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Mary F. Radford

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# Wills, Trusts & Administration of Estates

by Mary F. Radford\*

This Article summarizes the major cases and legislative enactments relating to Georgia fiduciary law during the period from June 1, 1999 through May 31, 2000. Many of the cases described in this Article were decided under Georgia's Probate Code as it existed prior to the extensive revisions that became effective on January 1, 1998. References in this Article to former code sections will refer to the pre-1998 Probate Code, and all other references will be to the Revised Probate Code of 1998.<sup>1</sup>

## I. RECENT DECISIONS

### A. Construction of Wills

Two significant cases decided during the reporting period dealt with the construction of provisions in wills. The construction of the terms of the will in *Emmertz v. Cherry*<sup>2</sup> had dramatic federal estate tax ramifications for the beneficiaries of the will. In this case the Georgia Supreme Court found the testator had waived his executor's right to seek reimbursement from the beneficiary of a life insurance policy for the federal estate taxes incurred as a result of the inclusion of the life insurance proceeds in the testator's gross estate.<sup>3</sup> Thus, the tax was

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\* Professor of 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 and Guardianship Code Revision Committee, Fiduciary Law Section of the State Bar of Georgia.

1. O.C.G.A. §§ 53-1-1 to 53-11-11 (1997 & Supp. 2000). The revised code may be officially cited as the "Revised Probate Code of 1998." O.C.G.A. § 53-1-1 (Supp. 2000).

2. 271 Ga. 458, 520 S.E.2d 219 (1999).

3. *Id.* at 459, 520 S.E.2d at 220. For purposes of this discussion, the term "gross estate" is used to indicate the estate of the decedent, as defined by the federal estate tax laws, which is used as the basis for the federal estate tax computation. I.R.C. § 2031 (1982). As will be noted in this discussion, the value of a decedent's gross estate may

paid from the residue of the testator's estate. The tax was incurred because the testator died with "incidents of ownership" in three life insurance policies, all of which were payable to his daughter.<sup>4</sup> The testator's daughter and two sons were the beneficiaries of the residue of the testator's estate, and the will directed that all taxes be paid from the residue of the estate. Another item in the will directed the executor to recover from the recipients of any qualified terminable interest property<sup>5</sup> or property distributed under a power of appointment<sup>6</sup> the share of the estate taxes attributable to the inclusion of the value of that property in the testator's gross estate. This clause did not mention reimbursement from recipients of life insurance proceeds.<sup>7</sup> However, section 2206 of the Internal Revenue Code entitles the executor to recover taxes attributable to life insurance proceeds from the life insurance beneficiary "[u]nless the decedent directs otherwise in his

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include the value of property that is not part of the probate estate - that is, of property to which the decedent does not have actual title at death. Such nonprobate property (e.g., life insurance proceeds) passes to the ultimate recipient without ever coming into the hands of the executor or under the jurisdiction of the probate court. However, if an estate is subject to the federal estate tax, the executor of the estate must pay the tax. I.R.C. § 2002 (1982).

4. The Internal Revenue Code provides that a decedent's gross estate shall include the value of any proceeds of any life insurance policy "with respect to which the decedent possessed at his death any of the incidents of ownership." I.R.C. § 2042(2) (1982).

5. The Internal Revenue Code defines "qualified terminable interest property" (hereinafter "QTIP") as property from which a decedent's surviving spouse is entitled to all the income, payable at least annually, and which may not be appointed to anyone other than the surviving spouse. I.R.C. § 2056(b)(7) (1982). Thus, this is not property that the surviving spouse receives outright, but rather property that is available to the spouse during the spouse's life, with any property remaining at the spouse's death passing according to the direction in the original decedent's will. The value of QTIP property may be deducted from the decedent's gross estate, thus reducing the amount of estate tax due at the decedent's death. *Id.* § 2056(a). Because this property is treated as having passed to the surviving spouse (even though it does not actually do so), the value of the property is then included in the estate of the surviving spouse for tax purposes, although it does not constitute part of the spouse's probate estate. *Id.* § 2044. Because the QTIP property is not in the spouse's probate estate, the Internal Revenue Code allows the executor to recover from the recipient of the property the value of the tax attributable to the inclusion of that property in the gross estate, unless the spouse indicates otherwise by will. *Id.* § 2207A.

6. If a decedent dies owning property over which the decedent has a general power of appointment (that is, the unrestricted power to designate the ultimate recipients), the value of the property that is subject to the power is included in the decedent's gross estate even if, by reason of the exercise of that power, the property is not included in the decedent's probate estate. *Id.* § 2041. Unless the decedent directs otherwise by will, the executor may recover from the recipients of that property the value of any estate taxes that are accrued due to the inclusion of the property in the decedent's gross estate. *Id.* § 2207.

7. 271 Ga. at 458-59, 520 S.E.2d at 220.

will.<sup>8</sup> The probate court found the direction to pay all taxes from the residue, combined with inclusion of a clause that directed the executor to recover taxes from the recipients of certain nonprobate assets and the omission of a similar clause related to life insurance beneficiaries, illustrated the testator's awareness of the possibility that tax would be generated by nonprobate assets.<sup>9</sup> The probate court concluded these terms constituted a direction in the will that the executor not recover taxes from the life insurance beneficiary.<sup>10</sup> The supreme court affirmed.<sup>11</sup>

In *Crisp Area YMCA v. Nationsbank, N.A.*,<sup>12</sup> the Georgia Supreme Court adopted the plain meaning of the words of the will over somewhat compelling evidence that the testator's intent was otherwise.<sup>13</sup> The testator in this case was a founding director of the Cordele YMCA and was also an active member of the Albany YMCA, whose facility he used several times a week. He made financial contributions to both organizations. The Cordele YMCA became inactive in May 1992 and performed no functions from that time other than liquidating its assets and paying its debts.<sup>14</sup> The directors of that YMCA had invited the Albany YMCA to take control of activities in Crisp County, and the Albany YMCA complied.<sup>15</sup>

On May 14, 1992, six days after the Cordele YMCA ceased operation, the testator executed a will in which he bequeathed \$100,000 to the Cordele YMCA. In 1994 he twice instructed his attorney to draft a codicil changing the beneficiary to the Albany YMCA, but he never executed those codicils. He died on June 21, 1995. The executor sought declaratory judgment, and the trial court, applying the doctrine of *cy pres*, ordered that money be paid to the Albany YMCA.<sup>16</sup> The doctrine of *cy pres* was described in the former Probate Code as follows:

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8. I.R.C. § 2206 (1982).

9. 271 Ga. at 459-60, 520 S.E.2d at 220-21.

10. *Id.* at 458-59, 520 S.E.2d at 220.

11. *Id.* at 460, 520 S.E.2d at 221. Because this was a case of first impression in Georgia, the probate court turned to cases from other states for direction. The supreme court agreed with the probate court's citation of an Arizona case, *Estate of Tourea v. Nolan*, 845 P.2d 494 (Ariz. Ct. App. 1992), as an apt comparison. 271 Ga. at 460, 520 S.E.2d at 221.

12. 272 Ga. 182, 526 S.E.2d 63 (2000).

13. *Id.* at 184-85, 526 S.E.2d at 65-66.

14. *Id.* at 183, 526 S.E.2d at 64. Apparently the Cordele YMCA also lost its tax-exempt status. *See id.*

15. *Id.* at 182-83, 526 S.E.2d at 64.

16. *Id.*

A devise or bequest to a charitable use will be sustained and carried out in this state. In all such cases, when there is a general intention manifested by the testator to effect a certain purpose and the particular mode in which he directs it to be done fails from any cause, the superior court, utilizing its equitable powers, may effectuate by approximation the purpose in a manner most similar to that indicated by the testator.<sup>17</sup>

The trial court apparently determined that distribution of the money to an inactive organization would thwart the testator's intent to make a charitable gift and thus redirected the funds to the organization's successor.<sup>18</sup>

The supreme court reversed the trial court, holding that *cy pres* can be applied only when there is a "legal or practical impossibility of carrying into effect" the decedent's intent.<sup>19</sup> Although the Cordele YMCA was no longer active, the court noted that it was not defunct and that the testator was aware of its status.<sup>20</sup> In dissent Justices Sears and Benham found the testator's will evidenced an intent to bequeath a charitable gift to a Crisp County regional YMCA organization.<sup>21</sup>

#### B. *Lack of Testamentary Capacity and Undue Influence*

In several cases decided during the reporting period, the Supreme Court of Georgia affirmed its insistence on a stringent standard of evidence before finding a lack of testamentary capacity or undue influence and thus depriving a testator of the right to make a will.<sup>22</sup> These cases shared a basic fact pattern: A testator disinherited some family members in favor of one or more other family members. The family members who took under the will were in close contact with the testator in each case and thus, theoretically, had the opportunity to exert

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17. Former O.C.G.A. § 53-2-99 (1997). The Revised Probate Code defines the doctrine as follows: "If a testamentary gift to a charity cannot be executed in the exact manner provided by the testator, the superior court may exercise equitable powers in such a way as will as nearly as possible effectuate the intention of the testator." *Id.* § 53-4-62.

18. 272 Ga. at 182-83, 526 S.E.2d at 64.

19. *Id.* at 183, 526 S.E.2d at 64.

20. *Id.* at 183-84, 526 S.E.2d at 65.

21. *Id.* at 186, 526 S.E.2d at 66 (Sears, J., dissenting).

22. See *Dyer v. Souther*, 272 Ga. 263, 264-66, 528 S.E.2d 242, 245 (2000); *Kendrick-Owens v. Julian*, 271 Ga. 731, 732-33, 524 S.E.2d 237, 237-38 (1999); *Brooks v. Julian*, 271 Ga. 766, 768-70, 523 S.E.2d 862, 864-65 (1999); *In re Estate of Diaz*, 271 Ga. 742, 743-45, 524 S.E.2d 219, 221-22 (1999); *Crumbley v. McCart*, 271 Ga. 274, 276, 517 S.E.2d 786, 787-88 (1999).

undue influence.<sup>23</sup> However, in most of these cases, the supreme court found that the close relationship between the testator and the family member was not enough to sustain a finding of undue influence.<sup>24</sup> In many of the cases, the testator showed some signs of mental frailty.<sup>25</sup> On the issue of testamentary capacity, the court concentrated on the time the will was actually executed and looked closely at the evidence of professionals, such as the testator's physician or attorney, to determine whether the testator had capacity at that time.<sup>26</sup>

In *Crumbley v. McCart*,<sup>27</sup> the supreme court discussed the circumstances under which a relationship between brothers would rise to the level of a confidential relationship and thus result in a rebuttable presumption of undue influence by the surviving brother.<sup>28</sup> The brothers in this case were business partners and tenants in common as to certain farm land. The evidence showed that the testator had a weaker personality than his brother. The testator's brother made the appointment with the attorney who drew up the testator's will and was present when the will was executed. However, the brother's presence was explained by the fact that he was simultaneously executing his own will.<sup>29</sup> The attorney did not observe any indication of undue influence by the brother over the testator, and his physician testified that the testator was "alert and well oriented."<sup>30</sup> The brother was the sole beneficiary of the testator's will, and the testator's other siblings claimed the brothers shared a confidential relationship and, as a result, a rebuttable presumption arose that the testator was unduly influenced by

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23. See *Dyer*, 272 Ga. at 263-65, 528 S.E.2d at 243; *Kendrick-Owens*, 271 Ga. at 731-32, 524 S.E.2d at 237; *Brooks*, 271 Ga. at 766-68, 523 S.E.2d at 862-63; *Diaz*, 271 Ga. at 742-43, 524 S.E.2d at 220-21; *Crumbley*, 271 Ga. at 274-75, 517 S.E.2d at 786-87.

24. See *Kendrick-Owens*, 271 Ga. at 733, 524 S.E.2d at 238; *Brooks*, 271 Ga. at 770, 523 S.E.2d at 865; *Diaz*, 271 Ga. at 744-45, 524 S.E.2d at 222; *Crumbley*, 271 Ga. at 276, 517 S.E.2d at 787-88.

25. See *Dyer*, 272 Ga. at 265-66, 528 S.E.2d at 245; *Kendrick-Owens*, 271 Ga. at 732-33, 524 S.E.2d at 238; *Diaz*, 271 Ga. at 742, 524 S.E.2d at 220.

26. See *Dyer*, 272 Ga. at 265-66, 528 S.E.2d at 245; *Kendrick-Owens*, 271 Ga. at 732-33, 524 S.E.2d at 238; *Brooks*, 271 Ga. at 769-70, 523 S.E.2d at 864; *Diaz*, 271 Ga. at 743-44, 524 S.E.2d at 221-22; *Crumbley*, 271 Ga. at 276, 517 S.E.2d at 787-88.

27. 271 Ga. 274, 517 S.E.2d 786 (1999).

28. *Id.* at 275-76, 517 S.E.2d at 787. A confidential relationship is one in which one individual is in a position to assert a controlling influence over another. O.C.G.A. § 23-2-58 (1982). In Georgia a presumption of undue influence may arise if the individual who takes under the will was in a confidential relationship with the testator and actively participated in procuring the will. *Bryan v. Norton*, 245 Ga. 347, 348-49, 265 S.E.2d 282, 284 (1980).

29. 271 Ga. at 274-76, 517 S.E.2d at 786-87.

30. *Id.* at 275, 517 S.E.2d at 787.

his brother.<sup>31</sup> The probate court found in the caveators' favor, but the superior court and the supreme court ruled in favor of the surviving brother.<sup>32</sup> The supreme court stated in this case that the mere fact the testator and the sole beneficiary were brothers did not demonstrate the existence of a confidential relationship.<sup>33</sup> The court also noted that the evidence of the beneficiary's more dominant personality did not, in and of itself, demand a finding that the brothers operated other than as equals.<sup>34</sup>

In *In re Estate of Diaz*,<sup>35</sup> the testator disinherited her children after they tried to have her involuntarily committed. After her release from the hospital, the testator told the sheriff's deputies that she did not want to see her children again. She later resumed telephone communications with them but told them that although she might forgive them, she would never forget. About four months later, the testator was diagnosed with cancer. She asked her attorney to draw up a will that left her personal effects to her brother and the rest of the property to her grandchildren. A week after signing the will, she signed a codicil that stated that, due to recent events, her children and estranged husband were to take nothing under her will. She died a few months later, and the children challenged the will and codicil, claiming undue influence by the brother and lack of testamentary capacity.<sup>36</sup> The probate court rejected their challenges, and the supreme court affirmed.<sup>37</sup> The supreme court noted that although the testator was suffering from cancer when she executed her will, her doctor and the witnesses to the will found her to be lucid and coherent.<sup>38</sup> As to the claim of undue influence, the court pointed out that the mere fact the evidence showed the brother had the opportunity to exercise the influence was not the requisite clear and convincing evidence that the will had actually been procured by undue influence.<sup>39</sup>

In *Brooks v. Julian*,<sup>40</sup> a mother disinherited two of her four daughters when she became suspicious that one of them had abused her authorization to take things from the mother's safe deposit box and the

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31. *Id.*

32. *Id.*, 517 S.E.2d at 787-88.

33. *Id.* at 276, 517 S.E.2d at 787.

34. *Id.*

35. 271 Ga. 742, 524 S.E.2d 219 (1999).

36. *Id.* at 742-43, 524 S.E.2d at 220-21.

37. *Id.* at 745, 524 S.E.2d at 222.

38. *Id.* at 743-44, 524 S.E.2d at 221.

39. *Id.* at 744, 524 S.E.2d at 222.

40. 271 Ga. 766, 523 S.E.2d 862 (1999).

second had sympathized with her.<sup>41</sup> A jury found the other two daughters had exerted undue influence over their mother.<sup>42</sup> The supreme court, however, found insufficient evidence to support that finding.<sup>43</sup> The supreme court cited the testimony given by the attorney and the attorney's assistant (both of whom had known the testator for some time) that the testator appeared to know exactly what she was doing when she changed her will and that she did not appear to be acting other than freely and voluntarily.<sup>44</sup> Although the record contained evidence of suspicious circumstances, the court strongly stated that suspicion cannot be allowed to supplant direct evidence on the issue.<sup>45</sup>

In *Kendrick-Owens v. Clanton*,<sup>46</sup> the testator disinherited her older children in favor of her youngest child.<sup>47</sup> A jury verdict set aside the will on the ground of undue influence but the supreme court reversed, finding insufficient evidence to sustain the verdict.<sup>48</sup> The evidence showed the youngest daughter had a domineering personality and had driven the testator to the attorney's office on the two occasions on which the testator discussed and executed her will. However, the attorney, the other witness, the notary, and the testator's long-time physician all testified the testator was lucid and of sound mind when she executed her will.<sup>49</sup> The supreme court reiterated its emphasis on the circumstances surrounding the time the will was executed, rather than prior or subsequent times, and again stated that the mere opportunity to exercise undue influence is insufficient to support a finding thereof.<sup>50</sup>

In *Dyer v. Souther*,<sup>51</sup> a jury trial was held on the issues of whether the testator had testamentary capacity, whether the will was properly executed, and whether the will was the product of undue influence. At the close of the evidence, the superior court directed verdicts in favor of the propounder of the will on the latter two issues, and the jury decided in the propounder's favor on the issue of testamentary capacity.<sup>52</sup> The caveator appealed the directed verdict and the supreme court reversed

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41. *Id.* at 767, 523 S.E.2d at 863.

42. *Id.* at 768, 523 S.E.2d at 862.

43. *Id.* at 768-70, 523 S.E.2d at 865.

44. *Id.* at 769, 523 S.E.2d at 865.

45. *Id.* at 769-70, 523 S.E.2d at 864.

46. 271 Ga. 731, 524 S.E.2d 237 (1999).

47. *Id.* at 731-32, 524 S.E.2d at 237-38.

48. *Id.* at 731, 524 S.E.2d at 239.

49. *Id.* at 732-33, 524 S.E.2d at 238.

50. *Id.*

51. 272 Ga. 263, 528 S.E.2d 242 (2000).

52. *Id.* at 263-64, 528 S.E.2d at 243-44.



the directed verdict on the undue influence issue, finding that there was "circumstantial evidence sufficient to raise the issue of undue influence."<sup>53</sup> This case contained many of the familiar elements of the previously discussed undue influence cases. The testator, the last survivor of eleven children, bequeathed all of her property to a great-nephew to the exclusion of more than seventy nieces and nephews. In the event he did not survive the testator, the property was to go to his mother, who was not a blood relative of the testator. The great-nephew, Souther, was regularly at the testator's home, rented property from her, and made the appointment for the testator with her attorney. The testator lived with Souther's mother prior to entering a nursing home and executed a power of attorney in his favor. She opened certificates of deposit jointly in their two names, and prior to his death, he cashed them all. The testator exhibited a degree of mental impairment and dementia around the time the will was executed. She could not read or write or fill out a check. A relative testified that the testator had complained to her about Souther and said Souther would not be getting anything from her when she died.<sup>54</sup> The supreme court found this evidence "belies the finding that the evidence demanded a verdict in favor of the propounder."<sup>55</sup>

### C. *Children Born Out of Wedlock*

In *In re Estate of Garrett*,<sup>56</sup> the Georgia Court of Appeals construed the Georgia statute that defines the circumstances under which the putative father of a child born out of wedlock may inherit from the child.<sup>57</sup> The decedent died intestate in 1997. The administrator of his estate, who learned that a man named Phillips claimed to be the decedent's father, filed a Petition to Determine Heirs in accordance with Official Code of Georgia Annotated ("O.C.G.A.") section 53-2-21.<sup>58</sup> The probate court found Phillips was the decedent's father and thus one of his heirs.<sup>59</sup> The court of appeals reversed.<sup>60</sup> The court of appeals pointed out that Phillips had not signed the decedent's birth certificate or a sworn affidavit of paternity, that there was no genetic evidence of

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53. *Id.* at 265, 528 S.E.2d at 244.

54. *Id.* at 264-66, 528 S.E.2d at 244-45.

55. *Id.* at 266, 528 S.E.2d at 245.

56. 244 Ga. App. 65, 534 S.E.2d 843 (2000).

57. *Id.* at 66, 534 S.E.2d at 844.

58. Under the Code, an administrator may file a petition to determine the heirs of a decedent. O.C.G.A. § 53-2-21 (1997).

59. 244 Ga. App. at 65, 534 S.E.2d at 844.

60. *Id.*

paternity, and most importantly, that there had been no adjudication of paternity during the decedent's lifetime.<sup>61</sup> Phillips cited O.C.G.A. section 53-2-4(b)(1), which allows the putative father of a child born out of wedlock to inherit from the child if, among other things, a court has entered an order declaring a child to be legitimate or "[a] court of competent jurisdiction has otherwise entered a court order establishing paternity."<sup>62</sup> Phillips contended the finding by the probate court that he was the decedent's father constituted a court order establishing paternity.<sup>63</sup> However, the court of appeals, citing *Dunlap v. Moody*<sup>64</sup> and *Rainey v. Chever*,<sup>65</sup> pointed out that a putative father loses his right to inherit if the requirements of this code section are not met during the child's lifetime.<sup>66</sup> In *Dunlap* the court gave the rationale for this requirement: "[T]o rule otherwise . . . would not permit an illegitimate child, who is now dead, to dispute paternity."<sup>67</sup>

#### D. Appointment and Removal of Personal Representatives

In *Goolsby v. Estate of Williams*,<sup>68</sup> the court of appeals once again faced the question of whether an individual was the common-law spouse of the decedent and thus should serve as personal representative of the decedent's estate.<sup>69</sup> Common-law marriage was abolished in Georgia for relationships entered into on or after January 1, 1997.<sup>70</sup> However, individuals who entered into relationships prior to that time continue to claim to have been the common-law spouses of decedents.<sup>71</sup> One item of evidence that is often offered to disprove the existence of a common-law marriage is the fact that the individuals filed tax returns separately rather than as husband and wife.<sup>72</sup> In *Goolsby* Lester claimed to be the common-law husband of Williams, an intestate decedent, and applied to be the administrator of her estate. Williams' mother, who was the guardian of her minor children, objected and subpoenaed Goolsby, the

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61. *Id.* at 66, 534 S.E.2d at 844.

62. *Id.*

63. *Id.*

64. 224 Ga. App. 38, 479 S.E.2d 456 (1996).

65. 270 Ga. 519, 510 S.E.2d 823 (1999).

66. 244 Ga. App. at 66, 534 S.E.2d at 844.

67. 224 Ga. App. at 40, 479 S.E.2d at 458.

68. 243 Ga. App. 890, 534 S.E.2d 559 (2000), *cert. granted.*

69. *Id.* at 890, 534 S.E.2d at 560.

70. O.C.G.A. § 19-3-1.1 (1997).

71. *See, e.g., In re Estate of Wilson*, 236 Ga. App. 496, 497-98, 512 S.E.2d 383, 385-86 (1999); *In re Estate of Dunn*, 236 Ga. App. 211, 211-12, 511 S.E.2d 575, 577 (1999).

72. *See, e.g., Wilson*, 236 Ga. App. at 497-98, 512 S.E.2d at 386; *Dunn*, 236 Ga. App. at 212, 511 S.E.2d at 577.

Director of the Income Tax Division of the Georgia Department of Revenue, to produce copies of the decedent's income tax returns in order to show the decedent had filed returns as a single person. Goolsby claimed the information was confidential and protected from disclosure under O.C.G.A. section 48-7-60(a).<sup>73</sup> The probate court required the production of the returns, but the court of appeals reversed this order.<sup>74</sup> The court of appeals relied on the supreme court's "clear policy favoring nondisclosure," as evidenced in cases in which disclosure was required only when the integrity of the returns themselves was directly in issue.<sup>75</sup>

The remaining cases in this subsection involved the removal of a personal representative. In *In re Estate of Jackson*,<sup>76</sup> Willie Jackson filed a petition to remove Ira Jackson as administrator of his father's estate ten years after the estate had been opened. When the petition was filed, Ira was an inmate in the federal penitentiary in Montgomery, Alabama. The probate court granted the petition to remove Ira and also ordered him to re deed to the estate the property he had previously deeded to himself.<sup>77</sup> Ira appealed, and the court of appeals affirmed his removal.<sup>78</sup> Ira contended that the probate court abused its discretion in that it did not make any finding of waste, mismanagement, or lack of fitness to serve as administrator.<sup>79</sup> The court of appeals addressed this issue, even though it found that Ira failed to support or address the issue in his brief.<sup>80</sup> The court of appeals noted that Ira had filed no annual returns, and thus the probate court did not abuse its discretion in removing him.<sup>81</sup> Ira also argued that the court should have granted his requested continuance until his projected release from prison so that he could present his case in person.<sup>82</sup> The court of appeals found the trial court did not abuse its discretion in denying the continuance, which was requested only a week before the scheduled hearing and contained no showing that he would actually be released from prison on the projected date.<sup>83</sup>

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73. 243 Ga. App. at 890, 534 S.E.2d at 560.

74. *Id.*

75. *Id.*

76. 241 Ga. App. 392, 526 S.E.2d 884 (1999).

77. *Id.* at 392-93, 526 S.E.2d at 885-86.

78. *Id.* at 392, 526 S.E.2d at 885.

79. *Id.* at 394, 526 S.E.2d at 886.

80. *Id.*

81. *Id.* at 394-95, 526 S.E.2d at 886-87.

82. *Id.* at 394, 526 S.E.2d at 886.

83. *Id.* at 394-95, 526 S.E.2d at 886-87.

In *Crump v. McDonald*,<sup>84</sup> Gussie Butler named McDonald (her son) and H.P. Butler as coexecutors of her estate. Butler disclaimed his share of her estate. Crump, H.P. Butler's daughter, filed an action to have both McDonald and Butler removed as coexecutors. Butler died before Crump's petition was ruled upon, so Crump proceeded against McDonald. The probate court denied her petition, so she appealed to the superior court, and a jury returned a special verdict against her. She moved for a judgment notwithstanding the verdict ("j.n.o.v.") and was denied. She again appealed, arguing the requested orders for directed verdict (which she had requested early on in the trial) and j.n.o.v. were proper whenever a fiduciary has admitted facts that show a breach of fiduciary duty.<sup>85</sup> The court of appeals affirmed the denial of the j.n.o.v.<sup>86</sup> The standard applied by the court of appeals was whether there was "any evidence" to support the jury verdict.<sup>87</sup> Crump presented evidence at trial indicating there was some mismanagement of the estate: McDonald never inventoried the estate; he was late in filing the estate income tax return and thus incurred a penalty; he withheld information necessary for a valuation of the estate assets from the accountant for five years; he deeded the testator's house to his mother, but he actually had renovated it for his own use and paid for utilities and maintenance from the estate funds; he maintained the estate's cash in low-interest accounts in a bank in which he had an interest as an officer, shareholder, and director; and he failed to respond to Crump's numerous requests for an accounting. While McDonald admitted these allegations, he offered a variety of excuses as mitigating circumstances. For example, he said he did not have the estate valued because he believed it was under \$600,000; he did not think the will required him to give accountings to the beneficiaries while the administration of the estate was pending; and he filed the income tax returns late because Butler would not sign them.<sup>88</sup> The court of appeals concluded that "some evidence" existed to support the jury's verdict.<sup>89</sup> The court then pointed out that, even if the jury had found a breach of fiduciary duty, the court still had the discretion to determine that McDonald should not be removed as executor.<sup>90</sup>

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84. 239 Ga. App. 647, 520 S.E.2d 283 (1999).

85. *Id.* at 647, 520 S.E.2d at 284-85.

86. *Id.*, 520 S.E.2d at 285.

87. *Id.* at 647-48, 520 S.E.2d at 285.

88. *Id.* at 648, 520 S.E.2d at 285.

89. *Id.*

90. *Id.* at 649, 520 S.E.2d at 285.

In *In re Estate of Williams*,<sup>91</sup> Collis and Arthur Williams were divorced in 1996, and Collis subsequently filed a contempt action against him for failing to pay child support. The next month, both Collis and Arthur's daughter from a prior relationship died. Arthur was appointed administrator of his former wife's estate and used money from her estate to pay for his daughter's funeral. Collis' sister petitioned to have Arthur removed as administrator and the probate court granted her petition, because Arthur misused the estate funds, and because he had a conflict of interest due to his past-due child support.<sup>92</sup> The court of appeals found that Arthur failed to carry his burden on appeal because he did not prove affirmatively that he no longer owed any child support.<sup>93</sup> The court then pointed out that, even if Arthur did not owe child support, the use of the estate funds to pay his daughter's funeral expenses alone justified his removal as administrator.<sup>94</sup>

The tragic case of *In re Estate of Davis*<sup>95</sup> reflects many sad elements of today's society. The decedent committed suicide after being accused of molesting two of his brother's children. The decedent's will named his father, Davis, who was an attorney and the drafter of the will, as executor and sole residuary beneficiary. Davis arrived at the scene of the suicide shortly after his son's death and was told by police that they had found sexually explicit material in the son's home. Davis later searched the house and found videotapes, magazines, and pornographic material that had been printed off the Internet. Davis claimed none of these materials would constitute child pornography. He placed the materials in a storage facility and then had a trash collector dispose of them.<sup>96</sup> Davis also testified that he searched his son's computer and deleted numerous pornographic files. He explained at trial that he had previously attended an attorney general's seminar on pedophilia and thus knew what types of pornography would be relevant in the molestation case. Davis stated that he did not discover that kind of pornography, although later testimony by computer experts showed a large amount of the deleted material consisted of sexual pictures and stories involving underage boys. The parents of the molested children informed Davis they were pursuing a cause of action against the estate based on the molestation allegations. When Davis received notice of the

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91. 241 Ga. App. 17, 525 S.E.2d 742 (1999).

92. *Id.* at 17, 525 S.E.2d at 743.

93. *Id.*

94. *Id.* at 17-18, 525 S.E.2d at 743-44.

95. 243 Ga. App. 58, 532 S.E.2d 169 (2000).

96. *Id.* at 58-59, 532 S.E.2d at 170-71. Davis claimed the police detective told him this was legal. *Id.*, 532 S.E.2d at 171.

claims, he paid himself \$200,000 in fees and then, six months later, told the parents that he could not fund trusts established under the will for their children because of the pending action. The parents then filed a petition to have Davis removed as executor, and the probate court granted it.<sup>97</sup> The court of appeals affirmed.<sup>98</sup> Citing O.C.G.A. section 53-7-55 and cases construing its predecessor statute,<sup>99</sup> the court of appeals stated that the probate court has broad discretion to remove an executor and that this probate court properly found the "good cause" required by the current statute<sup>100</sup> in that Davis had destroyed evidence that would have had value in the molestation suit.<sup>101</sup> The court of appeals declined Davis' request that it issue an advisory opinion as to how the probate court should go about appointing a successor personal representative.<sup>102</sup>

### *E. Guardianships*

In *Hayes v. Clark*,<sup>103</sup> the court of appeals affirmed a directed verdict ordering Ms. Clark's mother, Ms. Hayes, to pay \$12,139.94 to Clark as settlement of an express trust created in Clark's favor.<sup>104</sup> Clark was in a car accident in New Jersey when she was a minor. In the subsequent personal injury lawsuit, the New Jersey court entered judgment in Clark's favor and directed that \$5,887.50 be handled as follows: "Disbursed to the guardian and mother of [Clark] to be held by [the mother] in trust for her daughter until her daughter's 18th birthday; and any bond of said guardian is hereby waived."<sup>105</sup> Hayes deposited the money in her own account. When Clark reached age eighteen, Hayes said she herself had been unable to support Clark financially, so she had used Clark's funds to support her.<sup>106</sup>

The court of appeals applied Georgia law as it had "no proof of the law of the state of New Jersey."<sup>107</sup> Hayes first claimed the New Jersey court order did not create a valid express trust because the trustee was not given active duties to perform. Rather, she said, the New Jersey

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97. *Id.* at 59, 63, 532 S.E.2d at 171, 173.

98. *Id.* at 60, 532 S.E.2d at 172.

99. Prior to 1998 the provisions of O.C.G.A. § 53-7-55 appeared at O.C.G.A. § 53-7-148.

100. O.C.G.A. § 53-7-55 allows the court to cite a personal representative to appear if it appears "that good cause may exist to revoke the letters of a personal representative."

101. 243 Ga. App. at 60-61, 532 S.E.2d at 172-73.

102. *Id.* at 63, 532 S.E.2d at 174.

103. 242 Ga. App. 411, 530 S.E.2d 38 (2000).

104. *Id.* at 414, 530 S.E.2d at 41-42.

105. *Id.* at 411, 530 S.E.2d at 39.

106. *Id.*

107. *Id.* at 412, 530 S.E.2d at 39.

court merely appointed her as guardian of her child.<sup>108</sup> The court of appeals pointed out, however, that although the New Jersey court recognized Hayes as her child's natural guardian, it specifically ordered that the property be held in trust.<sup>109</sup> The court noted that the trustee's duties "may be specified in the writing [that creates the express trust] or [may be] implied by law."<sup>110</sup> Hayes next claimed the New Jersey court could not be the settlor of a trust.<sup>111</sup> The court of appeals disagreed with this claim also, stating: "Because the court had legal capacity to transfer title to the property, it could direct the guardian to hold the money in trust for the child."<sup>112</sup>

Hayes then tried to defend her actions by citing *Pettigrew v. Williams*,<sup>113</sup> a Georgia case in which a mother, as guardian for her minor children, used property received by them after their father's death to support them during their minority.<sup>114</sup> Though the mother had filed annual returns, the court held that the annual returns did not bar a child from suing the guardian upon reaching majority, but also noted that, when a parent is unable to support a child, an allowance for the child's support may be made from the guardianship estate.<sup>115</sup> In relying on this guardianship case, Hayes seemed to be confusing the difference between her role as a guardian and as a trustee. Although she was both her child's guardian and the trustee of the trust set up for the child's benefit, the amounts at issue were subject to the terms of the trust, which did not allow any encroachment.<sup>116</sup> The court of appeals relied not on *Pettigrew* but on *Shipp v. McCowen*.<sup>117</sup> The court noted that *Shipp* also involved a mother who had spent her children's property, which was inherited from their father, to support the children during their minority.<sup>118</sup> The court in *Shipp* held that, if the use of that property was necessary, a guardian should have been appointed who then should have made application to the probate court to encroach on

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108. *Id.*, 530 S.E.2d at 39-40.

109. *Id.* at 411, 530 S.E.2d at 39. In ordering the property to be placed in trust, the New Jersey court also relieved Hayes from filing a bond as guardian. *Id.*

110. *Id.* at 412, 530 S.E.2d at 39. The court cited O.C.G.A. § 53-12-20(a), (b) (1997). *Id.*

111. *Id.* at 412, 530 S.E.2d at 39.

112. *Id.*, 530 S.E.2d at 39-40. As authority for this statement, the Court cited O.C.G.A. § 53-12-22 (1997).

113. 65 Ga. App. 576, 16 S.E.2d 120 (1941).

114. 242 Ga. App. at 412, 530 S.E.2d at 40.

115. *Id.* at 413, 530 S.E.2d at 40.

116. *Id.*

117. 147 Ga. 711, 95 S.E. 251 (1918).

118. 242 Ga. App. at 413, 530 S.E.2d at 40.

the corpus, justifying its "harsh and stern rule" as "the only rule that will safeguard the estate of minors."<sup>119</sup> Therefore, the court in *Hayes* affirmed the lower court's order.<sup>120</sup>

In *In re Petition of Roscoe*,<sup>121</sup> the court of appeals clarified those circumstances under which an individual may be appointed the temporary guardian of a child.<sup>122</sup> Georgia law allows the probate court to appoint a temporary guardian for a minor "when the minor is alleged by the person having actual physical custody of such minor to be in need of a guardian."<sup>123</sup> The appointment can take place regardless of whether the child's parents consent.<sup>124</sup> However, if a parent indicates a preference in the choice of who will serve as the child's guardian, that preference must be honored unless good cause is shown to appoint a different individual.<sup>125</sup> Ms. Roscoe lived with A.T.P., a minor, and A.T.P.'s mother. Roscoe applied to become the temporary guardian of the child, and the child's mother agreed and relinquished her guardianship rights, as provided in O.C.G.A. section 29-4-4.1.<sup>126</sup> Roscoe stated in court that the reason she applied to be the child's guardian was to make the child eligible for coverage under her health insurance policy. The lower court held this alone was insufficient to make the child "in need of a guardian" and thus denied the guardianship.<sup>127</sup> Roscoe contended the court did not have discretion to deny a temporary guardianship if the child's parent consented.<sup>128</sup> The court of appeals noted that while O.C.G.A. section 29-4-4.1 requires a court to honor the parent's preference in the *choice* of a temporary guardian and requires the court to dissolve a temporary guardianship at the parent's request, the statute gives the probate court discretion to decide whether a child is in need of a guardian.<sup>129</sup> The court of appeals then examined whether the probate court abused its discretion by refusing to grant a

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119. *Id.* at 414, 530 S.E.2d at 40 (quoting *Shipp*, 147 Ga. at 714, 95 S.E. at 253).

120. 242 Ga. App. at 414, 530 S.E.2d at 40-41.

121. 242 Ga. App. 440, 529 S.E.2d 897 (2000).

122. *Id.* at 440, 529 S.E.2d at 898.

123. O.C.G.A. § 29-4-4.1(a)(1) (1997 & Supp. 2000).

124. *Id.* The parents must receive notice of the application for temporary guardianship, and the guardianship will not be allowed if either parent objects. *Id.* Also, the guardianship will be dissolved upon the application of either parent. O.C.G.A. § 29-4-4.1(c). See *infra* text accompanying notes 186-87 for a discussion of the 2000 amendment to this subsection of the statute.

125. O.C.G.A. § 29-4-4.1(a)(3) (1997).

126. *Id.* § 29-4-4.1(a)(1).

127. 242 Ga. App. at 440, 529 S.E.2d at 899.

128. *Id.* at 440-41, 529 S.E.2d at 897-98.

129. *Id.* at 441, 529 S.E.2d at 898.



temporary guardianship in this case and determined it did not.<sup>130</sup> The court of appeals noted: "Health insurance is an important benefit for a child, but we can find no precedent for the proposition that a child who lacks health insurance is in need of a guardian for that reason alone."<sup>131</sup>

#### F. Purchase Money Resulting Trusts

In *Burt v. Skrzyniarz*,<sup>132</sup> the supreme court clarified the circumstances under which a court would enforce the type of implied trust known as a "purchase money resulting trust."<sup>133</sup> Georgia law recognizes two types of implied trusts: resulting trusts and constructive trusts.<sup>134</sup> A purchase money resulting trust is defined as "a resulting trust implied for the benefit of the person paying consideration for the transfer to another person of legal title to real or personal property."<sup>135</sup> One person's payment of the purchase price for property and another's taking title to the property creates a rebuttable presumption that the holder of title is holding it in trust for the purchaser.<sup>136</sup> In this case Burt claimed his former girlfriend, Skryniarz, held certain property in a purchase money resulting trust for his benefit. Burt and Skryniarz began dating in 1990 and took possession of a home as tenants in common in 1997. The sales contract and warranty deed named them both as grantees, and the parties took joint possession of the property. When they separated, Burt claimed he had a ninety-nine percent interest in the property under the purchase money resulting trust theory.<sup>137</sup> The supreme court affirmed the trial court's finding that the parties held the property in equal shares as tenants in common and not as parties to a purchase money resulting trust.<sup>138</sup> The court first noted that a presumption exists that parties who take property as tenants in common take in equal shares and that this presumption can only be rebutted by clear and convincing evidence.<sup>139</sup> The court called this

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130. *Id.*

131. *Id.*, 529 S.E.2d at 899.

132. 272 Ga. 35, 526 S.E.2d 848 (2000).

133. *Id.* at 37-38, 526 S.E.2d at 850-51.

134. O.C.G.A. § 53-12-90 (1997).

135. *Id.* § 53-12-92(a).

136. *Id.* § 53-12-92(b). This presumption is rebuttable by a preponderance of the evidence. *Id.* However, if the parties are husband and wife, parent and child, or siblings, the presumption is that the purchaser gave the property to the one who took title. *Id.* § 53-12-92(c).

137. 272 Ga. at 35-36, 526 S.E.2d at 849-50.

138. *Id.* at 35, 526 S.E.2d at 849.

139. *Id.* at 36, 526 S.E.2d at 850.

axiom "a fundamental precept of the law [that] should not be easily subjected to uncertainty or undoing."<sup>140</sup> The court then addressed Burt's contention that the trial court's instruction regarding the tenancy in common was incompatible with its instruction regarding whether a purchase money resulting trust existed.<sup>141</sup> The court pointed out that, in order for a purchase money resulting trust to be established, it must be shown that both parties contemplated that type of trust.<sup>142</sup> The agreement between the parties may either appear in an express agreement or may be implied by the surrounding circumstances, but the agreement must have existed at the time the purchase took place.<sup>143</sup> Most importantly, the parties cannot intend simultaneously to create a tenancy in common and a purchase money resulting trust. Thus, insofar as Burt had conceded a tenancy in common was created, the purchase money resulting trust could not exist simultaneously.<sup>144</sup>

### G. Powers of Attorney

A power of attorney creates an agency relationship between the principal and the attorney in fact, who is authorized to act on the principal's behalf.<sup>145</sup> In *Stewart v. Stewart*,<sup>146</sup> Mrs. Core, who had suffered a stroke, gave a power of attorney to her stepmother, Mrs. Stewart. Mrs. Stewart sold certain property that she owned jointly with Core and invested the proceeds in subordinated debentures issued by Stewart Finance Co., the wholly-owned company of defendant. Mrs. Stewart designated defendant as co-owner of the debentures with right of survivorship. Four months later Mrs. Stewart and Core both executed general powers of attorney in favor of defendant. Core died the next year, and Mrs. Stewart entered a nursing home. Defendant, using the power of attorney, opened a joint Merrill Lynch account in both his and Mrs. Stewart's names. He deposited in the account stock owned individually by Mrs. Stewart, then sold the stock and made personal investments with the proceeds. Later that same year, defendant cancelled the subordinated debentures he held jointly with Mrs. Stewart

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140. *Id.*

141. *Id.* at 37, 526 S.E.2d at 850.

142. *Id.*, 526 S.E.2d at 851.

143. *Id.*

144. *Id.*, 526 S.E.2d at 851.

145. Georgia law provides that "[t]he relation of principal and agent arises wherever one person, expressly or by implication, authorizes another to act for him or subsequently ratifies the acts of another in his behalf." O.C.G.A. § 10-6-1 (2000). Georgia has established a statutory form that may be used to create a power of attorney. *Id.* §§ 10-6-140 to -142.

146. 240 Ga. App. 573, 524 S.E.2d 267 (1999).

and credited them to his company's capital account. When Mrs. Stewart died, plaintiffs brought an action against defendant, both individually and as assignees of the estates of Mrs. Stewart and Core. They sought to recover the funds held in the survivorship account and alleged fraud, conversion, and breach of fiduciary duty. The actions on behalf of Core's estate were dismissed because plaintiffs were not beneficiaries under her will, but the action on behalf of Mrs. Stewart's estate proceeded to a jury trial. The jury found the asset transfers made by defendant to himself proper because Mrs. Stewart intended the actions of her attorney-in-fact.<sup>147</sup> The court of appeals affirmed.<sup>148</sup>

The court first cited O.C.G.A. section 7-1-813 for the proposition that "[s]ums remaining on deposit at the death of a party to a joint account belong to the surviving party."<sup>149</sup> The court then examined whether the duty of loyalty implicit in a power of attorney prohibits the agent from making gifts to himself.<sup>150</sup> The court noted that gifts are not foreclosed if: 1) there was no fraud in obtaining the power of attorney; 2) the power of attorney expressly included the power to transfer stocks; and 3) the evidence shows that the principal indicated the intent that the transfer should occur.<sup>151</sup> On the third point, the court cited evidence that Mrs. Stewart was "fully rational and alert" during some of her days in the nursing home.<sup>152</sup> The evidence also showed that, when she created the power of attorney, Mrs. Stewart did not limit the use of the funds she jointly owned with defendant, other than that they be used to support herself and her stepdaughter during their lives, and that she intended defendant take whatever funds remained at her death.<sup>153</sup> The court concluded "that there is evidence that Mrs. Stewart intended that the defendant should receive the gifts which resulted from the defendant's transfer of their subordinated debentures and the sale of stock she owned individually."<sup>154</sup>

In *Allen v. Dominy*,<sup>155</sup> during his last illness, Mr. Dominy gave a general power of attorney to his sister, Ms. Allen. His wife also gave Allen a limited power of attorney. In conversations with Mr. Dominy, Allen agreed she would take title to his real property to ensure that Mrs. Dominy would be provided for after Mr. Dominy's death. Allen then had

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147. *Id.* at 573-74, 524 S.E.2d at 268-69.

148. *Id.* at 578, 524 S.E.2d at 271.

149. *Id.* at 575, 524 S.E.2d at 269 (quoting O.C.G.A. § 7-1-813(a) (1997)).

150. *Id.* at 574-75, 524 S.E.2d at 269.

151. *Id.* at 575, 524 S.E.2d at 269.

152. *Id.*, 524 S.E.2d at 270.

153. *Id.* at 575-76, 524 S.E.2d at 270.

154. *Id.* at 576, 524 S.E.2d at 270.

155. 272 Ga. 399, 529 S.E.2d 363 (2000).

her attorney draw up a deed conveying fee simple to her. She obtained her brother's signature on the deed, but she did not record it until after he died. Allen was named the executor of her brother's will. After her husband died, Mrs. Dominy revoked the power of attorney she had given Allen upon discovering Allen had moved Dominy's certificates of deposit ("CDs") and checking account to the bank where Allen worked. Mrs. Dominy then applied for a year's support from her husband's estate, apparently in the form of her husband's real property, but Allen, as executor, opposed the application. Mrs. Dominy then filed an action to set aside the deed to Allen. The trial court found that Allen breached a fiduciary duty she owed to both parties as their agent. Her actions in procuring the deed for herself and then opposing the year's support award violated her promise to her brother to use the property for his wife's benefit.<sup>156</sup> The supreme court affirmed the judgment and pointed out that, even if Allen had not used the limited power given her by Mrs. Dominy to procure the deed, Mrs. Dominy was arguably a third-party beneficiary of the agreement between Mr. Dominy and Allen.<sup>157</sup> Even if the evidence did not support a finding of Mrs. Dominy as a third-party beneficiary, she still was authorized to have the deed set aside in her representative capacity as Mr. Dominy's widow.<sup>158</sup>

#### H. Joint Bank Accounts

In *Parker v. Kennon*,<sup>159</sup> the court of appeals emphasized the nature of the relationship between parties to a joint bank account while all of the parties are alive.<sup>160</sup> In this case the guardian of a stroke victim's person and property sued the victim's three daughters for converting their mother's funds. Prior to her stroke, the mother purchased two CDs with her individual funds. The CDs were styled as joint accounts with the mother and a daughter. The daughters cashed in the CDs and opened accounts in their own names.<sup>161</sup> The court of appeals affirmed the trial court's judgment that the daughters wrongfully converted the CDs.<sup>162</sup> The court cited O.C.G.A. section 7-1-812(a), which provides that a joint account belongs, *during the lifetime of the parties*, to each

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156. *Id.* at 399-400, 529 S.E.2d at 363-64.

157. *Id.* at 400, 529 S.E.2d at 364.

158. *Id.*

159. 242 Ga. App. 627, 530 S.E.2d 527 (2000).

160. *Id.* at 628-29, 530 S.E.2d at 529-30. A "joint account" is one that is "payable on request to one or more of two or more parties, whether or not mention is made of any right of survivorship." O.C.G.A. § 7-1-810(4) (1997).

161. 242 Ga. App. at 627-28, 530 S.E.2d at 528-29.

162. *Id.* at 631, 530 S.E.2d at 531.

party in proportion to her net contributions, absent clear and convincing evidence to the contrary.<sup>163</sup> This statute creates a presumption that an individual who funds a joint account does not intend to make a gift of the funds during her lifetime. The court noted that it was "absolutely undisputed" that the daughters had the right to withdraw the funds from the CDs: "[T]hat is the very essence of a joint account."<sup>164</sup> However, the "daughters had no authority to use the funds for their own personal benefit."<sup>165</sup>

### *I. Attorney's Duty to Heirs of the Estate*

A question that remains unanswered in Georgia fiduciary law is whether an attorney who has been hired by a personal representative represents the personal representative, the estate, or the beneficiaries of the estate. This issue was raised in *Bowen v. Hunter, Maclean, Exley & Dunn*,<sup>166</sup> but the court of appeals decided the case on grounds that did not necessitate giving an answer to the question.<sup>167</sup> In this case the decedent's mother and sister sued an attorney and his law firm for professional malpractice, breach of fiduciary duty, negligence, conspiracy, fraud, and conversion. The attorney and his firm represented the decedent's widow in her administration of her husband's estate. Plaintiffs asserted the attorney should have given them a copy of the decedent's prenuptial agreement, which they stated barred the decedent's widow from inheriting from him, thus leaving them as the sole heirs of his estate.<sup>168</sup> Plaintiffs claimed that at the very least, the attorney should have notified them of their potential interest in the estate.<sup>169</sup> The attorney responded that he was aware of the contract but could not deliver it without his client's permission. The mother and sister eventually sued the widow, and they settled by dividing the estate, one-half to the widow and one-half to the mother and sister. Nine

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163. *Id.* at 628-29, 530 S.E.2d at 529. When one of the parties to a joint account dies, the account "belong[s] to the surviving party or parties as against the estate of the decedent, unless there is clear and convincing evidence of a different intention at the time the account is created." O.C.G.A. § 7-1-813 (1997).

164. 242 Ga. App. at 629, 530 S.E.2d at 530.

165. *Id.*

166. 241 Ga. App. 204, 525 S.E.2d 744 (1999).

167. *Id.* at 206-08, 525 S.E.2d at 748-49.

168. *Id.* at 204, 525 S.E.2d at 746.

169. *Id.* at 204-05, 525 S.E.2d at 746-47. The mother and sister became aware of the prenuptial agreement before the estate was closed but waited for several months before asking the attorney about it. *Id.*, 525 S.E.2d at 747.

months after the settlement, the mother and sister sued the attorney and his firm.<sup>170</sup>

The trial court bifurcated the issues under the theory that a jury had to determine whether the prenuptial agreement was valid before plaintiffs could make a claim against the attorney. The jury found the agreement was not valid, so the trial court entered judgment for the attorney on the theory that plaintiffs had never been the attorney's clients, and thus the attorney owed no duty to them. The mother and sister did not appeal the trial court's finding that no attorney-client relationship existed between them and the attorney. However, they argued the attorney, as attorney for the administrator of the estate, had a fiduciary duty to them as potential or possible heirs, even if they did not turn out to be actual heirs.<sup>171</sup> The court of appeals examined the facts to determine whether a fiduciary or confidential relationship existed, even though none had been created by law or by contract.<sup>172</sup> The mother and sister said they trusted the attorney when he originally told them they "had no interest in the prenuptial agreement," and thus the attorney owed them a fiduciary duty.<sup>173</sup> The court pointed out, however, that the mere existence of a close personal advisory relationship does not establish a confidential relationship unless "one party is so situated as to exercise a controlling influence over" the other.<sup>174</sup> The court found no controlling influence.<sup>175</sup> After affirming various evidentiary rulings made by the trial court, the court of appeals examined whether the trial court erred in denying the mother and sister's motion for directed verdict on the ground that the widow failed to rescind the prenuptial agreement once she became aware it was invalid.<sup>176</sup> The court of appeals noted the widow could not "rescind" her only benefit under the contract, which was marriage to her husband.<sup>177</sup>

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170. *Id.*, 525 S.E.2d at 746-47.

171. *Id.* at 207, 525 S.E.2d at 748.

172. *Id.* at 207-08, 525 S.E.2d at 748.

173. *Id.* at 208, 525 S.E.2d at 749.

174. *Id.* The court cited O.C.G.A. § 23-2-58, which is discussed *supra* at text accompanying notes 27-34. *Id.*

175. *Id.*

176. *Id.* at 209, 525 S.E.2d at 750.

177. *Id.*

## II. 2000 LEGISLATION

A. *Title to Real Property of Intestate Decedent*

Prior to the revision of the Probate Code that became effective in 1998, Georgia law provided that, if an individual died intestate, title to that individual's real property vested in the individual's heirs, subject to administration.<sup>178</sup> The revised code changed that rule so that title to an intestate decedent's real property vests in the personal representative,<sup>179</sup> just as in the case of an individual who dies with a valid will.<sup>180</sup> The revised code also provided that, if no administrator was appointed within three years of an intestate decedent's death, the title to the real property vested in the decedent's heirs.<sup>181</sup>

In 2000 the Georgia legislature attempted to change the rule of vesting back to the rule as it existed prior to the 1998 revision.<sup>182</sup> However, the amendment adopted by the legislature did not restore the old law but instead created yet another rule for the passage of title to an intestate decedent's real property by providing that an intestate decedent's property "shall vest immediately in the decedent's heirs at law, subject to divestment by the appointment of an administrator of the estate."<sup>183</sup> There is no time limit within which an administrator must be appointed.<sup>184</sup> Thus, under the amended statute, it would seem that the only way to secure title to real property that could not later be divested would be to have an administrator appointed for the estate.

B. *Notice to Temporary Guardian*

Section 29-4-4.1 of the O.C.G.A. provides for the appointment of a temporary guardian for a minor, with or without the minor's parents' consent.<sup>185</sup> However, the temporary guardianship will be dissolved immediately upon the request of either parent, assuming the parent is

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178. O.C.G.A. § 53-4-8 (1997), amended by O.C.G.A. § 53-2-7(a) (1997 & Supp. 2000).

179. O.C.G.A. § 53-2-7(a) (1997 & Supp. 2000).

180. *Id.* § 53-8-15.

181. *Id.* § 53-2-7(b) (Supp. 2000).

182. *Id.* § 53-2-7(b).

183. *Id.* § 53-2-7(a).

184. The 2000 amendment repealed the provision, which appeared in O.C.G.A. § 53-2-7(b), that stated that the property would vest in the heirs if no administrator was appointed within three years of the decedent's death.

185. See *supra* text accompanying notes 121-31 for a discussion of the circumstances under which a temporary guardian may be appointed.

the child's natural guardian.<sup>186</sup> The statute was amended in 2000 to require that the temporary guardian be given notice and the opportunity to object if the parents seek to terminate the temporary guardianship.<sup>187</sup> If an objection is filed, the probate court is to transfer the case to the juvenile court for a determination of whether the termination of the temporary guardianship is in the best interest of the child.<sup>188</sup>

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186. O.C.G.A. § 29-4-4.1(c) (1997).

187. *Id.* § 29-4-4.1(c) (Supp. 2000).

188. *Id.*



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