d at 599; *In re Estate of Jones*, No. S18C1620, 2019 Ga. LEXIS 292 (Apr. 29, 2019).

26. Alternatively, a will may be admitted to probate in common form without anyone receiving notification. O.C.G.A. § 53-5-17(a) (2019). However, this type of probate is not

that is purported to be the will of the testator and for which probate proceedings have begun in this state, the beneficiaries and propounders of that will.²⁷ The notice gives these persons the opportunity to raise challenges to the probate. If they do not take the opportunity to raise challenges, then the will is admitted to probate in solemn form and is conclusive immediately.²⁸ The ruling in the *Jones* case would effectively allow anyone else (other than the parties who were required to be notified) to move to have the probate set aside in favor of another purported will of the testator for a period of at least five years after the personal representative under the probated will was appointed.²⁹ This leaves personal representatives under wills that are probated in solemn form in the unwieldy position of being unable to administer the estate with certainty until the period for filing motions to set aside has run. Hopefully, next year's report in the Recent Developments issue of the Mercer Law Review will include a description of legislation that has been enacted to remedy this situation.

B. Exoneration

Exoneration is a common law doctrine that provides that, unless the will states otherwise, when a person is devised a specific testamentary gift of real property by will and there is a lien or encumbrance on the property that is the subject of that gift, the encumbrance will be paid with proceeds from the estate and the devisee of the specific gift will receive the property free and clear of any encumbrances.³⁰ As noted in 2009 by the Georgia Supreme Court, that doctrine has been abrogated in England and by the majority of U.S. states as well as by the Uniform Probate Code.³¹ In its 2019 decision in *Woods v. Stonecipher*,³² the

conclusive on any party in interest until four years from the time of probate. O.C.G.A. § 53-5-19 (2019).

27. O.C.G.A. § 53-5-22(a) (2019).

28. O.C.G.A. §§ 53-5-20–53-5-21 (2019).

29. O.C.G.A. § 53-5-3 (2019) provides that a will cannot be offered for probate beyond the period of five years from when a personal representative is appointed for the estate or an order is entered that no administration is necessary on the estate. If no personal representative has been appointed nor has an order for no administration necessary been issued, the five-year limit would not apply.

30. *Woods v. Stonecipher*, 349 Ga. App. 698, 702, 824 S.E.2d 633, 638 (2019).

31. *Manders v. King*, 284 Ga. 338, 339 n.1, 667 S.E.2d 59, 60 n.1 (2008), discussed in Mary F. Radford, *Wills, Trusts, Guardianships, and Fiduciary Administration*, *Annual Survey of Georgia Law*, 61 MERCER L. REV. 385, 388–89 (2009). Section 2-607 of the Uniform Probate Code, entitled “Nonexoneration” provides: “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.” UNIF. PROBATE CODE § 2-607 (UNIF. LAW COMM’N 2018).

Georgia Court of Appeals indicated that Georgia is one of the few states that still adheres to this doctrine.³³ However, as will be discussed herein, there is a slight twist to the application of the doctrine when the property in question is acquired not by will or intestacy but through the death of a joint tenant in a joint tenancy with right of survivorship.

In 2010, Charlotte Blalock, whose health was declining, asked her granddaughter, Amber Stonecipher, to move into her home and care for her. Blalock had raised Stonecipher from a young age, and the two had a mother–daughter relationship. Stonecipher agreed and became Blalock’s caregiver, performing such services as accompanying her to medical appointments and doing her housework. Later that year, Blalock told Stonecipher that she wanted to update her will. Stonecipher hired an attorney, and on November 30, 2010, Blalock signed a new will that named Stonecipher as the executor and residuary legatee of her estate as well as the devisee of Blalock’s residence.³⁴

Despite the fact that her will devised her residence to Stonecipher, it later became evident that Blalock and her daughter (Stonecipher’s aunt), Nancy Woods, already shared a joint tenancy with right of survivorship in that same residence.³⁵

If property is held by two or more individuals as joint tenants with right of survivorship, upon the death of one owner, that owner’s right in the property is extinguished and the property belongs to the surviving joint tenant or tenants, regardless of any attempt by the deceased owner to devise the property by will and regardless of the intestacy laws that apply to the deceased owner’s estate.³⁶

Thus, after Blalock died, Woods automatically became the owner of Blalock’s residence due to the joint tenancy with right of survivorship.³⁷ Although the common law doctrine of exoneration applies to property that passes through a will, the doctrine is not necessarily applicable if property that is held as joint tenants with right of survivorship is encumbered.³⁸ Instead, “a surviving joint tenant does not qualify for exoneration of a mortgage on joint tenancy property unless there is

32. 349 Ga. App. at 702, 824 S.E.2d at 638.

33. *Id.*

34. *Id.* at 698–99, 824 S.E.2d at 635.

35. *Id.* at 698, 824 S.E.2d at 635.

36. MARY F. RADFORD, REDFEARN: WILLS AND ADMINISTRATION IN GEORGIA, § 2:3(B) (2018–2019 ed.).

37. *Woods*, 349 Ga. App. at 702, 824 S.E.2d at 637–38.

38. *Id.* at 702–03, 824 S.E.2d at 638.

language in the decedent's will clearly expressing an intention that the mortgage debt be paid."³⁹

When Stonecipher filed a petition to probate the will, Woods filed a caveat claiming that the 2010 will was invalid because (1) Blalock lacked testamentary capacity and (2) the will was signed under duress or undue influence. She also argued that Blalock's estate was liable for the outstanding mortgage on Blalock's residence, because during Blalock's life, Blalock alone, not Woods, had been liable for the mortgage.⁴⁰ On appeal from probate court rulings, the superior court⁴¹ upheld the 2010 will and did not require Blalock's estate to pay the debt on the residence. Woods appealed.⁴² The Georgia Court of Appeals, for reasons set forth in detail in the case (but not described in this Article), did not overrule the superior court's findings on the validity of the will.⁴³

On the exoneration issue, on the other hand, the court of appeals reversed the superior court's ruling that Blalock's estate was not responsible for paying the outstanding mortgage on Blalock's residence.⁴⁴ The court cited the common law doctrine of exoneration but emphasized that the surviving tenant of a joint tenancy with right of survivorship may only seek for the estate to satisfy outstanding liens on the property if the will expressly stated that the decedent intended for the estate to pay the debt.⁴⁵ Here, the mortgage encumbered Woods's interest in the property because her name was with Blalock's on the deed to secure debt, but Blalock alone was liable for the loan. Blalock's will expressly directed that all her debts "be paid out of the Residuary Estate" and not charged to "any recipient or joint-owner of any property passing outside this will."⁴⁶ Because the will clearly expressed Blalock's intent for her estate (rather than any joint owner) to be responsible for her debts, the court of appeals held that Blalock's estate was liable for the outstanding mortgage.⁴⁷ Thus, while Stonecipher remained the

39. *Manders*, 284 Ga. at 340, 667 S.E.2d at 60 (quoting *Cook v. Phillip (In re Estate of Young)*, No. A-96-423, 1997 Neb. Ct. App. LEXIS 105, at *5 (July 1, 1997); *In re Estate of Dolley*, 71 Cal. Rptr. 56, 61-62 (1968)).

40. *Woods*, 349 Ga. App. at 701-02, 824 S.E.2d at 637-38.

41. For a discussion of which probate courts' rulings must be appealed to the superior courts rather than directly to the Georgia appellate courts, see MARY F. RADFORD, REDFEARN: WILLS AND ADMINISTRATION IN GEORGIA, §§ 6:5-6:7 (2018-2019 ed.).

42. *Woods*, 349 Ga. App. at 698, 824 S.E.2d at 635.

43. *Id.*

44. *Id.* at 702, 824 S.E.2d at 637.

45. *Id.* at 702, 824 S.E.2d at 638 (citing *Manders*, 284 Ga. at 339, 667 S.E.2d at 60).

46. *Id.* at 702-03, 824 S.E.2d at 638.

47. *Id.* at 703, 824 S.E.2d at 638.

beneficiary of Blalock's estate, that estate was forced to pay off the mortgage on the property that belonged to Woods by virtue of her joint tenancy ownership.⁴⁸

It is important to note the distinction between the language used in the Blalock will and the language used in the will that was at issue in *Manders v. King*,⁴⁹ a 2008 Georgia Supreme Court case that also addressed the question of exoneration in the context of a joint tenancy with right of survivorship. In the *Manders* case, the testator's will included the boilerplate language that appears in many wills directing that "all [her] just debts [should] be paid without unnecessary delay."⁵⁰ The supreme court held that this language alone was "not a clear expression of the testatrix's intent that the estate pay the note secured by the deed to secure debt on the property received by Mr. Manders."⁵¹ However, in the *Woods* case, the will contained not only the directive to pay her debts out of the residue but, in addition, the express order that these debts were not to be paid by a "joint-owner of any property passing outside the will."⁵² This language, according to the court of appeals, "clearly expresses the intent" that the doctrine of exoneration should be applied.⁵³ The Author is often intrigued when the appellate courts opine that lay persons "clearly" understood and intended the legal effect of the words in their wills and suspects that, for most testators, these words are not words of "intent" but rather words that were placed in the will by the lawyer who drafted it. Nevertheless, this close reading by the courts of words of this type indicates that it is incumbent upon practitioners to parse the words of their documents carefully (rather than copying them from forms) and discuss with their clients the legal ramifications of all of the words and phrases used in the will.

C. Trustee's Warranties

Among the powers that are granted by statute to all trustees in Georgia is the power "to sell, exchange, grant options upon, partition, or otherwise dispose of any property or interest therein which the fiduciary may hold from time to time, at public or private sale or otherwise, with or without warranties or representations"⁵⁴

48. *Id.*

49. 284 Ga. 338, 667 S.E.2d 59 (2008).

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

51. *Id.*

52. *Woods*, 349 Ga. App. at 703, 824 S.E.2d at 638.

53. *Id.*

54. O.C.G.A. § 53-12-261(b)(1) (2019).

Trustees who sell property that is owned by the trust are sometimes asked to give warranties as to the past use of the property, even if the property has not been in the trustee's possession for an extended period of time.⁵⁵ The 2018 case of *Rivers v. Revington Glen Investments, LLC*⁵⁶ illustrates how important it is for the trustee to limit those warranties to only those facts and circumstances of which the trustee has actual knowledge. In this case, Rivers, as Trustee of the Rivers Family Trust, sold certain real property to Revington. There had been two prior owners of the property prior to its acquisition by the Trust.⁵⁷ Rivers said that "he had 'never walked the property' before agreeing" to the sale to Revington.⁵⁸ In the sales contract, Rivers, as Seller, warranted that

Seller has at all times complied with, and has not violated in connection with the ownership, use, maintenance or operation of the Property and the conduct of the business related thereto, any applicable federal, state, county or local laws, regulations, rules, ordinances, codes, standards, orders, licenses and permits of any governmental authorities relating to environmental matters.⁵⁹

Rivers also represented that "to its knowledge and belief" there were no hazardous substances on the property.⁶⁰ After the sale, Revington discovered that many old tires and other debris had been buried on the property. Revington claimed that Rivers had violated the contract (even though Revington admitted that Rivers had not known of the tires and had not put them on the property).⁶¹ After a bench trial, the trial court granted Revington summary judgment.⁶² The court of appeals reversed the trial court's order.⁶³ The court of appeals looked to the plain meaning of the words of the contract and also noted that Revington's own argument on appeal made it clear that the trial court had incorrectly read those words.⁶⁴ The court of appeals noted that the contract did not contain a broad warranty that the property had not

55. See *Rivers v. Revington Glen Invs., LLC*, 346 Ga. App. 440, 816 S.E.2d 406 (2018).

56. *Id.*

57. *Id.* at 441, 816 S.E.2d at 407.

58. *Id.*

59. *Id.* at 441, 816 S.E.2d at 407–08.

60. *Id.*

61. *Id.* at 442, 816 S.E.2d at 408.

62. *Id.*

63. *Id.* at 443, 816 S.E.2d at 409.

64. *Id.* at 442, 816 S.E.2d at 408.

been used or maintained in any way that violated any environmental laws.⁶⁵

Instead, the contract plainly stated that the Seller (the Trust) itself had not taken any action on the property that would violate the law.⁶⁶ This warranty plainly did not extend to any actions taken by prior owners.⁶⁷ In fact, according to the court of appeals, “[h]ad Revington wished for such a warranty, it should have demanded such a provision.”⁶⁸ The court of appeals also noted that the Trustee had only warranted “to its knowledge and belief” that there were no hazardous substances on the property.⁶⁹ Additionally, Revington itself had acknowledged that the Trustee did not know of nor had caused the environmental hazard.⁷⁰

D. Payment of Guardian ad Litem Fees in Guardianship Cases

The 2019 case of *In re Estate of Wertzer*⁷¹ illustrates the confusion that has surrounded the award and allocation of expenses, costs, and fees in guardianship cases. The legislation that is discussed in Section II(A) below, which becomes effective on January 1, 2020, will hopefully resolve many of these issues and save parties, lawyers, and courts the time and expense involved in bringing these cases to fruition.

Grace and Saul Wertzer were the divorced parents of Sierra, their incapacitated adult daughter. In December 2013, when Sierra turned 18, Grace sought and obtained guardianship of Sierra. The order gave Saul supervised visitation rights and Grace appealed, claiming Saul should have no rights to visitation.⁷² Grace did not prevail.⁷³ After Grace’s case was resolved, Saul petitioned to modify the guardianship in February 2016, asking for complete removal of the requirement that

65. *Id.* at 443, 816 S.E.2d at 408.

66. *Id.* at 442, 816 S.E.2d at 408.

67. *Id.* at 442–43, 816 S.E.2d at 408.

68. *Id.* at 443, 816 S.E.2d at 408.

69. *Id.* at 443, 816 S.E.2d at 408–09.

70. *Id.* at 443, 816 S.E.2d at 409.

71. 349 Ga. App. 303, 826 S.E.2d 168 (2019) (hereinafter *Wertzer III*). Other issues in this contentious guardianship case have already been addressed by the Georgia Court of Appeals in *In re Estate of Wertzer*, 330 Ga. App. 294, 765 S.E.2d 425 (2014) (hereinafter *Wertzer I*) (discussed in Mary F. Radford, *Wills, Trusts, Guardianships, and Fiduciary Administration, Annual Survey of Georgia Law*, 67 MERCER L. REV. 273, 281 (2015)) and in *In re Estate of Wertzer*, No. A17A1223 (Ga. App. Oct. 27, 2017) (hereinafter *Wertzer II*) (unpublished).

72. *Wertzer I*, 330 Ga. App. at 294–96, 765 S.E.2d at 426–28.

73. *Id.* at 301, 765 S.E.2d at 431.

his visits with Sierra be supervised.⁷⁴ The probate court granted Saul's petition, finding that Sierra should be allowed to communicate freely and privately with Saul and should be given the least restrictive form of guardianship. Grace appealed, claiming the probate court erred by (1) granting Saul's request for a protective order against discovery of his finances; (2) modifying the guardianship because there had been no significant change in circumstances; and (3) requiring that she split the costs of Sierra's guardian ad litem.⁷⁵

The court of appeals disagreed on her first two claims and determined there was no reversible error in the probate court's ruling; however, it determined her third claim was meritorious.⁷⁶ The court of appeals vacated the litigation award and remanded the case to the probate court with direction for further proceedings.⁷⁷ The probate court then found that the fees paid to the court-appointed attorney for Sierra in the earlier case should be allocated to Sierra's estate, as the attorney's services solely benefitted Sierra as ward.⁷⁸ However, the probate court divided responsibility for the guardian ad litem's fees equally among Sierra, her mother, and her father, reasoning that these were a "reasonable and necessary expense of litigation in which all parties sought relief and/or benefitted from the appointment of the guardian ad litem."⁷⁹ Grace appealed and the court of appeals reversed the probate court's finding, holding that the costs of the guardian ad litem should not be assessed against the mother.⁸⁰ The probate court had characterized the guardian ad litem fees as an "expense of litigation."⁸¹ Grace, on appeal, insisted that the guardian ad litem fees were in fact "attorney's fees."⁸² The court of appeals concluded that they were neither but instead classified the guardian ad litem fees as a "cost of litigation."⁸³ The court of appeals cited case law decided under the pre-2005 Georgia Guardianship Code, as well as cases that dealt with the treatment of guardian ad litem fees in divorce and child custody cases.⁸⁴ The court of appeals then pointed out that "costs" of litigation

74. *Wertzer III*, 349 Ga. App. at 307 n.7, 826 S.E.2d at 171 n.7.

75. *See id.* at 303, 826 S.E.2d at 169 (citing *Wertzer II*, No. A17A1223 (Ga. App. Oct. 27, 2017) (unpublished)).

76. *Id.* at 304, 826 S.E.2d at 169.

77. *Id.* at 303, 826 S.E.2d at 169.

78. *Id.* at 303-04, 826 S.E.2d at 169.

79. *Id.* at 304, 826 S.E.2d at 169.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Wertzer III*, 349 Ga. App. at 305 n.3, 826 S.E.2d at 170 n.3.

may not be awarded unless authorized by statute or contract.⁸⁵ The court of appeals examined Georgia guardianship statutes and held that nothing in them allowed for the award of costs.⁸⁶ The court of appeals then evaluated whether O.C.G.A. § 9-11-54⁸⁷ allowed such an award.⁸⁸ O.C.G.A. § 9-11-54(d)⁸⁹ provides that costs in a civil action “shall be allowed as a matter of course to the prevailing party unless the court otherwise directs.”⁹⁰ But the court of appeals noted that a “guardianship proceeding is not an adversary proceeding and [thus] there is no prevailing party.”⁹¹ Thus, the court of appeals concluded that the probate court had erred in assessing a portion of the guardian ad litem fees against Grace.⁹² The court of appeals also examined the wording of O.C.G.A. § 29-4-22(c),⁹³ which limits a guardian’s personal liability as follows:

[a] guardian, solely by reason of the guardian–ward relationship, is not personally liable for: (1) The ward’s expenses or the expenses of those persons who are entitled to be supported by the ward; (2) Contracts entered into in the guardian’s fiduciary capacity; (3) The acts or omissions of the ward; (4) Obligations arising from ownership or control of property of the ward; or (5) Other acts or omissions occurring in the course of the guardianship.⁹⁴

The court of appeals recognized that this statute did not mention costs but noted that “the fact that the General Assembly decided that the guardian of a ward cannot be liable for certain things does not compel the conclusion that guardians are therefore liable for costs of litigation.”⁹⁵

85. *Id.* at 305, 826 S.E.2d at 170.

86. *Id.* at 308, 826 S.E.2d at 172.

87. O.C.G.A. § 9-11-54 (2019).

88. *Wertzer III*, 349 Ga. App. at 308, 826 S.E.2d at 172.

89. O.C.G.A. § 9-11-54(d) (2019).

90. *Id.*

91. *Wertzer III*, 349 Ga. App. at 308, 826 S.E.2d at 172.

92. *Id.* at 308–09, 826 S.E.2d at 172.

93. O.C.G.A. § 29-4-22(c) (2019).

94. *Id.*; *Wertzer III*, 349 Ga. App. at 308, 826 S.E.2d at 172.

95. *Wertzer III*, 349 Ga. App. at 308, 826 S.E.2d at 172.

II. GEORGIA LEGISLATION

A. Revisions to the Georgia Guardianship & Conservatorship Code

In 2019, the Georgia legislature revised Title 29 of the Georgia Code for the primary purpose of conforming the Georgia Guardianship & Conservatorship Code⁹⁶ with the changes that were made to that Code when Georgia enacted the Uniform Adult Guardianship, Conservatorship, & Protective Proceedings Jurisdiction Act (2016)⁹⁷ and the Revised Fiduciary Access to Digital Assets Act (2018).⁹⁸ The revisions do not become effective until January 1, 2020.⁹⁹

The bill that enacted these revisions does contain one substantive amendment to the Georgia Guardianship & Conservatorship Code. The amendment, which will be codified at O.C.G.A. §§ 29-9-3,¹⁰⁰ 29-9-15,¹⁰¹ and 29-9-16,¹⁰² revolves around the award and allocation of attorney fees, expenses, and court costs in guardianship and conservatorship cases and the compensation paid to lawyers and professional evaluators.¹⁰³

A brief description of the statutory and case law prior to 2019 is necessary to place the 2019 revisions in context. When the Georgia Guardianship Code was revised in 2005,¹⁰⁴ the revised Code did not include a provision that had appeared in the pre-2005 Code that allocated the expenses for any hearing held in conjunction with a guardianship or conservatorship to the parties in the case.¹⁰⁵ This provision was not included in the 2005 Revised Guardianship Code

96. Ga. H.R. Bill 70, Reg. Sess. (2019).

97. Ga. H.R. Bill 954, Reg. Sess. (2016) (amending O.C.G.A. tit. 29, ch. 11 (2016)). For a description of the Jurisdiction Act, see Mary F. Radford, *Wills, Trusts, Guardianships, and Fiduciary Administration, Annual Survey of Georgia Law*, 68 MERCER L. REV. 321, 326–28 (2016).

98. Ga. S. Bill 301, Reg. Sess., 2018 Ga. Laws 1089 (codified at O.C.G.A. § 53-13-2 (2018)). For a description of the Access to Digital Assets Act, see Radford, *supra* note 1, at 282–86.

99. Ga. H.R. Bill 70, Reg. Sess. § 43 (2019).

100. O.C.G.A. § 29-9-3 (2019). Prior to the amendment, O.C.G.A. § 29-9-3 prohibited the same person from serving as both counsel for the proposed ward and guardian ad litem in a guardianship or conservatorship case. After the effective date of the revision, that prohibition will appear as subsection (b) of O.C.G.A. § 29-9-2 (2019). O.C.G.A. § 29-9-2(b) (2019).

101. O.C.G.A. § 29-9-15 (2019).

102. O.C.G.A. § 29-9-16 (2019).

103. O.C.G.A. §§ 29-9-15–29-9-16 (2019).

104. For a general description of the Georgia Revised Guardianship Code of 2005, see MARY F. RADFORD, *GEORGIA GUARDIANSHIP & CONSERVATORSHIP*, § 1:2 (2018–2019 ed.).

105. This provision had appeared in O.C.G.A. § 29-5-13(a) (2004) of the pre-2005 Code.

under the theory that the judge should have discretion to allocate these expenses and should not be tied to a preordained rule of allocation.¹⁰⁶ However, various complaints were received by the Guardianship Code Revision Committee about the elimination of this preordained rule.¹⁰⁷

Consequently, the rules of allocation were reinstated in 2006 with the “[t]echnical [c]orrection” amendment to the 2005 Code.¹⁰⁸ These provisions (which appeared in O.C.G.A. §§ 29-4-17¹⁰⁹ and 29-5-17¹¹⁰) required that “the amounts actually necessary or requisite to defray the expenses of any hearing” be paid: (1) From the estate of the ward if a guardianship or conservatorship was ordered; (2) By the petitioner if no guardianship or conservatorship was ordered;¹¹¹ or (3)

By the county in which the proposed ward was domiciled or by the county in which the hearing was held only if the person who actually presided over the hearing executes an affidavit or include a statement in the order that the party against whom costs [were] cast pursuant to paragraph (1) or (2) of this Code section appear[ed] to lack sufficient assets to defray the expenses.¹¹²

Case law preceding the 2005 Revised Guardianship Code and the 2019 amendment caused some confusion as to what was included in the category “expenses of any hearing.”¹¹³

106. The provisions that covered the assessment of fees for attorneys, guardians ad litem, and professional evaluators, which had appeared in former O.C.G.A. § 29-9-13(c)–(f) were revised and included in the 2005 Guardianship Code in O.C.G.A. §§ 29-9-15–29-9-16.

107. MARY F. RADFORD, *GEORGIA GUARDIANSHIP AND CONSERVATORSHIP*, § 4:11 (2018-2019 ed.). (The author was the Reporter for the Guardianship Code Revision Committee.)

108. For a general description of the 2006 technical corrections to the Georgia Revised Guardianship Code of 2005, see RADFORD, *supra* note 104.

109. O.C.G.A. § 29-4-17 (repealed 2020).

110. O.C.G.A. § 29-5-17 (repealed 2020).

111. O.C.G.A. § 29-9-17 (2006); O.C.G.A. § 29-5-17. The requirement that the petitioner bear the costs in the event no guardianship or conservatorship is ordered applied regardless of whether there was an adjudication on the merits. Thus, even though the petition for guardianship was voluntarily dismissed, the petitioner was still charged with costs to defray the expenses of the hearing in *In re Connell*, 217 Ga. App. 523, 523, 457 S.E.2d 832, 832 (1995).

112. O.C.G.A. § 29-4-17; *see also* O.C.G.A. § 29-5-17. These code provisions were repealed by the 2019 amendment (effective January 1, 2020).

113. *See, e.g., Wertzler III*, 349 Ga. App. 303, 826 S.E.2d 168 (discussed in Section I(D) above); *Wertzler II*, No. A17A1223 (Ga. App. Oct. 27, 2017) (unpublished); *In re Connell*, 217 Ga. App. 523, 457 S.E.2d 832; *In re Olliff*, 184 Ga. App. 846, 363 S.E.2d 159 (1987).

1. Allocation of Costs, Compensation, Fees, and Expenses

New O.C.G.A. § 29-9-3 treats all costs of court,¹¹⁴ compensation, fees, and expenses awarded by the court¹¹⁵ in the same manner, thus eliminating the need for appellate court attention to placing the award in one particular category. Subsection (a) of new O.C.G.A. § 29-9-3 provides the general rule that these amounts “may be assessed and shall be paid as directed by the court in the exercise of its sound discretion and as the court may deem in the best interest of the minor, proposed ward, or ward who is the subject of the particular proceeding[s].”¹¹⁶ Subsections (b) and (c) then add factors that the court is to consider in determining the allocation of these amounts.¹¹⁷

Subsection (b) deals exclusively with proceedings for the appointment of a guardian or conservator. In making the allocation, the court “shall consider” the following: (1) “[t]he estate of the minor or ward” if a guardian or conservator is appointed; (2) the conduct of the petitioners if no guardianship or conservatorship is appointed; (3) “the county of the court that is exercising jurisdiction” if the court finds that the party on which the “costs, compensation, fees, and expenses are cast” does not have sufficient assets to pay them; (4) “[t]he conduct of any party or other person . . . who has been the perpetrator of abuse, neglect, or exploitation against the” minor or proposed ward if the judge who presided over the hearing includes a finding that such action has occurred and identifies the perpetrator; or (5) “[a]ny property [or] fund or proceeds [that were] recovered on behalf of or in favor of [the] minor or ward in accordance with an order assessing such costs,

114. O.C.G.A. § 29-9-3(a) (2019) defines these as “costs of court under Code Sections 15-9-60 and 15-9-126 or other applicable law.”

115. O.C.G.A. § 29-9-3(a) refers to all compensation, fees, and expenses awarded by the court under subsections (a) and (b) of Code Section 29-9-15 [which refers to fees and expenses of legal counsel and guardians ad litem], under Code Section 29-9-16 [which refers to fees for evaluators], or under Code Section 29-9-18 [which relates to a proceeding to examine the sealed records of a guardianship or conservatorship].

Id.

116. O.C.G.A. § 29-9-3(a). This sentence applies “[e]xcept as otherwise ordered by the court under paragraph (2) of subsection (a) of Code Section 29-4-10, under paragraph (2) of subsection (a) of Code Section 29-5-10, or under subsection (b) of Code Section 29-11-16.” These Code Sections relate to the authority of the court to assess costs, etc., against a party whose “unjustifiable conduct” caused the court to acquire jurisdiction. *Id.*; Ga. H.R. Bill 70, Reg. Sess. §§ 6, 14 (2019).

117. See O.C.G.A. § 29-9-3(b)–(c) (2019).

compensation, fees, and expenses against such property, fund or proceeds.”¹¹⁸

Subsection (c) deals with all other proceedings relating to guardianships and conservatorships that are governed by Chapters 2–7 and 11 of Title 29.¹¹⁹ Subsection (c) begins by repeating the general rule that the costs, compensation, fees, and expenses are to be assessed and paid as the court in its discretion deems “to be in the best interest of the minor, proposed ward, or ward who is the subject of the . . . proceeding[s].”¹²⁰ This subsection then enumerates different possible parties or funds that will be responsible for the payment of the awarded amounts. These are:

(1) From the estate of the minor or ward for whom a guardian or conservator has been appointed in any such proceeding, if the court finds that the proceeding was brought in the best interest of the minor or ward; (2) By the petitioners or movants in any such proceeding; (3) From a guardian or conservator or from the surety on such guardian’s or conservator’s bond, subject to other applicable law governing the liability of sureties on such bonds, in any such proceeding, if: (A) Such guardian or conservator admits to a violation of any obligation of such guardian or conservator in such guardian’s or conservator’s representative capacity under this title or other applicable law; (B) The court finds that such guardian or conservator has committed a breach of fiduciary duty or has threatened to commit a breach of fiduciary duty; (C) The court revokes or suspends such guardian’s letters of guardianship or such conservator’s letters of conservatorship or imposes sanctions upon such guardian or conservator in such proceeding; or (D) The court otherwise finds that such guardian or conservator has committed misconduct or has acted contrary to the best interest of the minor or ward; (4) By the county of the court exercising jurisdiction over any such proceeding, provided that the judge who actually presided over the hearing includes a finding in the order that the party against whom such costs, compensation, fees, and expenses are cast pursuant to paragraph (1), (2), (3), or (5) of this subsection appears to lack sufficient assets to defray such costs, compensation, fees, and expenses; (5) By any party or other person subject to the jurisdiction of the court who has been the perpetrator of abuse, neglect, or exploitation against the person or property of the minor, proposed ward, or ward, provided that the judge who actually presided over the hearing includes a finding in the order determining that such

118. *Id.*

119. O.C.G.A. § 29-9-3(c) (2019).

120. *Id.*

abuse, neglect, or exploitation against the person or property of the minor, proposed ward, or ward has occurred and identifying the perpetrator thereof; or (6) From any property, fund, or proceeds recovered on behalf of or in favor of a minor or ward in accordance with an order of the court assessing such costs, compensation, fees, and expenses against such property, fund, or proceeds.¹²¹

Subsection (d) of new O.C.G.A. § 29-9-3 provides that any award made “under this Code [S]ection may be enforced by a judgment, a writ of fieri facias, execution, or attachment for contempt.”¹²²

2. Compensation of Attorneys and Professional Evaluators

O.C.G.A. § 29-9-15, as enacted in the 2005 Revised Guardianship Code, provided that “[a]ny legal counsel or guardian ad litem who [was] appointed . . . in a guardianship or conservatorship proceeding shall be awarded reasonable fees.”¹²³ These fees were to be “commensurate with the tasks performed [and] the time devoted to the proceeding and any appeals.”¹²⁴ The 2019 amendment (effective January 1, 2020) reproduced these provisions as subsection (a) of § 29-9-15, with some refinements.¹²⁵ The revised Code subsection applies to “any proceeding brought pursuant to Chapter 2, 3, 4, 5, 7, or 11” of Title 29.¹²⁶ The revised subsection clarifies that the award of fees may be “voluntarily waived.”¹²⁷ The revised subsection also covers both “reasonable fees and expenses.”¹²⁸

As an alternative to having appointed counsel, a proposed ward may also retain his or her own counsel.¹²⁹ The 2019 amendment to the 2005 Revised Guardianship Code added a new subsection (b) to O.C.G.A. § 29-9-15.¹³⁰ This subsection clarifies and codifies that the court may also “award reasonable fees and expenses . . . to any legal counsel who is retained by or on behalf of a minor, a proposed ward, the petitioner(s), and any other party to [the] proceeding.”¹³¹ The court is to

121. O.C.G.A. § 29-9-3(c)(1)–(6) (2019).

122. O.C.G.A. § 29-9-3(d) (2019).

123. O.C.G.A. § 29-9-15 (2018).

124. *Id.*

125. O.C.G.A. § 29-9-15(a) (2019).

126. *Id.*

127. *Id.*

128. *Id.*

129. *See* O.C.G.A. § 29-9-15(b) (2019).

130. *Id.*

131. *Id.*

act in “exercise of its sound discretion and as the court may deem to be in the best interest of the minor, proposed ward, or ward who is the subject of the . . . proceeding.”¹³²

The 2019 amendment, in subsection (b) of revised O.C.G.A. § 29-9-16, addresses the payment to an “evaluating physician, psychologist, or licensed clinical social worker” whose attendance is required at a hearing on the appointment of a guardian or conservator, the appointment of an emergency guardian or conservator, the termination of a guardianship or the modification of a conservatorship, “other than pursuant to a subpoena requested by a party to the proceeding.”¹³³ The revised Code Section provides that, rather than a flat fee of \$75, the “physician, psychologist, or licensed clinical social worker shall receive a reasonable fee commensurate with the tasks performed, plus actual expenses.”¹³⁴

B. Payment of Bank Deposits and Checks of Intestate Decedents

If an individual dies intestate (without a valid will) in Georgia, normally the estate cannot be administrated and the decedent’s assets distributed to the heirs until a personal representative (known as an “administrator”)¹³⁵ is appointed by the probate court.¹³⁶ However, sometimes the decedent’s estate is so small that it does not warrant the time and expense of opening a formal estate administration. Consequently, the Georgia Code offers the survivors of intestate decedents a number of ways in which the estate can be distributed without the necessity of a formal administration.¹³⁷ Included among these are the mechanisms set forth in O.C.G.A. §§ 7-1-239¹³⁸ and 7-1-239.1,¹³⁹ which allow for the payment of the decedent’s deposits and the cashing of checks payable to the decedent without an estate administration, provided the amounts in question are under a certain specified amount.¹⁴⁰

132. *Id.*

133. O.C.G.A. § 29-9-16(b) (2019).

134. *Id.*

135. O.C.G.A. § 53-1-2(1) (2019) defines an “[a]dministrator’ [as] any person appointed and qualified to administer an intestate estate, including an intestate estate already partially administered by an administrator and from any cause unrepresented.”

136. For a general discussion of intestacy and the administration of intestate estates, see MARY F. RADFORD, REDFEARN: WILLS AND ADMINISTRATION IN GEORGIA, Ch. 9 (2018-2019 ed.).

137. *Id.*

138. O.C.G.A. § 7-1-239 (2019).

139. O.C.G.A. § 7-1-239.1 (2019).

140. O.C.G.A. §§ 7-1-239 & 7-1-239.1.

O.C.G.A. § 7-1-239 was amended in 2019¹⁴¹ to increase the amount that can be paid out by a financial institution¹⁴² to an intestate decedent's family members¹⁴³ (without the necessity of administration of the estate) from \$10,000 to \$15,000.¹⁴⁴ The amended Code section requires the family member to present an affidavit to the financial institution and spells out that the affidavit must include statements that: (1) the individual qualifies "as the proper relation of the decedent;" (2) no will of the decedent is known; and (3) no other claimants of the deposit are known.¹⁴⁵

Subsection (c) of this Code section was amended to provide that, if none of the family members named in the statute apply to receive the deposited funds within 45 days (down from 90 days) of the death of the decedent, the financial institution may apply funds up to \$15,000 (up from \$10,000) to pay the funeral expenses of the decedent and expenses of the decedent's last illness.¹⁴⁶ The revised Code section also contains a form affidavit to be presented to the financial institution by the provider of services for the funeral expenses and expenses of the last illness.¹⁴⁷

The same bill that amended O.C.G.A. § 7-1-239 also amended O.C.G.A. § 7-1-239.1.¹⁴⁸ This Code section provides that if an individual who died intestate was in possession of a check payable to that individual of a certain amount or lower, the financial institution on which the check was drawn could accept and redeem the check by payment to the same family members who are listed in O.C.G.A. § 7-1-239(b).¹⁴⁹ The 2019 amendment raised the maximum amount of the check from \$10,000 to \$15,000.¹⁵⁰

141. Ga. H.B. 490, Reg. Sess. (2019).

142. The 2019 amendment added the following expanded definition of financial institution: "any federally chartered financial institution or state chartered financial institution, including, but not limited to, those chartered by states other than the State of Georgia whose deposits are federally insured." O.C.G.A. § 7-1-239(a)(2) (2019). Prior to the amendment, O.C.G.A. § 7-1-239(f) (2018) stated: "As used in this Code section, the term 'financial institution' includes any federally chartered financial institution."

143. For purposes of this statute, family members include, in this order: the surviving spouse; the children, pro rata; the decedent's parents, pro rata; and the decedent's siblings, pro rata. O.C.G.A. § 7-1-239(b) (2019).

144. See O.C.G.A. § 7-1-239(e) (2019).

145. O.C.G.A. § 7-1-239(b)(4) (2019).

146. O.C.G.A. § 7-1-239(c) (2019).

147. The form affidavit appears in new O.C.G.A. § 7-1-239(e).

148. Ga. H.B. 490, Reg. Sess. § 2 (2019).

149. O.C.G.A. § 7-1-239.1(b) (2019).

150. Ga. H.B. 490, Reg. Sess. § 2 (2019).