Wills, Trusts, and Administration of Estates

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by Mary F. Radford*

This Article summarizes the major cases and legislative enactments relating to Georgia fiduciary law during the period June 1, 1998 through May 31, 1999. Most 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. When appropriate, this Article will discuss briefly how the amendments that appear in the Revised Probate Code of 1998 will affect the issue under discussion.

I. RECENT DECISIONS

A. Construction of Wills and Trusts

Four of the most important cases decided by the Georgia Supreme Court during the survey period involved the construction of the language of wills and trusts. In each case, the language in question was language that is commonly used by lawyers to effect the purposes of similar instruments. Absent the particular set of facts in each case, the language and operation of these instruments would probably never have come into question. However, in each case, unexpected circumstances arose that were not addressed directly by the instrument and thus caused the fiduciary to seek judicial construction. While an instrument can never provide for every possible future event, these cases illustrate situations that should be explored by lawyers and their clients and possibly addressed directly in the instrument. This initial investment of time and energy may well avoid the later substantial expenditure

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involved when the task of determining a testator's or grantor's intent falls to the courts.

In *Linkous v. Candler*, the supreme court found that the words of a trust instrument prevented an acceleration of the interests of the remaindermen following renunciations by the life tenants. The Probate Code section that was relevant to the renunciations, former Official Code of Georgia Annotated ("O.C.G.A.") section 53-2-115, provided in part that "[u]nless the decedent or donee of the power has otherwise indicated by his or her will, the interest renounced and any future interest which is to take effect in possession or enjoyment at or after the termination renounced shall pass as if the person renouncing had predeceased the decedent." This provision reflected the common law theory that a remainder interest can be accelerated upon a renunciation absent any indication in the controlling document of a contrary intent.

The trust in *Candler* was an irrevocable trust established in settlement of Mr. Candler's support obligations at the time Howard and Ruth Candler divorced. The trust left the income to Mrs. Candler for life. According to the supreme court's reading of the trust, at Mrs. Candler's death, the trust income was to be paid to the Candlers' four children until the death of the "last survivor" of them. In fact, the income distribution scheme was more complicated. The trust provided that if any Candler child had no living issue, that child was to receive a share of the income. If a Candler child had living issue, that child could request the trustee to distribute part of that child's share of the income to the child for support and health needs. Otherwise, that child's share of the income was to be distributed to his or her living children or the issue of any predeceased child. The trust then provided that when the last Candler child died, the corpus was to be distributed to the then

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4. 270 Ga. at 284, 508 S.E.2d at 658.
6. The Restatement of Property explains that "acceleration operates as the normal consequence of the renunciation of an attempted prior interest because normally it gives the largest possible efficacy to the total disposition attempted." *RESTATEMENT OF PROPERTY* § 231 cmt. a at 963 (1936).
7. 270 Ga. at 284, 508 S.E.2d at 658.
8. *Id.*
living grandchildren of Howard and Ruth Candler, with the issue of any deceased grandchild to take per stirpes that child's deceased parent's share. The three Candler children who were living at the time of their mother's death all had living issue.\footnote{Id. at 284-85, 508 S.E.2d at 658.}

The unanticipated event in this case occurred in 1997, when, upon the death of their mother, the three surviving Candler children filed renunciations of their interests in the trust. They filed a petition in superior court for a construction of the trust that would allow an acceleration of the remaindermen's interests in light of the life tenants' renunciation. William Linkous, Jr., as guardian ad litem for the "otherwise unrepresented descendants, born and unborn," opposed the acceleration. The superior court ordered the property distributed to the grandchildren because it found no language in the trust agreement that indicated an intent to prohibit acceleration.\footnote{Id. The author appeared as an expert witness at trial on behalf of the Candler children.} The guardian ad litem appealed, and the supreme court reversed the judgment of the superior court.\footnote{Id. at 286-87, 508 S.E.2d at 659.}

The supreme court focused on the wording of the Candler trust and found that the document manifested the intent to prohibit acceleration because it required a grandchild to survive his or her parent to be able to take.\footnote{Id. at 287, 508 S.E.2d at 659.} Thus, the court held that no acceleration would be allowed.\footnote{Id. at 286-87, 508 S.E.2d at 659.}

The court found that

\[\text{the class of remaindermen in the Candler trust is subject to open by the birth of more grandchildren . . . . Therefore, the remaindermen cannot be ascertained until the last child of Howard and Ruth Candler has died. To hold otherwise would be contrary to the intent of the Candlers and would deprive potential class members of their share of the trust.}\]

In reaching its decision in \textit{Candler}, the supreme court reaffirmed its statement in \textit{Wetherbee v. First State Bank & Trust Co.},\footnote{266 Ga. 364, 466 S.E.2d 835 (1996). For a discussion of \textit{Wetherbee}, see James C. Rehberg, \textit{Wills, Trusts and Administration of Estates}, 48 MERCER L. REV. 565, 580-81 (1996).} that "a contrary intent [that is, an intent to prohibit acceleration] is indicated if the testator has provided that the holder of the future interest must
survive the holder of the renounced interest.”16 The court in Candler noted, somewhat defensively, that this rule did not put Georgia “outside the mainstream in this regard.”17 However, the cases from other jurisdictions that the court cited do not effectively support this conclusion.18 In any event, the results in Wetherbee and Candler indicate that lawyers and their clients should explore the possibility of future renunciation by life tenants and should consider including language that expressly indicates whether the testator or grantor intends for acceleration to occur.

The second of the construction cases, Lamb v. NationsBank, N.A.,19 involved a will that contained the following direction:

Upon the death of my last surviving daughter, the corpus of my estate is to be divided into two (2) equal parts, one of the parts to be immediately paid over and delivered to my nieces and nephews then living. In the event of the death of any of my nieces and nephews leaving children, the share of the parent shall be paid over and delivered to such children or their legal guardians. In the event at the time of the distribution hereinafter provided for, any of my nieces and nephews are indebted to me or to my estate, the amount of such indebtedness shall be deducted from the share which would go to such niece or nephew, or to his or her children.20

The unanticipated occurrence in this case was that Victoria, the last surviving daughter of the testator, lived to a fairly advanced age. When she died, no niece or nephew of the testator was still living. The testator had one nephew and one niece. The nephew died in 1965, leaving two children. One of the children, John, was still alive when Victoria died. The other child, Meredith Lamb, died before Victoria died but left two surviving children. The testator’s niece had one child, but that child also died before Victoria. Therefore, when Victoria died, the survivors were the son of the testator’s nephew (John) and two grandchildren of the testator’s nephew (Meredith’s children).21

16. 270 Ga. at 286, 508 S.E.2d at 659.
17. Id.
18. See Trenton Banking Co. v. Hawley, 70 A.2d 896 (N.J. Super. Ct. Ch. Div. 1950); Bass v. Moore, 49 S.E.2d 391 (N.C. 1948); Compton v. Rixey’s Ex’rs., 98 S.E. 651 (Va. 1919); Cool v. Cool, 54 Ind. 225 (1876). None of these cases directly support the Georgia rule, as described by the supreme court in Candler, that “a substitutionary gift in a will indicates a contrary intent on the part of the testator with respect to acceleration of the remainder interests.” 270 Ga. at 286, 508 S.E.2d at 659.
20. Id. at 388-89, 507 S.E.2d at 458.
21. Id. at 389 n.2, 507 S.E.2d at 458 n.2.
The question that the court examined was whether the language of the will contemplated that the estate would be divided among the nieces' and nephews' surviving issue or only among the nieces' and nephews' surviving children.\textsuperscript{22} Phrased differently, the court examined whether the child of a niece or nephew had to survive the life tenant, Victoria, in order to have his or her interest vest and thus be passed on to that child's children if the child died intestate.\textsuperscript{23} John claimed that he should receive all the assets because he was the only survivor of Victoria who met the description in the testator's will (that is, a niece or nephew, or the child of a niece or nephew, of the testator). The other parties, which included the nephew's grandchildren and the successors in interest of the estates of the predeceased grandnieces, cited Georgia's preference for early vesting of remainders\textsuperscript{24} for their argument that they should take as the heirs of their parent. Under their theory, while the interest of the nieces and nephews was contingent upon surviving the life tenant, the interest of the child of a niece or nephew was not limited by a survival requirement and instead was to be paid over (that is, to vest) immediately upon the death of that individual's parent. This happened when Melissa's father died leaving children, thus causing his interest to become indefeasibly vested in his two children. When Melissa later died, her indefeasibly vested interest passed to her children.\textsuperscript{25}

The supreme court found in the words of the will an express condition that a niece or nephew must survive the last surviving daughter in order to take.\textsuperscript{26} The court found further that this survivorship requirement also applied to the children of any niece or nephew because, although the will did not expressly require their survival, it granted payment to them, not to their parents' estates or their parents' heirs.\textsuperscript{27} The court held that the reference to these children's legal guardians "demonstrates that the testator contemplated that the children would be in life."\textsuperscript{28} The court also pointed out that the term "children" usually does not include other generations such as grandchildren.\textsuperscript{29}

\textsuperscript{22} \textit{Id.} at 389, 507 S.E.2d at 458.
\textsuperscript{23} \textit{Id.}
\textsuperscript{24} \textit{See} O.C.G.A. § 44-6-66 (1991) ("The law favors the vesting of remainders in all cases of doubt. In construing wills, words of survivorship shall refer to those survivors living at the time of the death of the testator in order to vest remainders unless a manifest intention to the contrary shall appear.").
\textsuperscript{25} 270 Ga. at 389-90, 507 S.E.2d at 458-59.
\textsuperscript{26} \textit{Id.}, 507 S.E.2d at 459.
\textsuperscript{27} \textit{Id.} at 390, 507 S.E.2d at 459.
\textsuperscript{28} \textit{Id.}
\textsuperscript{29} \textit{Id.}
The court looked not only to the above-quoted provision, but also to the rest of the will to support its conclusion that the testator's intent was "that his estate benefit only those persons and entities known and dear to him and over which he had some manner of influence." The court also noted that the interpretation that was urged by the appellants would possibly result in property passing outside the testator's bloodline, which would fly in the face of the legal assumption "that one would rather have property pass within the bloodline than diverted to others."

In *Lamb* the testator seemed not to anticipate that one of his children would live as long as Victoria lived. The language of the will contemplated that the testator's nieces' and nephews' children would still be minors at the time that his last surviving child died. It is common to expect that people will die "in order," that is, older people will die before younger people. However, as that often is not the case, attorneys should pay some attention to clarifying the testator's wishes in the document rather than leaving that task to the courts.

The construction issue in *Swanson v. Swanson* also revolved around whether the language of the will indicated an intent by the testator that a beneficiary survive to become vested. Mr. Swanson was survived by his wife and nine children. His will created two trusts that gave his wife a life estate and the remainder to the nine children, all of whom were named. One of the trusts, the "ITEM IV TRUST," gave his wife a general power of appointment over the trust property. In the event that power was not exercised, the trust property

"shall pass to my nine children, hereinabove named, to be divided among them in equal shares, share and share alike. If any of my children should not be in life at the time of death of my said wife, the share of such deceased child shall go to his or her surviving children, per stirpes."

The second trust, the "ITEM V TRUST," provided that "the remaining assets of this trust shall be divided into nine equal shares, one share for each of my surviving children or for the then surviving issue of each deceased child of ours." The unexpected occurrence in this case was the death of one of Mr. Swanson's children, Bennie, prior to his mother's

30. *Id.*
31. *Id.* at 391, 507 S.E.2d at 460.
32. *Id.* at 390, 507 S.E.2d at 459.
34. *Id.* at 734-35, 514 S.E.2d at 823-24.
35. *Id.* at 735, 514 S.E.2d at 824.
36. *Id.* at 736, 514 S.E.2d at 825.
(the life tenant's) death. Bennie had no children. His wife, Peggy, was the sole beneficiary under his will.37

The supreme court found that Peggy was entitled to Bennie's remainder interests in the two trusts.38 The majority's opinion focused first on whether the remainder interests were contingent or vested subject to divestment.39 The majority cited Georgia's preference for early vesting and the preference for construing conditions as subsequent rather than precedent.40 The majority found the interests to have been vested in the nine children who survived Mr. Swanson, subject to being divested if a child died before the mother (the life tenant) and left one or more surviving children.41 For example, if Bennie had been survived by a child and that child had also survived Bennie's mother, Bennie's interest would have been divested in favor of the child. The court also noted that there was no language in the will that clearly required Mr. Swanson's children to survive their mother to be vested.42

The dissenters also concluded that the remainders were vested subject to divestment.43 However, they construed the language to require that a child survive the mother not to be divested.44 In other words, survival of the mother was a condition subsequent that, if not met, would divest Bennie of any interest he had in the trust. The dissenters focused on the language in the two trusts and on other sections of the will for the purpose of ascertaining Mr. Swanson's intent.45 The dissent pointed out that "although OCGA § 44-6-66 provides that words of survivorship shall refer to the death of the testator in order to vest remainders, [that statute contains the caveat] that this construction is unnecessary if a 'manifest intent to the contrary appears.'"46 The dissenters accused the majority of adhering to the preference for early vesting of remainders "to the detriment of the overriding principle of ascertaining the testator's intent."47

In Swanson the testator and his lawyer apparently explored the possibility that an older beneficiary could outlive the younger beneficia-

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37. Id. at 734, 514 S.E.2d at 823.
38. Id. at 737, 514 S.E.2d at 825-26.
39. Id. at 734, 514 S.E.2d at 824.
40. Id. These preferences are expressed in O.C.G.A. section 44-6-66. See supra note 24.
41. 270 Ga. at 735-36, 514 S.E.2d at 824-25.
42. Id. at 735, 514 S.E.2d at 824.
43. Id. at 737, 514 S.E.2d at 826 (Sears, J., dissenting).
44. Id. at 741, 514 S.E.2d at 828.
45. Id. at 739, 514 S.E.2d at 827.
46. Id. at 738, 514 S.E.2d at 826 (quoting O.C.G.A. § 44-6-66 (1998)).
47. Id.
ries. However, the testator in Swanson apparently did not seem to contemplate what should happen if his child should die without leaving any surviving children. Once again, a clear direction in the will would have saved the time and expense involved in having the court discern his intent.

In Miller v. Walker, the supreme court examined a curious interplay between trust construction and adoption law. In this case, a father "created a trust for the benefit of his daughter . . . and her descendants." The trust provided that the trustee was to use the trust funds for "the education, maintenance, and support of the daughter of Grantor, and the descendants of [daughter]." The trust was to terminate when all the daughter's children reached age twenty-one and was to be distributed among "her descendants per stirpes." At the time the trust was created, the daughter had four children. A few months after the trust was created, the father died, and in his will he bequeathed $300,000 to the trust.

The unanticipated event in this case occurred several years after the father's death when the daughter's parental rights to three of her children were terminated and the children were adopted. The fourth child was not adopted. The trustee petitioned for clarification as to the rights of the children who had been adopted. The supreme court affirmed the superior court's grant of summary judgment in favor of the child who had not been adopted, finding that the adopted children had ceased to be the daughter's "descendants" when they were adopted.

The court cited O.C.G.A. section 19-8-19 as authority for the proposition that "following adoption there be a complete substitution of families for the adopted individual." This statute provides in part as follows:

[A] decree of adoption terminates all legal relationships between the adopted individual and his relatives, including his parent, so that the adopted individual thereafter is a stranger to his former relatives for all purposes, including inheritance and the interpretation or construction of documents, statutes, and instruments, whether executed before or after the adoption is decreed, which do not expressly include the

49. Id. at 811, 514 S.E.2d at 23.
50. Id.
51. Id. at 812, 514 S.E.2d at 23.
52. Id. at 811, 514 S.E.2d at 23.
53. Id. at 812-13, 514 S.E.2d at 24.
54. Id. at 813-14, 514 S.E.2d at 24-25.
55. Id. at 814, 514 S.E.2d at 25.
individual by name or by some designation not based on a parent and child or blood relationship.\textsuperscript{56}

The court noted that to allow "continuing financial ties...[with]...the biological family would necessitate some type of contact" and thus undermine the confidentiality of the adoption and "have serious consequences for the welfare of the adopted children."\textsuperscript{57} The court added that the statute does not operate as an unconstitutional taking of property.\textsuperscript{58}

Ultimately, however, the court claimed that it reached its decision not by application of the statute, but by a determination of the father's intent in setting up the trust.\textsuperscript{59} The court stated that the father was "charged with knowledge of the adoption laws in effect at the time of execution of the trust, and such laws should determine the class of beneficiaries entitled to take, in the absence of an express contrary intent."\textsuperscript{60} The court also pointed out that the father neither chose to name his grandchildren as beneficiaries nor provided any interest for his spouse.\textsuperscript{61} The court concluded that the father's desire was to "benefit only those who are actual members of his family."\textsuperscript{62}

Justice Fletcher's dissenting opinion focused on the theory that the children's rights in the trust were vested when the trust was created and that the subsequent adoptions could not divest them of these rights.\textsuperscript{63} Justice Fletcher also pointed to trust language that indicated that the father meant to benefit immediately not only his named daughter, but also his grandchildren.\textsuperscript{64} Furthermore, Justice Fletcher noted that there was no language that indicated any intent that their rights should terminate upon their adoptions.\textsuperscript{65} He stated that the adoption law in effect when the trust was created should be used only to determine who fell into the class of beneficiaries at the time their rights vested.\textsuperscript{66} Finally, he noted that none of the cases from other jurisdictions that were cited by the majority related to rights that had already vested.\textsuperscript{67}

\textsuperscript{57} 270 Ga. at 814-15, 514 S.E.2d at 25.
\textsuperscript{58} Id. at 815, 514 S.E.2d at 25.
\textsuperscript{59} Id.
\textsuperscript{60} Id., 514 S.E.2d at 25-26.
\textsuperscript{61} Id. at 815-16, 514 S.E.2d at 26.
\textsuperscript{62} Id.
\textsuperscript{63} Id. at 816-17, 514 S.E.2d at 26 (Fletcher, J., dissenting).
\textsuperscript{64} Id., 514 S.E.2d at 26-27.
\textsuperscript{65} Id. at 817, 514 S.E.2d at 26.
\textsuperscript{66} Id. at 818-19, 514 S.E.2d at 27-28.
\textsuperscript{67} Id. at 817-18, 514 S.E.2d at 27.
It is interesting, in light of the stark words of the adoption statute, that both the majority and the dissenting justices focused on the grantor's intent. The statute does not seem to leave room for a contrary construction of a will or other document that does not name the individual beneficiaries or refer to them by something other than the parent-child or blood relationship.

This case highlights two areas in which lawyers should be diligent. First, when drafting instruments that favor descendants, children, or other similar classes, lawyers should pay attention to whether a class member should lose eligibility for class membership because of an adoption. Second, lawyers and guardians ad litem in adoption proceedings should investigate whether a pending adoption would result in the extermination of substantial financial benefits for the child. The adoption may still be in the child's best interest, but the court should have this information available when making that determination. The court in Miller did not discuss whether this information was available to the court when the three children were adopted.

B. Year's Support

In Driskell v. Crisler, the probate court granted to the testator's surviving spouse a year's support award in an amount that reflected the style of living the couple had experienced not just in the year before the husband's death, but over a much longer period of time. Mr. Crisler's second wife sought $193,000 as year's support, which the probate court awarded. As coexecutors, Mr. Crisler's daughter (from his first marriage) and son-in-law challenged the award. Mr. Crisler's will left his estate to his daughter, her two daughters, and his wife. The only evidence presented at the bench trial was Mrs. Crisler's testimony. The Crislers married in 1972 when his daughter was no longer a minor, and Mr. Crisler executed his will in 1976. From the time he made his will until 1991, the Crislers were comfortably situated financially. Mr. Crisler later developed dementia and was institutionalized in 1992. Mrs. Crisler's lifestyle deteriorated substantially thereafter as Mr. Crisler's assets were used to fund his care. When he died in 1996, she was seventy-six years old and in failing health. Her only income was $544 per month in social security benefits, plus checks voluntarily provided by her daughter. When Mr. Crisler died, his estate was valued at about $584,000.

69. Id. at 413, 515 S.E.2d at 422.
70. Id. at 408-09, 515 S.E.2d at 418-19.
The court of appeals upheld the award of year's support to Mrs. Crisler.\textsuperscript{71} The court began its opinion by stating that the entitlement to year's support is attributable to status and "governed in part by dependency."\textsuperscript{72} The court noted that one of the criteria to be taken into account in determining the appropriate amount of a year's support award is whether there is available support for the applicant from other sources.\textsuperscript{73} The court also pointed out that the trial court correctly took into account Mrs. Crisler's standard of living during her entire marriage and did not limit its consideration to the lean years that immediately preceded Mr. Crisler's death.\textsuperscript{74} The court found this consideration appropriate, given the "humane purpose served by the provision for obligatory year's support."\textsuperscript{75} The court stated that O.C.G.A. section 53-5-2(c) does not limit consideration to the one year prior to the decedent's death and that Mrs. Crisler's entitlement was based on her status as his wife, a status that she had enjoyed since 1972.\textsuperscript{76} The court also pointed out that it need not ignore the fact that the Crislers' standard of living in the last few years of Mr. Crisler's life would have been as comfortable as it was during the first twenty years of their marriage had it not been for his illness.\textsuperscript{77} The court distinguished this case from its 1998 decision in Richards v. Wadsworth,\textsuperscript{78} in which Mr. Richards had other substantial resources and used them to maintain the standard of living that he and his wife enjoyed before her death.\textsuperscript{79} Finally, the court examined the particular items for which Mrs. Crisler testified that she needed money from her husband's estate.\textsuperscript{80} These included money for medical procedures that she deferred during his illness and expenses for the repair of their home, furniture, and automobile.\textsuperscript{81} The court concluded:

It would be ludicrous for the law to be that, because she did not maintain the before-Alzheimer's standard of living during her husband's institutionalization and thereby relegate him to public

\textsuperscript{71} Id. at 414, 515 S.E.2d at 422.
\textsuperscript{72} Id. at 410, 515 S.E.2d at 419.
\textsuperscript{73} Id.
\textsuperscript{74} Id., 515 S.E.2d at 420.
\textsuperscript{75} Id.
\textsuperscript{76} Id. at 411, 515 S.E.2d at 420.
\textsuperscript{77} Id.
\textsuperscript{79} 237 Ga. App. at 411, 515 S.E.2d at 420.
\textsuperscript{80} Id. at 411-12, 515 S.E.2d at 420-21.
\textsuperscript{81} Id.
welfare, she herself must be relegated to the near-pauper financial
c Condition she endured after her husband's debilitation occurred.82

C. Intestacy and Children Born Out of Wedlock

The courts continue to face the variety of issues that arise because of
the high percentage of children who are born out of wedlock. The typical
inheritance case in this context involves whether the child is actually the
child of the deceased putative father and thus is able to inherit from the
father.83 However, Rainey v. Chever84 did not involve the right of the
child to inherit from the father, but rather the right of the father to
inherit from the deceased child. More specifically, the issue here was
not proof of paternity, but rather whether the father of a child born out
of wedlock can be precluded by statute from inheriting from that child
because he failed to support the child or to treat the child openly as his
own.85 The supreme court held that this statutory exclusion of fathers
was an unconstitutional denial of equal protection to men.86

The father's paternity in Rainey had been judicially established a
couple of years after the child's birth. When the child was killed in a car
accident at age twenty, his mother tried to sever the father's inheritance
rights because the father allegedly had failed or refused to treat the
child openly as his own.87 At the time the father sued, Georgia law
prohibited a father from inheriting from a nonmarital child under these
circumstances.88 No similar prohibition existed for the mother of a
child born out of wedlock who refused to support the child or to treat the
child as her own. The father successfully argued that this statute
created an unconstitutional gender classification because it did not
"further[] important governmental objectives, and the discriminatory
means employed [were not] 'substantially related' to the achievement of
[the] governmental objectives."89 The child's mother and the State were
not able to persuade the court that the gender classification could be
justified because it advanced the interest of encouraging fathers to
remain involved with and support their nonmarital children. The court
"reject[ed] the argument that mothers are less likely than fathers to

82. Id. at 412, 515 S.E.2d at 421.
discussion of Sharp, see Rehberg, supra note 78, at 381-82.
85. Id. at 519, 510 S.E.2d at 823-24.
86. Id., 510 S.E.2d at 824.
87. Id., 510 S.E.2d at 823.
88. O.C.G.A. § 53-2-4(b)(2). When the action accrued, this same prohibition was
codified at O.C.G.A. section 53-4-5(b)(2).
89. 270 Ga. at 520, 510 S.E.2d at 824 (quoting Reed v. Reed, 404 U.S. 71, 76 (1971)).
abandon children born out of wedlock as reliant on stereotypes and overbroad generalizations.\textsuperscript{90}

The result of this decision is that the portion of the statute that precludes nonsupporting fathers from inheriting is void. The legislature's options for dealing with this issue are all problematic. First, the legislature could expand the support requirement to include mothers of nonmarital children as well as fathers. This alternative could result in not only an increase in litigation, but also a potential further attack on the statute as denying equal protection to unmarried, as opposed to married, parents. Second, the legislature could expand the requirement to apply to all parents, whether married or not, but this option could greatly increase the litigation involved in intestacy cases. Third, the legislature could leave the statute as it currently stands, with no support requirement for either parent. This alternative may result in substantial unfairness in cases in which a father who has never supported or even acknowledged his out of wedlock child suddenly has a change of heart when the child dies with a substantial estate, such as one that is enhanced by a personal injury award. The last, and probably least desirable, alternative is to deny both parents the right to inherit from a nonmarital child. Again, this is vulnerable to constitutional challenge and is inherently inequitable to parents who raise and support a child in the same manner as if they had been married when the child was born.

D. Probate of Copy of Will

Georgia law permits the probate of a copy of a will when the original cannot be found to probate.\textsuperscript{91} However, before probating a copy, the propounder must overcome by a preponderance of the evidence the presumption of revocation that arises when a will cannot be found.\textsuperscript{92} Additionally, the copy must be proved to be a true copy of the will.\textsuperscript{93} Two cases decided during the survey period outline the process for overcoming the presumption of revocation and for probating a copy of a will.

In \textit{Murchison v. Smith},\textsuperscript{94} Ms. Smith, the testator, was diagnosed with cancer in December 1994. In January 1995 she executed a will that left the bulk of her estate to her brother-in-law and his wife, who were helping to care for her. Shortly thereafter, Ms. Davis-Murchison, Ms.

\begin{itemize}
\item \textsuperscript{90} Id.
\item \textsuperscript{91} O.C.G.A. § 53-4-46(b) (Supp. 1999).
\item \textsuperscript{92} Id.
\item \textsuperscript{93} Id.
\item \textsuperscript{94} 270 Ga. 169, 508 S.E.2d 641 (1998).
\end{itemize}
Smith’s cousin, came to visit Ms. Smith. On March 10, 1995, Ms. Smith executed a new will while in the hospital. Ms. Davis-Murchison was present for the execution of this will, which left the bulk of the estate to her. The will also contained several handwritten alterations that the testator initialed. When Ms. Smith was released from the hospital, Ms. Davis-Murchison took her to the probate court, where her January 1995 will was on file. Ms. Smith was on oxygen and dressed in a robe. Ms. Davis-Murchison “did most of the talking.” The probate judge had drafted the January 1995 will when he was in private practice, and when Ms. Smith withdrew it, he insisted on making a copy of that will. Ms. Smith, Ms. Davis-Murchison or the probate judge, per Ms. Davis-Murchison’s suggestion, wrote “Revoked” across the January will before the judge made a copy of it. Ms. Smith left the March 1995 will on file with the court, but Ms. Davis-Murchison withdrew that will on April 13, 1995. Ms. Smith died three days after the will was withdrawn. The January will was not found in her possession, and Ms. Davis-Murchison testified that Ms. Smith had torn it up. The brother-in-law sought to probate a copy of the January will, possibly the copy made at the probate judge’s suggestion, and Ms. Davis-Murchison sought to probate the March will in common form and challenged the probate of the January will. The court noted that “[t]he probate court declared in an order that the January will had been revoked and it had no authority to determine the validity of the March will offered for probate in common form.” After a de novo appeal to the superior court, the jury found that the January will had not been revoked. On appeal to the supreme court, Ms. Davis-Murchison argued that she should have been granted a directed verdict that the January will had been revoked because the uncontradicted testimony showed that it had been destroyed by the testator with the intent to revoke it. She also argued that the January will had been expressly revoked by the March will.

The supreme court found that there was sufficient evidence to support a finding that Ms. Smith lacked testamentary capacity and therefore could not have formed the intent to revoke the January will. The court also found that the jury had a sufficient basis to find that the presumption of revocation that arises when a will cannot be found to

95. Id. at 169-70, 508 S.E.2d at 642-43.
96. Id. at 170, 508 S.E.2d at 643.
97. Id.
98. Id.
99. Id.
100. Id. at 171-72, 508 S.E.2d at 645.
probate had been rebutted. The dissent argued that the brother-in-law had not met his burden of proving that a revocation had not taken place.

The dissent focused on the undisputed actions of Ms. Smith: withdrawing the will from the probate court file and writing or causing to be written the word "Revoked" across the face of it. The dissent found the record "wholly insufficient" to support a finding that Ms. Smith lacked the capacity to revoke the January will in the time between her execution of that will and her death.

In Smith v. Srinivasa, Ms. Smith executed a will in 1989 that could not be found when she died in 1995. Srinivasa, Ms. Smith's former son-in-law, sought to probate a conformed copy of the 1989 will. Unlike an earlier will, the 1989 will devised to Ms. Smith's daughter and Srinivasa three rental properties for which Ms. Smith held title but for which her daughter and Srinivasa had paid. Other relatives challenged the son-in-law's petition for probate. After a trial in the superior court, a jury found the copy of the 1989 will to constitute the last will and testament of Ms. Smith. The relatives argued first that the copy was deficient in that it did not bear the signatures of the testator and the witnesses. The supreme court stated that "the statute does not discriminate about the types of copies that may be made." The court also described the testimony of the testator's attorney, whose standard office procedure was to prepare conformed copies. Additionally, the relatives argued that Srinivasa had not overcome the presumption of revocation that arose when the will could not be found to probate, but the court found that he had met that burden.

The court pointed out that evidence had shown a good working relationship between the testator and Srinivasa that continued beyond his divorce from her daughter and that their relationship was rooted in the fact that the testator was the property manager of the three properties that were held

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101. Id. at 172, 508 S.E.2d at 645. This case was decided under former O.C.G.A. section 53-3-6, which required the presumption of revocation to be rebutted by clear and convincing evidence.
102. Id. at 173-74, 508 S.E.2d at 645 (Carley, J., dissenting).
103. Id. at 174-75, 508 S.E.2d at 646.
104. Id. at 174, 508 S.E.2d at 646.
106. Id. at 736-37, 506 S.E.2d at 112. The conformed copy contained only the notation "/s/" on the lines where the signatures would have appeared. Id. at 736 n.2, 506 S.E.2d at 112 n.2.
107. Id. at 737, 506 S.E.2d at 112.
108. Id.
109. Id.
in her name because of Srinivasa’s tax problems. Testimony by other witnesses also showed that the testator’s conversations with others prior to her death confirmed her intent that the 1989 will govern the distribution of her property.

E. Property of the Estate

In three cases decided during the survey period, the appellate courts examined what constitutes property of a decedent’s estate over which a personal representative has control. In Escareno v. Carl Nolte Sohne GmbH, the supreme court determined that a court could appoint an administrator of an estate that consisted only of a cause of action pending in Georgia. The decedent had been employed by a German company and, while working in Georgia, had been severely burned in an on-the-job accident. He sued the company in the Northern District of Georgia and then moved back to Mexico. When he died in Mexico, his property interests in Georgia consisted only of the lawsuit and the file in his Georgia lawyer’s possession. The Probate Court of Fulton County, the county where the lawsuit was pending, appointed an administrator of his estate who then continued to pursue his cause of action. The supreme court found that the appointment was proper.

In Jimerson v. Republic Land & Investment Co., the court examined whether the personal representative or the devisee of real property had title to that property during the administration of the estate. The testator died in 1990 and was survived by his wife and daughter. His house was his only asset. His will named his wife as the sole beneficiary of his estate and as executor. Prior to offering the will for probate, the wife entered into a roofing contract and simultaneously signed a deed to secure debt and claimed she had good and simple title in the house. The wife did not notify the daughter of the pending probate. The wife claimed that the daughter’s whereabouts were unknown, even though she knew where the daughter lived and worked. After the will was admitted to probate, the wife defaulted on the loan. As executor, she also executed a deed of assent conveying the house to herself. The daughter did not learn these facts until her mother died two years later. The year after the mother died, the lender foreclosed on

110. Id. at 737-38, 506 S.E.2d at 112-13.
111. Id.
113. Id. at 264, 507 S.E.2d at 743.
114. Id. at 264-65, 507 S.E.2d at 743-44.
115. Id. at 265, 507 S.E.2d at 743.
the loan. The daughter was appointed as successor executor of her father's estate, and she sought to set aside the foreclosure. The daughter argued that her mother did not own the property at the time she signed the deed to secure debt. The trial court granted summary judgment for the lender. The court of appeals affirmed. The court noted that the mother, as devisee of her husband's realty, held inchoate title to that realty, which would be perfected when the executor assented to the devise. The inchoate title allowed her to make a voluntary conveyance of the property prior to the executor's assent. Even though the daughter later challenged the grant of probate, the court's order was in effect when the mother, as executor, conveyed the property to herself and thus perfected her title.

In *Welch v. Welch*, the supreme court addressed the unusual question of whether an executor retains control over the body of the decedent. Ms. Welch died in 1994. Her will directed that she have a Christian burial at her executor's direction. Her son was appointed executor of her estate. Ms. Welch was buried in a Baptist church cemetery in Mountain City, Georgia. Two years later, her husband was granted permission to move her remains to land that was dedicated as the Welch family cemetery in Mountain City, Georgia. The husband died soon thereafter and was buried beside his wife. Because the son then decided that he was not happy with his mother's burial site, he sought permission to disinter her remains and rebury her in Virginia, but his siblings objected. The supreme court upheld the lower court's decision to enjoin the son from removing his mother's remains. The court reviewed its precedent on the control of dead bodies and determined that a "quasiproperty right" in the body of an individual belonged to that individual's spouse or, absent a spouse, next of kin, "in the absence of testamentary disposition." The court found that the burial direction in Ms. Welch's will did not constitute a contrary testamentary disposition that gave control over her remains to her son as executor. The court held that any duty that a personal

117. *Id.* at 417-18, 506 S.E.2d at 921-22.
118. *Id.* at 420, 506 S.E.2d at 923.
119. *Id.* at 419, 506 S.E.2d at 922.
120. *Id.*
121. *Id.*
123. *Id.* at 742, 505 S.E.2d at 471.
124. *Id.* at 744, 505 S.E.2d at 472.
125. *Id.* at 743, 505 S.E.2d at 472 (quoting Georgia Lions Eye Bank, Inc. v. Lavant, 255 Ga. 60, 61, 335 S.E.2d 127, 128 (1985)).
126. *Id.*
representative has relating to the burial or disposition of a decedent's body terminates after the initial discharge of that duty.\textsuperscript{127}

\section*{F. Common-Law Spouse as Administrator}

Although the General Assembly abolished common-law marriage in Georgia in 1997,\textsuperscript{128} the probate courts continue to face situations in which a survivor claims to have been the common-law spouse of the decedent. Two cases during the survey period involved a petition by the putative spouse to serve as the administrator of the decedent's estate. These cases are indicative of the proof problems that are inherent in a claim of common-law marriage.

The decedent in \textit{In re Estate of Wilson}\textsuperscript{129} died in the crash of ValuJet flight 592. Mr. Hinely applied to administer Ms. Wilson's estate under the claim that he was her common-law husband. Her father challenged the existence of the marriage, and the probate court found that a common-law marriage did not exist. The probate court's order indicated that the judge found much of Mr. Hinely's testimony and the evidence given by other parties to be evasive and often incredible.\textsuperscript{130} The court of appeals affirmed the probate court's holding.\textsuperscript{131} The issue in question was whether the couple had "agreed to live together as man and wife and consummated the agreement."\textsuperscript{132} Mr. Hinely testified that the couple had cohabited since 1992 and had agreed in 1993 to be common-law husband and wife.\textsuperscript{133} However, other evidence indicated that Mr. Hinely wrote a note soon after Ms. Wilson's death denying the common-law marriage, that the cohabitation ended in 1995, that her family referred to him only as their "soon-to-be" son-in-law, that Mr. Hinely gave her an "engagement ring" in 1994, that they procured a marriage license but never followed through, that they consistently referred to each other as "fiancée" and "fiancé," that they swore on tax documents that they were single, and that, in 1995 and 1996, Ms. Wilson "told friends . . . that she had no intention of marrying Hinely,

\begin{itemize}
\item \textsuperscript{127} \textit{Id.}
\item \textsuperscript{128} See O.C.G.A. § 19-3-1.1 (1999) ("No common-law marriage shall be entered into in this state on or after January 1, 1997. Otherwise valid common-law marriages entered into prior to January 1, 1997, shall not be affected by this Code section and shall continue to be recognized in this state.").
\item \textsuperscript{129} 236 Ga. App. 496, 512 S.E.2d 383 (1999).
\item \textsuperscript{130} \textit{Id.} at 496, 512 S.E.2d at 385.
\item \textsuperscript{131} \textit{Id.} at 499, 512 S.E.2d at 387.
\item \textsuperscript{132} \textit{Id.} at 497, 512 S.E.2d at 385.
\item \textsuperscript{133} \textit{Id.}
\end{itemize}
that he was not the man for her, and that she was not ready to get
married.\textsuperscript{134}

In \textit{In re Estate of Dunn},\textsuperscript{135} Ms. Dunn was appointed administrator
of the decedent's estate upon her claim that they were married at
the time of his death. The decedent's daughter filed a petition to remove
Ms. Dunn, which the probate court granted. Ms. Dunn appealed on the
ground that the probate court erred in requiring her to prove that she
was the decedent's common-law spouse.\textsuperscript{136} The court of appeals
affirmed the probate court's order.\textsuperscript{137} Ms. Dunn and the decedent were
ceremonially married in 1986, but they divorced in 1994.\textsuperscript{138} Thus, the
court found that she had the burden of proving that a common-law
marriage occurred after the divorce.\textsuperscript{139} The following evidence present-
ed in the probate court suggested that there was no common-law
marriage: she filed tax returns indicating that she was single; she lacked
any joint accounts or credit cards with the decedent; she owned her car
and house solely in her name; and she told others that the decedent was
not her husband.\textsuperscript{140} The court of appeals found the evidence sufficient
to support the probate court's finding that no common-law marriage
existed.\textsuperscript{141} Ms. Dunn also challenged her removal as administrator
under the theory that the probate judge was required to find some
evidence of mismanagement or of false and fraudulent misrepresentation
in her petition for letters of administration.\textsuperscript{142} The court of appeals
refocused the inquiry on whether her statements in the petition "were
material either in establishing her statutory qualifications . . . or in
influencing the probate court's exercise of discretion in granting letters
of administration where no statutory priority exists."\textsuperscript{143} The court
found that her misrepresentation was material and that she failed to
establish that the probate court abused its discretion in removing
her.\textsuperscript{144}

\begin{verse}
\begin{tabular}{ll}
134. & \textit{Id.} at 497-98, 512 S.E.2d at 386. \\
136. & \textit{Id.} at 211, 511 S.E.2d at 577. \\
137. & \textit{Id.} at 212, 511 S.E.2d at 577. \\
138. & \textit{Id.} at 211, 511 S.E.2d at 577. \\
139. & \textit{Id.} at 211-12, 511 S.E.2d at 576-77. \\
140. & \textit{Id.} at 212-13, 511 S.E.2d at 577. \\
141. & \textit{Id.} at 213, 511 S.E.2d at 577. \\
142. & \textit{Id.}, 511 S.E.2d at 578. \\
143. & \textit{Id.} at 213-14, 511 S.E.2d at 578. \\
144. & \textit{Id.} at 214, 511 S.E.2d at 578. \\
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II. 1999 LEGISLATION

A. Uniform Transfer on Death Security Registration Act

The 1999 Georgia General Assembly adopted the Uniform Transfer on Death Security Registration Act.\textsuperscript{145} This Act provides for the transfer, outside of probate, of securities that are registered as transfer on death ("TOD") securities.

The new TOD registration is available only if the current registration "shows sole ownership by one individual or multiple ownership [of a security] by two or more [persons] with right of survivorship, rather than as tenants in common."\textsuperscript{146} This form of registration is available if "authorized by this or a similar statute of the state of organization of the issuer or registering entity, the location of the registering entity's principal office, the office of its transfer agent . . . or by this or a similar statute of the state listed as the owner's address."\textsuperscript{147} A beneficiary designation that was made when the statute was not in force is still "presumed to be valid and authorized as a matter of contract law."\textsuperscript{148}

The Act allows the registration to be shown as "transfer on death" ("TOD") or "pay on death" ("POD").\textsuperscript{149} The statute provides the following illustrations:

1. Sole owner-sole beneficiary: John S. Brown TOD (or POD) John S. Brown, Jr.;
3. Multiple owners-primary and secondary (substituted) beneficiaries: John S. Brown Mary B. Brown JT TEN TOD John S. Brown, Jr., SUB BENE Peter Q. Brown or John S. Brown Mary B. Brown JT TEN TOD John S. Brown, Jr., LDPS.\textsuperscript{150}

A TOD designation is not effective until the owner's death and can be changed by the owner at any time without the consent of the beneficiary.\textsuperscript{151} At the owner's death, or the death of the last to die of multiple deaths of multiple owners, the TOD designation will be effective as to the last to die.

\textsuperscript{145} O.C.G.A. §§ 53-5-60 to -71 (Supp. 1999).
\textsuperscript{146} Id. § 53-5-62.
\textsuperscript{147} Id. § 53-5-63.
\textsuperscript{148} Id.
\textsuperscript{149} Id. § 53-5-65.
\textsuperscript{150} Id. § 53-5-70(b)(1)-(3). LDPS indicates that if John, Jr. does not survive, his "lineal descendants per stirpes" (in accordance with the law of his domicile at death) will take in his place.
\textsuperscript{151} Id. § 53-5-66.
owners, the security is re-registered in the beneficiary’s name. If no beneficiary survives, the security is simply treated as an asset of the owner’s estate. However, registering entities are not required to offer registration in this form. If an entity offers registration in this form, the entity is discharged from any claims to the security by the estate, creditors, heirs, or devisees of the deceased owner. The Act makes clear that TOD registration “does not affect the rights of beneficiaries in disputes between themselves or other claimants to ownership of the security transferred or its value or proceeds.”

Another limitation of the Act is that it “does not limit the rights of creditors of security owners against beneficiaries and other transferees under other laws of this state.” Finally, the Act applies to registrations made by decedents who die on or after July 1, 1999, regardless of when the designation was made.

While offering another convenient way to have property pass outside of probate, the Act may also create traps for the unwary. First, with this new way of registering securities, individuals may inadvertently subvert an otherwise carefully constructed estate plan. For example, an individual whose estate plan revolves around treating her two children equally will often have a will or trust that gives her children undivided interests in all her property to avoid unfairness in the event of the inevitable appreciation or depreciation of specific assets. Should this individual then go to her broker and buy $100,000 worth of stock in a soft drink company and register the stock TOD to her son, and buy $100,000 worth of bank stock and register that stock TOD to her daughter, her plan of equal distribution will not be realized unless the two blocks of stock appreciate or depreciate at exactly the same rate.

Second, this additional way of transferring property outside of probate may result in a surviving spouse being denied the right to year’s support. If a husband’s estate is primarily stock that is registered as TOD, his probate estate will have no assets from which the surviving spouse and minor children may be awarded year’s support.

152. Id. § 53-5-67.
153. Id.
154. Id. § 53-5-68(a).
155. Id. § 53-5-68(c).
156. Id. § 53-5-68(d).
157. Id. § 53-5-69(b).
158. Id. § 53-5-71.
B. Amendments to the Guardianship Code and Related Amendments

The General Assembly amended a variety of provisions relating to the guardianship of incapacitated adults in 1999. First, the General Assembly amended O.C.G.A. section 29-5-13 to allow the probate judge to set a reasonable fee for service as a guardian ad litem in a guardianship case, as opposed to having the fee limited to that paid to witnesses for attendance at superior court.\(^{159}\) Second, the General Assembly amended O.C.G.A. section 10-6-36 and added sections 10-6-141 and 10-6-142 to clarify that a financial power of attorney terminates upon the appointment of a guardian of the property for a principal.\(^{160}\) Third, the General Assembly amended O.C.G.A. sections 31-36-6 and 31-36-10 to clarify that a health care power of attorney survives the disability or incapacity of the principal absent an order by the probate court or superior court.\(^{161}\) Before terminating the health care agency, the court must notify the agent by first-class mail and there must be "clear and convincing evidence that the agent is acting in a manner inconsistent with the power of attorney."\(^{162}\)

Finally, the General Assembly enacted the Temporary Health Care Placement Decision Maker for an Adult Act.\(^{163}\) This Act responds to the legislature's recognition that there may be times when an adult has not made arrangements, such as a power of attorney, for consent to her admission to, discharge from, or transfer to a health care facility.\(^{164}\) The Act sets up a mechanism by which consent may be given when a physician certifies that it is in the adult's best interests to be discharged from one facility and admitted or transferred to another.\(^{165}\)

\(^{159}\) Id. § 29-5-13(f).
\(^{160}\) Id. §§ 10-6-36, -141, -142.
\(^{161}\) Id. §§ 31-36-6(c), -10.
\(^{162}\) Id. § 31-36-6(c).
\(^{163}\) Id. §§ 31-36A-1 to -7.
\(^{164}\) Id. § 31-36A-2(a).
\(^{165}\) Id. § 31-36A-5.