

12-2012

## Wills, Trusts, Guardianships, and Fiduciary Administration

Mary F. Radford

Follow this and additional works at: [https://digitalcommons.law.mercer.edu/jour\\_mlr](https://digitalcommons.law.mercer.edu/jour_mlr)



Part of the [Estates and Trusts Commons](#)

---

### Recommended Citation

Radford, Mary F. (2012) "Wills, Trusts, Guardianships, and Fiduciary Administration," *Mercer Law Review*.  
Vol. 64 : No. 1 , Article 19.

Available at: [https://digitalcommons.law.mercer.edu/jour\\_mlr/vol64/iss1/19](https://digitalcommons.law.mercer.edu/jour_mlr/vol64/iss1/19)

This Survey Article is brought to you for free and open access by the Journals at Mercer Law School Digital Commons. It has been accepted for inclusion in Mercer Law Review by an authorized editor of Mercer Law School Digital Commons. For more information, please contact [repository@law.mercer.edu](mailto:repository@law.mercer.edu).

# Wills, Trusts, Guardianships, and Fiduciary Administration

by **Mary F. Radford\***

This Article describes selected cases and significant legislation from the period of June 1, 2011 through May 31, 2012 that pertain to Georgia fiduciary law and estate planning.<sup>1</sup>

## I. GEORGIA CASES

### A. *Construction of the Terms of a Will*

The case of *Stewart v. Ray*<sup>2</sup> involved the interpretation of the commonly-used term “per stirpes” in the will of Willy Ray, Sr., who was survived by his eight children.<sup>3</sup> One of Ray’s daughters, Stewart, served as his conservator during life<sup>4</sup> and was named as the executor under his

---

\* Marjorie Fine Knowles Professor of Law, Georgia State University College of Law. Newcomb College of Tulane University (B.A., 1974); Emory University (J.D., 1981). Reporter, Probate Code Revision Committee, Guardianship Code Revision Committee, Trust Code Revision Committee of the Fiduciary Section of the State Bar of Georgia. Immediate Past President, American College of Trust and Estate Counsel. Author, MARY F. RADFORD, REDFEARN: WILLS AND ADMINISTRATION IN GEORGIA (7th ed. 2008); MARY F. RADFORD, GEORGIA GUARDIANSHIPS AND CONSERVATORSHIPS (2012 ed.); MARY F. RADFORD, GEORGIA TRUSTS & TRUSTEES (2012-2013 ed.).

1. For an analysis of Georgia fiduciary law and estate planning during the prior survey period, see Mary F. Radford, *Wills, Trusts, Guardianships, and Fiduciary Administration*, *Annual Survey of Georgia Law*, 63 MERCER L. REV. 385 (2011).

2. 289 Ga. 679, 715 S.E.2d 79 (2011).

3. *Id.* at 679-80, 715 S.E.2d at 79.

4. Ray had been injured in an accident earlier in his life. His daughter, Stewart, had served as his conservator while he was alive. After he died, she was discharged as conservator. *Id.* at 679, 715 S.E.2d at 79. Stewart’s sister made an unsuccessful challenge to the discharge on due process grounds. See *Ray v. Stewart*, 287 Ga. 789, 789, 700 S.E.2d 367, 368 (2010).

will.<sup>5</sup> One of Ray's other daughters asked for a declaratory judgment interpreting the following Item IV of Ray's will:

All the rest, residue and remainder of my property, I give, devise and bequeath to my eight (8) children, per stirpes, at the discretion of my Executor, to be divided among them as and in the manner in which my Executor in his or her sole discretion determines to be fair and reasonable. If any of my children do not survive me, his or her share of my property shall pass to his or her lineal descendants, if any, per stirpes. If a child predeceases me without leaving lineal descendants, his or her share shall pass to my surviving children.<sup>6</sup>

The Fulton County Probate Court determined this language indicated that the testator intended his children to share equally in his estate.<sup>7</sup> Stewart had interpreted the language as giving her sole discretion over how and to whom to distribute the property, including the discretion to distribute the estate to herself alone and thus exclude her siblings.<sup>8</sup> The Georgia Supreme Court affirmed the probate court's interpretation of the language of the will.<sup>9</sup> The term "per stirpes" is used in the Georgia Probate Code to describe how property is to pass under the rules of intestacy<sup>10</sup> in the event that the primary taker has died before the decedent. A distribution "per stirpes" is a distribution that divides the property among the "stocks" or "roots" of the decedent's family.<sup>11</sup> So, for example, if a decedent dies and is survived by one daughter and by two grandchildren who are the children of a son who died before the decedent the daughter represents one "root" and takes one-half of the estate and the children of the deceased son (the other "root") share that

---

5. *Stewart*, 289 Ga. at 679, 715 S.E.2d at 79. The "executor" is the "person nominated in a will who has qualified to administer a testate estate." O.C.G.A. § 53-1-2(7) (2011).

6. *Stewart*, 289 Ga. at 680, 715 S.E.2d at 80. The other daughter also asked the court to construe Item III of Ray's will which contained similar language dividing his personal property among his eight children per stirpes. *Id.* at 679, 715 S.E.2d at 79.

7. *Id.* at 680, 715 S.E.2d at 80.

8. *Id.* at 681, 715 S.E.2d at 80.

9. *Id.* at 682, 715 S.E.2d at 81. Stewart contended that the use of the term "per stirpes" was meant only to ensure that, if she determined that one of Ray's children were to receive a distribution and that child was dead, that child's distribution would be made to the descendants of that child. *Id.* at 681, 715 S.E.2d at 80.

10. An individual who dies "intestate" is an individual who dies without a valid will. O.C.G.A. § 53-2-1(c) describes the individuals to whom property will be distributed (the "heirs" of that individual) if the decedent has no will. O.C.G.A. § 53-2-1(c) (2011).

11. The term "per stirpes" means by the "root" or "stock." *MacGregor v. Roux*, 198 Ga. 520, 522, 32 S.E.2d 289, 290 (1944); *see also* 3 BOUVIER'S LAW DICTIONARY 3138 (8th ed. 1914).

son's one-half interest.<sup>12</sup> When the term "per stirpes" is used in a will, it is presumed that the term directs the property to be distributed "where the law carries it"<sup>13</sup> (in other words, in the same manner as the term is used for intestate distribution), although the court may find that the testator intended a different meaning when he or she used the term in the will.<sup>14</sup> The court in *Stewart* emphasized that the testator's intent will prevail in the construction of the will and that the court should look to the "four corners" of the will to find that intent.<sup>15</sup> The court also noted that, in addition to the term "per stirpes," Ray used the term "share" throughout the will, indicating that he did not intend to allow the executor to distribute the entire estate to herself, thus depriving the other children of a "share."<sup>16</sup> The supreme court also looked to its past ruling in a 1980 case that contained a devise to "my nieces and nephews, per stirpes."<sup>17</sup> In that case, the court had determined that the term "per stirpes" indicated a desire that all of the nieces and nephews would be "the stirps" and thus the "primary legatees."<sup>18</sup> The court concluded that each of Ray's children were meant to take an equal share of his estate.<sup>19</sup> The court said that to grant the executor unbridled discretion to distribute the estate in any other manner would leave the terms "share" and "per stirpes" without meaning.<sup>20</sup>

---

12. Under O.C.G.A. § 53-2-1(c)(3), the property of a decedent who has no spouse is to be divided equally among the decedent's children. O.C.G.A. § 53-2-1(c)(3). However, if any child dies before the decedent, that child's share is to be distributed to that child's descendants "per stirpes." *Id.* For a discussion of inheritance per stirpes, see MARY F. RADFORD, REDFEARN: WILLS AND ADMINISTRATION IN GEORGIA § 9:2 (7th ed. 2008).

13. *In re Will of Lewis*, 263 Ga. 349, 351, 434 S.E.2d 472, 473 (1993).

14. See *Fleming v. First Union Nat'l Bank*, 274 Ga. 527, 528, 555 S.E.2d 728, 730 (2001); *Bennett v. Lloyd*, 245 Ga. 706, 706, 267 S.E.2d 3, 3-4 (1980).

15. *Stewart*, 289 Ga. at 680, 715 S.E.2d at 80 (quoting *Hood v. Todd*, 287 Ga. 164, 166, 695 S.E.2d 31, 32 (2010)).

16. *Id.* at 681, 715 S.E.2d at 81.

17. *Id.* at 681, 715 S.E.2d at 80 (quoting *Bennett*, 245 Ga. at 706, 267 S.E.2d at 3).

18. *Bennett*, 245 Ga. at 706, 267 S.E.2d at 4. In *Bennett*, the testator was survived by eleven nieces and nephews. One niece was the child of a living brother, one was the child of a deceased brother, four were the children of a living brother, and five were the children of another living brother. The executors insisted that the term "per stirpes" required a division at the level of their parents, who were the testator's four brothers, with the child or children of each brother to share that brother's one-fourth share. *Id.* at 706, 267 S.E.2d at 3. The court determined that since the testator had referred specifically to her nieces and nephews, she intended that the distribution be made equally among them. *Id.* at 706, 267 S.E.2d at 3-4.

19. *Stewart*, 289 Ga. at 681, 715 S.E.2d at 80.

20. *Id.* at 681, 715 S.E.2d at 81.

*B. Discretionary Power of a Trustee*

In *Reliance Trust Co. v. Candler*,<sup>21</sup> the Georgia Court of Appeals affirmed a jury verdict of over \$1 million against a trustee and in favor of the remainder beneficiaries.<sup>22</sup> The trust was a revocable marital trust set up by Claire Candler in the year before she died. The trust gave the income to Claire's husband, Buddy, for life and provided that the remainder would be distributed among their children and grandchildren as appointed by Buddy in his will.<sup>23</sup> The trust also included the following provision:

Whenever in the sole judgment of the [t]rustee the income being paid to [Buddy], together with any other income or periodic payments known to the [t]rustee that are being received by [Buddy] shall be insufficient for his proper support, maintenance, or to enable him to meet any difficulty produced by sickness, accident, or similar cause, such portion of the corpus of this trust estate as in the discretion of the [t]rustee is deemed appropriate shall be paid to him or for his benefit.<sup>24</sup>

The trust was funded when Claire died, and Buddy then became the co-trustee, along with another individual. A few years later, Wachovia Bank replaced that individual as co-trustee and, in 2001, Reliance Trust Co. replaced Wachovia. The trust contained \$2.1 million in assets when Reliance became co-trustee. While Reliance was acting as co-trustee, the trust distributed over \$1 million from the principal of the trust to Buddy. When Buddy died, the remainder beneficiaries received \$838,762 from the trust. They brought suit against Reliance for the total amount of the distributions made to Buddy (plus interest from the time each distribution was made), and the jury rendered a verdict in their favor.<sup>25</sup> The court of appeals affirmed.<sup>26</sup> The court of appeals prefaced its discussion by listing the three elements of a breach of fiduciary duty claim: (1) the

---

21. 315 Ga. App. 495, 726 S.E.2d 636 (2012). This case is discussed in MARY F. RADFORD, *GEORGIA TRUSTS AND TRUSTEES* § 4:2 (2012-2013 ed.).

22. *Reliance Trust Co.*, 315 Ga. App. at 504-05, 726 S.E.2d at 644.

23. *Id.* at 495-96, 726 S.E.2d at 638. Buddy exercised this power of appointment to appoint the remainder to his grandchildren. After he died, they filed suit against Reliance Trust Co. *Id.*

24. *Id.* at 497, 726 S.E.2d at 639 (alteration in original).

25. *Id.* at 496-97, 726 S.E.2d at 638-39.

26. *Id.* at 497, 726 S.E.2d at 639. The court of appeals first affirmed the trial court's denial of Reliance's motion for summary judgment, stating that the question was moot because the case had proceeded to trial and there was evidence that supported the verdict. *Id.*

existence of the duty; (2) a breach of the duty; and (3) damages proximately caused by that breach.<sup>27</sup> The court determined that all three elements had been satisfied.<sup>28</sup> The court noted the trustee's duty to balance the interests of the income and remainder beneficiaries.<sup>29</sup> The court then addressed whether the trustee had abused the discretion granted it by the trust instrument, pointing out that a trustee's discretion is subject to judicial control only if such control is needed to prevent misinterpretation or an abuse of that discretion.<sup>30</sup> The court of appeals quoted former case law (and said that the 2010 Revised Georgia Trust Code was in agreement)<sup>31</sup> for the following proposition: "[A] court may interfere with an exercise of discretion by a trustee only if that discretion is 'infected with fraud or bad faith, misbehavior, or misconduct, arbitrariness, abuse of authority or perversion of the trust, oppression of the beneficiary, or want of ordinary skill or judgment.'"<sup>32</sup> The court held that the trustee's actions were "'infected with . . . arbitrariness,' as well as 'oppression of the beneficiary' grandchildren."<sup>33</sup> The court pointed to evidence that Reliance had treated Buddy's encroachment requests inconsistently, sometimes asking for

---

27. *Id.* at 498-99, 726 S.E.2d at 640 (quoting *SunTrust Bank v. Merritt*, 272 Ga. App. 485, 489, 612 S.E.2d 818, 822 (2005)).

28. *Id.* at 501, 726 S.E.2d at 641.

29. *Id.* at 499, 726 S.E.2d at 640 (quoting *SunTrust Bank*, 272 Ga. App. at 489, 612 S.E.2d at 822).

30. *Id.* The court cited *McPherson v. McPherson*, 307 Ga. App. 548, 551, 705 S.E.2d 314, 318 (2011), and noted that the opinion in *McPherson* cited the RESTATEMENT (THIRD) OF TRUSTS § 50 (2003). *Reliance Trust Co.*, 315 Ga. App. at 499, 726 S.E.2d at 641.

31. *Reliance Trust Co.*, 315 Ga. App. at 499, 726 S.E.2d at 641. The court cited O.C.G.A. § 53-12-260, which provides the following: "Notwithstanding the breadth of discretion granted to a trustee in the trust instrument, including the use of such terms as 'absolute,' 'sole,' or 'uncontrolled,' the trustee shall exercise a discretionary power in good faith." O.C.G.A. § 53-12-260 (2011). Reliance had claimed that this statute limited the circumstances under which a trustee can be found to have abused discretion to circumstances where the trustee acted in bad faith. *Reliance Trust Co.*, 315 Ga. App. at 500 n.3, 726 S.E.2d at 641 n.3. The court disagreed, stating that other factors such as arbitrariness or fraud could also lead a court to find an abuse of discretion. *Id.*

32. *Reliance Trust Co.*, 315 Ga. App. at 499-500, 726 S.E.2d at 641 (quoting *McPherson*, 307 Ga. App. at 552, 705 S.E.2d at 318). The court cited *McPherson* as the source of this proposition. *Id.* In fact, the court in *McPherson* cited an earlier Georgia case, *Citizens & Southern National Bank v. Haskins*, 254 Ga. 131, 142, 327 S.E.2d 192, 203 (1985), which was quoting an even earlier case, *Citizens & Southern National Bank v. Orkin*, 223 Ga. 385, 388, 156 S.E.2d 86, 88 (1967). The court in *Orkin* cited an early version of the legal encyclopedia, AMERICAN JURISPRUDENCE, 54 AM. JUR. 2D, *Control of Trustee's Discretion* § 287 (1945).

33. *Reliance Trust Co.*, 315 Ga. App. at 500, 726 S.E.2d at 641 (quoting *McPherson*, 307 Ga. App. at 552, 705 S.E.2d at 318).

documentation to support the request, sometimes not.<sup>34</sup> Reliance sometimes asked for a budget from him and sometimes did not, and even granted requests that were outside of the submitted budget.<sup>35</sup> Reliance sometimes approved mortgage and upkeep payments on Buddy's vacation property, and at other times it did not.<sup>36</sup> The court said that "Reliance offered no consistent explanations for these disparities."<sup>37</sup> The court concluded that the grandchildren showed they had been damaged by the encroachments that had depleted the value of their remainder interest.<sup>38</sup> The court of appeals also found no merit to Reliance's contention that the trial court should have allowed evidence about previous litigation involving Buddy and his competence to serve as trustee of other trusts, nor did it discern error in the trial court's statement to the jury that they were not bound to define "income" in the way it is defined in the Official Code of Georgia Annotated (O.C.G.A.) but should instead look to the intent of the settlor.<sup>39</sup> Reliance filed a petition for writ of certiorari with the Georgia Supreme Court on May 1, 2012, but as of the date of the writing of this Article, no action has been taken on the petition.<sup>40</sup>

### C. *Property of the Decedent's Estate*

**1. Contents of Decedent's Safety Deposit Box.** In *Longstreet v. Decker*,<sup>41</sup> the court of appeals examined the issue of the ownership of the contents of a safety deposit box that had been leased jointly by the testator and another individual. In this case, the testator and her niece entered into a lease agreement to lease a safety deposit box. The agreement allowed either of them access to the box and instructed the bank to provide access to the other in the event of the death of one of them. The testator put cash in the safety deposit box before she died.<sup>42</sup>

---

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 500-01, 726 S.E.2d at 641.

39. *Id.* at 501-02, 726 S.E.2d at 642.

40. *Reliance Trust Co. v. Candler*, 315 Ga. App. 495, 726 S.E.2d 636 (2012), *petition for cert. filed* (Ga. May 1, 2012) (No. S12C1390).

41. 312 Ga. App. 1, 717 S.E.2d 513 (2011).

42. *Id.* at 1-2, 717 S.E.2d at 515. The lease named them as joint tenants of the box.  
*Id.* The lease provided as follows:

It is agreed that any one of us alone shall be entitled to access to said box and control over its contents and shall have the right to surrender said box and cancel this contract on behalf of all . . . .

She told her niece to hold on to the key and “if anything ever happened to her, [the niece] should remove the contents of the safe deposit box.”<sup>43</sup> The niece interpreted this to mean that she would own whatever was in the box upon her aunt’s death. At the testator’s death, the niece removed undisclosed sums of cash from the box and refused to give it to the executor of the testator’s estate. The estate sued her for conversion and money had and received. The niece asked for and was denied summary judgment based on the terms of the lease contract, which allowed her access to the box both during the testator’s life and at the testator’s death. The estate was granted its motion for partial summary judgment on the ground that the contract did not indicate that the niece owned the contents of the box, and there was no evidence that the testator had made an inter vivos gift of the contents of the box to the niece.<sup>44</sup>

On the issue of the lease agreement, the niece claimed the terms of the contract unambiguously gave her “survivorship rights” to the contents of the box.<sup>45</sup> The trial court pointed out that the contract governed the rental of the box but not the ownership of the contents.<sup>46</sup> The court of appeals agreed that the language of the contract referred only to control of the box, not to ownership of the contents.<sup>47</sup> The court noted the leasing of a safe deposit box is not the same as the opening of a joint bank account.<sup>48</sup> O.C.G.A. § 7-1-813<sup>49</sup> provides that sums remaining in account upon the death of a party to a joint account belong to the other party absent clear and convincing evidence of a different intent at the time the account was opened.<sup>50</sup>

The court of appeals agreed with the trial court’s grant of summary judgment to the estate on the theory that there was no evidence that an inter vivos gift had been made to the niece by the testator.<sup>51</sup> The court of appeals reviewed the elements of an inter vivos gift, quoting O.C.G.A.

---

In the event of the death of any of us, the Bank . . . shall afford access to such box to the survivor or survivors of us, or any one of them.

*Id.* at 1, 717 S.E.2d at 515.

43. *Id.* at 2, 717 S.E.2d at 515.

44. *Id.* at 2, 717 S.E.2d at 515-16. The court reserved for trial the issue of damages as there were material issues of fact relating to how much money the niece had removed from the safety deposit box. *Id.* at 2-3, 717 S.E.2d at 516.

45. *Id.* at 2, 717 S.E.2d at 515.

46. *Id.* at 2, 717 S.E.2d at 516.

47. *Id.* at 4, 717 S.E.2d at 516.

48. *Id.* at 5, 717 S.E.2d at 517.

49. O.C.G.A. § 7-1-813(a) (2004).

50. *Id.*

51. *Longstreet*, 312 Ga. App. at 5, 717 S.E.2d at 517.



§ 44-5-80,<sup>52</sup> which provides the following: “(1) the donor must intend to give the gift; (2) the donee must accept the gift; and (3) the gift must be delivered or some act which under law is accepted as a substitute for delivery must be done.”<sup>53</sup> The court emphasized that delivery must be made during the donor’s lifetime and must divest the donor absolutely of control of the property.<sup>54</sup> The court pointed out that the testator had retained control of the box during her lifetime and could reclaim the property in the box at any time, and thus there had been no delivery of the contents of the box to the niece.<sup>55</sup>

**2. Ownership of Decedent’s Condominium.** The property at issue in *Villas at Stone Mountain Condominium Ass’n v. Blair*<sup>56</sup> was a condominium owned by a decedent who had died without a will (intestate).<sup>57</sup> Pauline Blair’s mother died intestate, owning a condominium in the Villas at Stone Mountain. Blair never lived in the condominium before or after her mother’s death, never claimed ownership of the condominium, and never gained any financial benefit from it. The condominium was sold in a foreclosure sale a couple of years after her mother died.<sup>58</sup> The condominium association sued Blair and her sister, the intestate heirs of the mother,<sup>59</sup> for past due fees and assessments incurred between the date of the mother’s death and the foreclosure sale. The trial court granted summary judgment in Blair’s favor.<sup>60</sup> The court of appeals reversed, holding that “the unambiguous language of Georgia’s Probate Code and Condominium Act, when read together, entitles the association to the relief it claims.”<sup>61</sup> The court of appeals cited O.C.G.A. § 53-2-7(a),<sup>62</sup> which provides: “Upon the death of an

---

52. O.C.G.A. § 44-5-80 (2010).

53. *Longstreet*, 312 Ga. App. at 5, 717 S.E.2d at 518; see also O.C.G.A. § 44-5-80.

54. *Longstreet*, 312 Ga. App. at 5, 717 S.E.2d at 518.

55. *Id.* at 6-7, 717 S.E.2d at 518-19.

56. 311 Ga. App. 718, 716 S.E.2d 718 (2011).

57. When an individual dies without a valid will (intestate), O.C.G.A. § 53-2-1 directs the descent of the property to the decedent’s family members in accordance with the scheme set forth in the statute. O.C.G.A. § 53-2-1 (2011).

58. *Villas*, 311 Ga. App. at 718, 716 S.E.2d at 719.

59. O.C.G.A. § 53-2-1(c)(3) provides that, upon the death of a decedent who is survived by children, the surviving children shall share the estate equally. O.C.G.A. § 53-2-1(c)(3). If a child does not survive, his share shall pass down to his descendants. *Id.* Apparently in this case, Blair and her sister were the only surviving children of the mother and there had not been another child who had predeceased the mother and left surviving descendants. See *Villas*, 311 Ga. App. at 719, 716 S.E.2d at 719.

60. *Villas*, 311 Ga. App. at 719, 716 S.E.2d at 719.

61. *Id.* at 718, 716 S.E.2d at 719.

62. O.C.G.A. § 53-2-7(a) (2011).

intestate decedent who is the owner of any interest in real property, the title to any such interest which survives the intestate decedent shall vest immediately in the decedent's heirs at law, subject to divestment by the appointment of an administrator of the estate.<sup>63</sup> Thus, as the court noted, title to the condominium vested in the sisters as their mother's heirs immediately upon her death.<sup>64</sup> Because no administrator had been appointed, the title remained vested in them until the foreclosure sale.<sup>65</sup>

The Georgia Condominium Act, O.C.G.A. § 44-3-109,<sup>66</sup> provides that all unpaid fees and assessments shall be "the personal obligation of the unit owner."<sup>67</sup> O.C.G.A. § 44-3-71(29)<sup>68</sup> defines the "[u]nit owner" as "one or more persons . . . who own a condominium."<sup>69</sup> The court of appeals in *Villas* concluded that the Georgia Probate Code clearly made Blair and her sister the "unit owners" immediately upon their mother's death.<sup>70</sup> Blair argued that a creditor cannot seek recovery against an intestate heir for the decedent's personal debt, but the court of appeals pointed out that the association was not seeking recovery for the mother's debts but rather for the assessments incurred after the mother's death up to the time of the foreclosure.<sup>71</sup>

#### D. Guardianship and Conservatorship

In the case of *In re Cochran*,<sup>72</sup> the Georgia Court of Appeals affirmed the appointment of a conservator for a woman who had fallen victim to a number of false claims that she had won huge sums of money in bogus lotteries and sweepstakes.<sup>73</sup> A conservator may be appointed for an adult when the probate court finds that the adult "lacks sufficient capacity to make or communicate significant responsible decisions concerning the management of his or her property."<sup>74</sup>

---

63. *Villas*, 311 Ga. App. at 719, 716 S.E.2d at 719; see also O.C.G.A. § 53-2-7(a). In contrast, when a decedent dies with a will, title to the property of the estate vests in the executor and does not pass to the beneficiaries until the executor assents to the distribution to them. O.C.G.A. § 53-8-15 (2011).

64. *Villas*, 311 Ga. App. at 720, 716 S.E.2d at 720.

65. *Id.*

66. O.C.G.A. § 44-3-109 (2010).

67. O.C.G.A. § 44-3-109(a).

68. O.C.G.A. § 44-3-71(29) (2010).

69. *Id.*

70. *Villas*, 311 Ga. App. at 720, 716 S.E.2d at 720.

71. *Id.*

72. 314 Ga. App. 188, 723 S.E.2d 490 (2012).

73. *Id.* at 188, 723 S.E.2d at 491.

74. O.C.G.A. § 29-5-1(a) (2007).

In 2007, Cochran's family became concerned that Cochran was being financially exploited. They contacted the Georgia Department of Human Services whose subsequent investigation revealed that she had spent \$100,000 or more on domestic and foreign lotteries and sweepstakes.<sup>75</sup> This prompted the family to petition to have an emergency conservator appointed for her.<sup>76</sup> An emergency conservator may be appointed on an expedited basis when the probate court finds that there is "an immediate and substantial risk of irreparable waste or dissipation of the proposed ward's property unless an emergency conservator is appointed."<sup>77</sup> An emergency conservatorship can stay in place for no more than sixty days from the date the emergency conservator is appointed.<sup>78</sup>

Cochran's emergency conservator found that Cochran and her husband had been fraudulently induced on multiple occasions to spend their assets on sweepstakes and lotteries. The emergency conservator advised that, at this rate, the couple would deplete their assets within two years. As soon as the emergency conservatorship terminated, the couple went to their bank to withdraw \$52,000. The couple brought with them what they stated was a handwritten note from the president of SunTrust Bank that advised Cochran that she had won a huge sum in a lottery but would be required to wire the money to cover her taxes before her winnings could be distributed to her. The banker (who refused to authorize the withdrawal) testified that he had to talk the Cochrans out of withdrawing money several times when they thought they had won lotteries.<sup>79</sup> He stated that they once had tried to deposit multi-million dollar checks made payable to Cochran from the "Sweet Steaks Company of Australia."<sup>80</sup> After another bank (which had authorized the \$52,000 withdrawal) reported the suspected financial exploitation to the Department of Human Services, the Department again conducted an investigation. The case manager persuaded the Cochrans to consult a psychologist.<sup>81</sup>

The psychologist concluded that Cochran met the criterion of the conservatorship statute because she lacked sufficient capacity to make responsible decisions about the management of her property. The Department of Human Services filed a petition for the appointment of

---

75. In the conservatorship hearing, Ms. Cochran herself testified that she had spent between \$600,000 and \$700,000 on these lotteries. *In re Cochran*, 314 Ga. App. at 188 n.1, 723 S.E.2d at 491 n.1.

76. *Id.* at 188, 723 S.E.2d at 491.

77. O.C.G.A. § 29-5-14(b)(4) (2007).

78. O.C.G.A. § 29-5-16(b)(3)(E) (2007).

79. *In re Cochran*, 314 Ga. App. at 188-89, 723 S.E.2d at 491-92.

80. *Id.* at 189, 723 S.E.2d at 492.

81. *Id.*

a conservator for Cochran.<sup>82</sup> Cochran underwent a court-ordered evaluation by a licensed clinical social worker, who agreed with the psychologist as to Cochran's lack of capacity.<sup>83</sup> After a hearing, the probate court appointed a conservator for Cochran.<sup>84</sup> Cochran appealed the appointment, stating there was not clear and convincing evidence that she was in need of a conservator to manage her financial affairs.<sup>85</sup> The court of appeals affirmed the appointment.<sup>86</sup> It agreed with Cochran's assertion that just because an individual spends large amounts of money on lotteries does not prove that the individual is in need of a conservator.<sup>87</sup> In fact, the court noted that there may be people who know the lotteries are a scam but "nevertheless might choose to play the lotteries as escapist fantasy and fun."<sup>88</sup> However, in Cochran's case, it was not the decisions themselves that were the issue but rather the fact that Cochran's "cognitive loss" impaired her ability to weigh the consequences of those decisions.<sup>89</sup>

---

82. *Id.* The petition included an affidavit from the psychologist. *Id.* O.C.G.A. § 29-5-10(c)(1) requires that a petition for the appointment of a conservator for an adult must either be sworn to by two petitioners or supported by such an affidavit. O.C.G.A. § 29-5-10(c)(1) (2007). The Department also filed a petition for the appointment of an emergency conservator for Ms. Cochran as a protective interim measure. This petition was granted. *In re Cochran*, 314 Ga. App. at 189 n.2, 723 S.E.2d at 492 n.2. The Department filed a petition for the appointment of a conservator for Mr. Cochran also but that petition was dismissed by the court. *Id.* at 189 n.3, 723 S.E.2d at 492 n.3.

83. *In re Cochran*, 314 Ga. App. at 189, 723 S.E.2d at 492. O.C.G.A. § 29-5-11(d) requires an evaluation of a person for whom a conservatorship is sought. O.C.G.A. § 29-5-11(d) (2007). The evaluation may be performed by a physician, a psychologist, or a licensed clinical social worker. O.C.G.A. § 29-5-11(d)(1).

84. *In re Cochran*, 314 Ga. App. at 189, 723 S.E.2d at 492.

85. *Id.* at 189-90, 723 S.E.2d at 492. The standard of proof for establishing the need for a conservatorship is clear and convincing evidence. O.C.G.A. § 29-5-12(d)(4) (2007). The proceeding in question was brought in the Probate Court of Cobb County, which is one of the probate courts with expanded jurisdiction from which appeals may be taken directly to the Georgia Court of Appeals or Georgia Supreme Court. *See* discussion *infra* at part II.B.

86. *In re Cochran*, 314 Ga. App. at 188, 723 S.E.2d at 491.

87. *Id.* at 190, 723 S.E.2d at 492-93.

88. *Id.* at 190, 723 S.E.2d at 493. The court quoted this Author's 2005 treatise on Georgia guardianships and conservatorships, in which she noted that "[w]hile it is tempting to gauge whether a decision is 'responsible' through the lens of one's own value structure, it is vital that those involved in adult conservatorships isolate the actual decision-making process from the decision made." *Id.* at 190 n.4, 723 S.E.2d at 493 n.4 (alteration in original); *see also* MARY F. RADFORD, *GUARDIANSHIPS AND CONSERVATORSHIPS IN GEORGIA* § 5-1, at 239 (1st ed. 2005).

89. *In re Cochran*, 314 Ga. App. at 190, 723 S.E.2d at 493. The psychologist who had examined Ms. Cochran prior to the filing of the petition for conservatorship had noted this "cognitive loss" and the licensed clinical social worker had agreed with his conclusion. *Id.*

The psychologist who examined Cochran reported that Cochran was unable to articulate facts that would support her belief that she had won the lottery.<sup>90</sup> The licensed clinical social worker expressed concern about Cochran's inability to remember significant details about the transaction, such as the ability to name the persons who had told Cochran that she had won \$57 million in the lottery.<sup>91</sup> The court of appeals also pointed to Cochran's own testimony at the hearing.<sup>92</sup> Although she "arguably displayed a sound grasp of her financial affairs," Cochran told the court that as soon as the hearing was finished, she was going to meet a man from Jamaica who was bringing her \$57 million in lottery winnings and two cars.<sup>93</sup> The court of appeals concluded that Cochran was a "serial victim of fraudulent lottery schemes" and that her repeated victimization was caused by her cognitive loss.<sup>94</sup>

Cochran also raised two other claims on appeal. She claimed first that the probate court had erred when it denied her motion to have the petition for the appointment of a conservator dismissed for lack of probable cause.<sup>95</sup> O.C.G.A. § 29-5-11<sup>96</sup> requires the court to review a petition and affidavit immediately upon filing in order to determine whether probable cause exists to believe that the proposed ward is in need of a conservator.<sup>97</sup> If no probable cause exists, the court must dismiss the petition.<sup>98</sup> The court of appeals stated that a decision by the probate court not to dismiss the petition is not appealable if the case has proceeded to trial and a conservatorship has been ordered.<sup>99</sup> Second, Cochran argued that the affidavit of the psychologist should have been stricken. She challenged the affidavit on several grounds. Cochran stated that the affidavit was conclusory and did not state facts to support the psychologist's conclusion that Cochran was in need of a conservator.<sup>100</sup> The court reviewed the affidavit and found it to be sufficient.<sup>101</sup> The court noted that the affidavit spoke of Cochran's cognitive loss, her inability to articulate facts to support her belief that

---

at 190-91, 723 S.E.2d at 493 (internal quotation marks omitted).

90. *Id.* at 191, 723 S.E.2d at 493.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 190-91, 723 S.E.2d at 493.

95. *Id.* at 191, 723 S.E.2d at 493-94.

96. O.C.G.A. § 29-5-11 (2007).

97. O.C.G.A. § 29-5-11(a).

98. O.C.G.A. § 29-5-11(b).

99. *In re Cochran*, 314 Ga. App. at 191-92, 723 S.E.2d at 494.

100. *Id.* at 192, 723 S.E.2d at 494.

101. *Id.*

she had won the lotteries, and her inability to process cause and effect when presented with specific examples.<sup>102</sup> Cochran also argued that in obtaining the evaluation the state had violated her right to privacy and her right to be free from unreasonable searches and seizures.<sup>103</sup> The court disagreed, noting that Cochran had given permission for the evaluation and that the psychologist had informed her that it might be used to support a petition for the appointment of a conservator for her.<sup>104</sup>

## II. GEORGIA LEGISLATION

### A. *Criminal Records Check for Guardians and Conservators*

In 2012, the Georgia General Assembly enacted O.C.G.A. § 29-9-19,<sup>105</sup> which allows the probate court to order an individual who is seeking to be appointed or has been nominated as a guardian<sup>106</sup> or conservator<sup>107</sup> to submit to a criminal history records check.<sup>108</sup> For purposes of this statute, “criminal history record information” is “information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, detentions, indictments, accusations, information, or other formal charges, and any disposition arising therefrom, sentencing, correctional supervision, and release.”<sup>109</sup> To accomplish this records search, the individual who is seeking appointment, or who has been nominated, submits fingerprints to the Georgia Crime Information Center (GCIC), which searches its own records and also submits the fingerprints to the Federal Bureau of Investigation (FBI).<sup>110</sup> The GCIC compiles the information and

102. *Id.*

103. *Id.* at 193, 723 S.E.2d at 494.

104. *Id.* at 193, 723 S.E.2d at 494-95. The case manager for the Department of Human Services had suggested that Cochran be examined by her own physician but Cochran refused to do so because she was embarrassed by her actions. *Id.* at 193, 723 S.E.2d at 494.

105. O.C.G.A. § 29-9-19 (Supp. 2012).

106. A guardian is appointed under O.C.G.A. Title 29, Ch.2 or Ch. 4 to manage the personal affairs of a minor or an adult who lacks the capacity to do so. See MARY F. RADFORD, GEORGIA GUARDIANSHIPS AND CONSERVATORSHIPS § 1:5 (2012-2013 ed.).

107. A conservator is appointed under O.C.G.A. Title 29, Ch. 3 or Ch. 5 to handle the financial affairs of a minor or an adult who lacks the capacity to do so. See MARY F. RADFORD, GEORGIA GUARDIANSHIPS AND CONSERVATORSHIPS § 1:5 (2012-2013 ed.).

108. O.C.G.A. § 29-9-19(b).

109. O.C.G.A. § 29-9-19(a).

110. O.C.G.A. § 29-9-19(b).

submits a report to the probate court.<sup>111</sup> A limited criminal records check for personal representatives,<sup>112</sup> as well as for guardians and conservators, has been authorized since 1999 by Georgia Uniform Probate Court Rule 24.1.<sup>113</sup> This rule allows the court itself to access the GCIC information with the consent of the individual who is being investigated.<sup>114</sup> The GCIC Council promulgates detailed practice and procedure rules for the use of the GCIC. These include, among other things, rules that would require the probate court to provide “secure areas out of public view in which criminal justice information is handled.”<sup>115</sup> A GCIC check performed under this rule would be limited to the information available in Georgia on the individual, whereas a search under the new law would extend to information in the hands of the FBI.<sup>116</sup>

### *B. Georgia Probate Courts with Expanded Jurisdiction*

O.C.G.A. §§ 15-9-120 through 15-9-127,<sup>117</sup> which were enacted in 1986, allow certain probate courts enhanced jurisdiction to conduct jury trials<sup>118</sup> and perform other acts, and give these courts concurrent jurisdiction with the superior courts over matters such as declaratory judgments regarding fiduciaries, appointment of replacement trustees, and approval of settlement agreements.<sup>119</sup> Appeals from these courts go directly to the supreme court or the court of appeals rather than to the superior court.<sup>120</sup> This enhanced jurisdiction is available only if the probate judge in the county is a lawyer who has at least seven years of practice experience and the population of the county is at least 90,000 under the 2010 census or “any future such census.”<sup>121</sup> The population threshold in the original statute was 150,000.<sup>122</sup> It was reduced to

---

111. *Id.*

112. A personal representative is “any administrator, administrator with the will annexed, county administrator, or executor” who handles that estate of a deceased individual. O.C.G.A. § 53-1-2(12) (2011).

113. GA. UNIFORM PROB. CT. R. 24.1, available at [www.georgiacourts.org/councils/probate/URPC.html#I24a](http://www.georgiacourts.org/councils/probate/URPC.html#I24a).

114. *Id.*

115. GA. CRIME INFO. CTR. COUNCIL R. 140-2-.08 (2007), available at [gbi.georgia.gov/vgn/images/portal/cit\\_1210/38/8/88224162GCIC%20Rules%202007%20Final.pdf](http://gbi.georgia.gov/vgn/images/portal/cit_1210/38/8/88224162GCIC%20Rules%202007%20Final.pdf).

116. *See id.* at R. 140-1.01.

117. O.C.G.A. §§ 15-9-120 to -127 (2012).

118. O.C.G.A. § 15-9-121 (2012).

119. O.C.G.A. § 15-9-127 (2012). For a discussion of the expanded jurisdiction of these probate courts, see RADFORD, *supra* note 12, § 6:1.

120. O.C.G.A. § 15-9-123(a) (2012).

121. O.C.G.A. § 15-9-120(2).

122. 1986 Ga. Laws 982, 985 (codified at O.C.G.A. § 15-9-120).

100,000 in 1988<sup>123</sup> and to 96,000 in 1994.<sup>124</sup> Each of those amendments was prompted by the fact that the population of one county, Dougherty County, kept falling below the threshold, thus causing the potential loss of enhanced jurisdiction by that county's probate court.<sup>125</sup> In the 2010 census, Dougherty County's population dropped below the 96,000 threshold to 94,565. Thus, as of July 1, 2012, Dougherty County was once again slated to lose its place among those probate courts with enhanced jurisdiction. It was the only county that was scheduled to do so.<sup>126</sup>

Effective July 1, 2012, O.C.G.A. § 15-9-120(2) was amended to reduce the population threshold to 90,000, thus allowing the Dougherty County Probate Court to maintain its status as a court with expanded jurisdiction.<sup>127</sup> As of July 1, 2012, the following counties have populations that exceed the 90,000 threshold: Bartow, Bibb, Carroll, Chatham, Cherokee, Clarke, Clayton, Cobb, Columbia, Coweta, DeKalb, Dougherty, Douglas, Fayette, Floyd, Forsyth, Fulton, Gwinnett, Hall, Henry, Houston, Lowndes, Muskogee, Newton, Paulding, Richmond, and Whitfield.<sup>128</sup>

### C. *Workers' Compensation Conservator*

O.C.G.A. § 34-9-226<sup>129</sup> grants the State Board of Workers' Compensation the limited right to appoint a conservator to handle Workers' Compensation benefits for a minor or incapacitated adult (referred to in the statute as a "legally incompetent claimant").<sup>130</sup> In 2012, this statute was amended to eliminate the prohibition against such a conservator serving longer than fifty-two weeks.<sup>131</sup> This conservator is allowed not only to administer the minor's or incapacitated adult's weekly income<sup>132</sup> but also to compromise and terminate workers' compensation claims of that individual where the net settlement amount

---

123. 1988 Ga. Laws 743, 744 (codified at O.C.G.A. § 15-9-120).

124. 1994 Ga. Laws 1665, 1666 (codified at O.C.G.A. § 15-9-120). The constitutionality of this statute was upheld in *Ellis v. Johnson*, 291 Ga. 127, 132, 728 S.E.2d 200, 204 (2012).

125. See *Ellis*, 291 Ga. at 128, 132, 728 S.E.2d at 201, 203-04.

126. *Id.* at 128-29, 132, 728 S.E.2d at 201-02, 204.

127. *Id.* at 128-29, 728 S.E.2d at 201-02; see also O.C.G.A. § 15-9-120.

128. See RADFORD, *supra* note 12, at § 6:1.

129. O.C.G.A. § 34-9-226 (Supp. 2012).

130. O.C.G.A. § 34-9-226(a).

131. O.C.G.A. § 34-9-226 cmt. Prior to the amendment, this conservator was referred to as a "temporary conservator." Ga. H.R. Bill 971, Reg. Sess. (2012).

132. O.C.G.A. § 34-9-226(b)(1).



is below a certain dollar amount.<sup>133</sup> The amendment raised the dollar amount of a claim that such a conservator can resolve from \$50,000 to \$100,000.<sup>134</sup> The amended statute now also reflects the Georgia Guardianship Code<sup>135</sup> in providing that no conservator need be appointed if the settlement amount is less than \$15,000 and the “natural parent is the guardian of [the child].”<sup>136</sup>

---

133. O.C.G.A. § 34-9-226(b)(2).

134. O.C.G.A. § 34-9-226(b)(2) cmt.

135. See O.C.G.A. § 29-3-3 (Supp. 2012).

136. O.C.G.A. § 34-9-226(b)(2). The Georgia Guardianship Code uses the term “natural guardian” rather than “natural parent.” O.C.G.A. § 29-3-3(c). A parent of a child is the natural guardian of his minor child. O.C.G.A. § 29-1-1(13) (2007). If the parents are divorced, the parent who has custody is the natural guardian. O.C.G.A. § 29-2-3(b) (2007). The term “parent” does not include a biological or adoptive parent whose parental rights have been terminated nor does it include the father of a child who is born out of wedlock. O.C.G.A. §§ 29-1-1(13) (2007), 19-7-25 (2010).