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# Wills, Trusts, Guardianships, and Fiduciary Administration

by Mary F. Radford\*

This Article describes selected cases and significant legislation from the period of June 1, 2009 through May 31, 2010 that pertain to Georgia fiduciary law and estate planning.<sup>1</sup>

## I. GEORGIA CASES

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

The Official Code of Georgia Annotated (O.C.G.A.) contains a statute that deals extensively with the rights of a child who is born out of wedlock to inherit from the child's putative father.<sup>2</sup> Under this statute, one way in which a child may prove that the decedent was the child's father is by establishing a 97% probability of paternity through genetic testing.<sup>3</sup> These test results raise a rebuttable presumption of paternity,

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1. For 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*, 61 *MERCER L. REV.* 385 (2009).

2. See O.C.G.A. § 53-2-3 (1997). For an in-depth discussion of the inheritance rights of children born out of wedlock, see MARY F. RADFORD, *REDFEARN: WILLS & ADMINISTRATION IN GEORGIA* § 9.5 (7th ed. 2008).

3. O.C.G.A. § 53-2-3(2)(B)(ii). The statute indicates that "[p]arentage-determination genetic testing . . . include[s] but [is] not . . . limited to[] red cell antigen, human leucocyte

which can only be rebutted by clear and convincing evidence by those who claim there is no parent-child relationship.<sup>4</sup>

The question addressed in *In re Estate of Warren*<sup>5</sup> was whether genetic testing could be performed by using genetic material of the father's relatives or only by using the father's own genetic material.<sup>6</sup> In that case, Doris Mattison sought to prove that she was the biological child of William Warren and was therefore an heir to his estate. Mattison produced evidence from testing performed on DNA samples of herself, her biological mother, and the undisputed son of William Warren. The samples established a 99.65% probability that she and Warren's son were half-siblings, and because there was absolutely no evidence of any relationship between her mother and Warren's son, the samples also established a 99.65% probability that William Warren was her father. Warren's son argued that the DNA samples had to be direct comparisons of the DNA of the putative father and the child, rather than of the child and parties related to the putative father.<sup>7</sup> The trial court found, and the court of appeals affirmed, that the statute contains no such requirement.<sup>8</sup> Thus, the DNA testing created the rebuttable presumption required by the statute.<sup>9</sup> This holding is a welcomed one because it clarifies that a child who is trying to prove paternity need not produce genetic material of the putative father. Importantly, the acquisition of such material from a decedent may be impossible if the decedent was cremated, or it may necessitate the exhumation of the decedent's body.<sup>10</sup>

The rights of children born out of wedlock to take under the parent's will are somewhat more murky because such rights are more focused on the testator's intent than on statutory law. In *Hood v. Todd*,<sup>11</sup> the Georgia Supreme Court examined a will in which the testator left his estate to his children, whom he defined "as 'only the lawful blood

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antigen (HLA), red cell enzyme, and serum protein electrophoresis tests or testing by deoxyribonucleic acid (DNA) probes." *Id.*

4. O.C.G.A. § 53-2-3(2)(B)(ii)-(C).

5. 300 Ga. App. 408, 685 S.E.2d 411 (2009).

6. *Id.* at 410-11, 685 S.E.2d at 413.

7. *Id.* at 409-11, 685 S.E.2d at 412-13.

8. *Id.* at 410-11, 685 S.E.2d at 413.

9. *Id.* at 411, 685 S.E.2d at 413.

10. As noted by the court, O.C.G.A. § 53-2-27 (1997 & Supp. 2009) allows the court in limited circumstances to order the disinterment of the remains of a decedent in order to acquire genetic material, see *In re Estate of Warren*, 300 Ga. App. at 411, 685 S.E.2d at 413, but this process is certainly not one that a court would order lightly, particularly if there are other means of proving paternity.

11. 287 Ga. 164, 695 S.E.2d 31 (2010).

descendants in the first degree of the parent designated.<sup>12</sup> The supreme court determined that it was the testator's intent to exclude from this class his biological child who had been born out of wedlock.<sup>13</sup>

### B. Will Revocation

The O.C.G.A. allows a testator to revoke his or her will at any time prior to death.<sup>14</sup> One of the ways in which revocation may be accomplished is by any destruction or obliteration of the will that is performed with the intent to revoke the will.<sup>15</sup> If the will is not completely destroyed or obliterated, the intent to revoke the will is presumed if a material portion<sup>16</sup> of the will is destroyed or obliterated.<sup>17</sup> Unlike some states,<sup>18</sup> Georgia does not allow a will to be revoked in part by a revoking act.<sup>19</sup> Thus, if a material portion of the will is destroyed or obliterated, the presumption arises that the testator intended to revoke the entire will.<sup>20</sup> For the will to be admitted to probate, the propounder of the will must overcome this presumption by a preponderance of the evidence.<sup>21</sup>

The Georgia Supreme Court's recent decision in *Peterson v. Harrell*<sup>22</sup> causes some confusion about the correct way to analyze whether the revocation of a material portion of the will revokes the will in its entirety. The testator, Marion E. Peterson, was survived by her two siblings (her closest relatives) and her long-time companion, Vasta Lucas. The testator's will established a trust, the benefits of which would accrue to Lucas during her life and at her death to four remainder beneficiaries, two of whom were Peterson's siblings. When the will was offered for probate, it exhibited some markings that raised the question of whether the will had been revoked. The testator had used ink to strike through the names of all the remainder beneficiaries as well as

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12. *Id.* at 165, 695 S.E.2d at 32.

13. *Id.* at 166, 695 S.E.2d at 33.

14. O.C.G.A. § 53-4-40 (1997).

15. O.C.G.A. § 53-4-44 (1997 & Supp. 2009). See RADFORD, *supra* note 2, at § 5.15 for a discussion of revocation by destruction or obliteration.

16. The question of whether the portion that was destroyed is "material" is a question of law. *Lovell v. Anderson*, 272 Ga. 675, 676, 533 S.E.2d 64, 65-66 (2000).

17. O.C.G.A. § 53-4-44.

18. See, e.g., UNIF. PROBATE CODE § 2-507(a)(2) (1990) (permitting a testator to revoke a will "or any part thereof . . . by performing a revocatory act" such as destroying, canceling, tearing, or obliterating the will).

19. *Price v. Hill*, 184 Ga. 191, 195, 190 S.E.2d 575, 578 (1937); see *Hartz v. Sobel*, 136 Ga. 565, 576-79, 71 S.E. 995, 1001-02 (1911).

20. *Howard v. Cotton*, 223 Ga. 118, 122, 153 S.E.2d 557, 560 (1937).

21. *Id.*

22. 286 Ga. 546, 690 S.E.2d 151 (2010).

the language naming her successor executor.<sup>23</sup> She had written at the end of the will, "My executrix is Julie Peterson."<sup>24</sup> None of these obliterations had been witnessed, but it was undisputed that they had been made by the testator.<sup>25</sup> The trial court held, and the supreme court agreed, that the testator clearly had not intended to revoke the will in its entirety but rather had only intended to revoke it in part.<sup>26</sup> The supreme court concluded that because the testator had intended only to revoke the will in part (and the caveators had offered no proof of a different intent), the will remained completely intact and was properly admitted to probate.<sup>27</sup>

Justices Hunstein and Carley dissented in this case.<sup>28</sup> They took the position that the obliteration of the names of the successor beneficiaries was indeed an obliteration of a material portion of the will.<sup>29</sup> According to the dissenters, this obliteration of a material portion of the will had raised the presumption of the intent to revoke the will in its entirety.<sup>30</sup> The dissenters noted that it was then the burden of the propounders of the will to rebut the presumption, but the propounders had offered no rebuttal evidence.<sup>31</sup> Thus, the presumption would prevail, the requisite intent would be deemed to have been present, and the will would be revoked in its entirety.<sup>32</sup>

This case presented the trial court with a very difficult dilemma: the court clearly knew that the testator's primary intent was to benefit her companion during her companion's life, but it faced statutory law that would completely annihilate her intent. Had the trial court found that the will was revoked in its entirety, the companion would have received nothing, and the two siblings would have taken the entire estate by intestacy. The trial court's opinion would have carried out the testator's intent but for one unanticipated twist of fate: Vasta Lucas, the companion, died during the pendency of the appeal.<sup>33</sup> Lucas's interest

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23. *Id.* at 546, 690 S.E.2d at 152.

24. *Id.* at 546-47, 690 S.E.2d at 152.

25. *Id.* at 546-47 & n.1, 690 S.E.2d at 152 & n.1.

26. *Id.* at 547, 690 S.E.2d at 153. Evidence relied upon by the supreme court included the fact that the caveators had no independent knowledge of nor had ever had any discussions with the testator about her intent to revoke the will; the will was found among the testator's personal possessions and in good condition (other than the obliterations), and the "primary bequest to Lucas . . . remained intact." *Id.*

27. *Id.* at 548, 690 S.E.2d at 153.

28. *Id.* (Carley, J., dissenting).

29. *Id.* at 550, 690 S.E.2d at 154.

30. *Id.*

31. *Id.* at 550, 690 S.E.2d at 155.

32. *Id.* at 551, 690 S.E.2d at 155.

33. *Id.* at 546, 690 S.E.2d at 152 (majority opinion).

under the will was only a life interest.<sup>34</sup> Thus, the individuals who gained from the result in this case were the two remainder beneficiaries who were not the testator's siblings. Had the will been found to have been revoked, they would have been cut out entirely. In fact, the testator herself had obliterated their names along with those of the two siblings.<sup>35</sup> To the degree one can discern the testator's true intent, it appears that she did not want any of those beneficiaries to take anything from her estate. However, under the majority opinion, all of them became beneficiaries of the trust.<sup>36</sup>

*C. Charging Expenses of Administration Against a Beneficiary's Share of the Estate*

In *Pate v. Wilson*,<sup>37</sup> the supreme court addressed whether a beneficiary whose malfeasance had caused the estate to incur litigation expenses and attorney fees should have her share of the estate reduced by these expenses.<sup>38</sup> Soon after the testator died, his widow and her son from another marriage were sued by the executor of his estate—a daughter from his first marriage—for undue influence in connection with the transfer of land that the testator had owned in North Carolina. The North Carolina Court of Appeals ruled against the widow and her son. The testator's will was admitted to probate in Richmond County, Georgia, which was his domicile at the date of his death.<sup>39</sup> The will devised a share of the testator's estate to his widow and provided further that the share “shall not be reduced by any expenses of administration of my estate.”<sup>40</sup> The executor sought to charge the widow's share with the expenses of the North Carolina litigation under the theory that the widow's wrongdoing had caused those expenses to be incurred.<sup>41</sup>

The supreme court approached this issue as a question of the testator's intent.<sup>42</sup> The court concluded that the clause in the testator's will regarding administrative expenses indicated that he did not want his widow's share to be diminished by the “ordinary and usual expenses” of administration but that the expenses at issue were not ordinary but were rather expenses that resulted from the widow's undue influence

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34. *See id.*

35. *Id.*

36. *See id.* at 548, 690 S.E.2d at 153.

37. 286 Ga. 133, 686 S.E.2d 88 (2009).

38. *See id.* at 133, 686 S.E.2d at 88.

39. *Id.* at 133-34, 686 S.E.2d at 88-89.

40. *Id.* at 134, 686 S.E.2d at 89 (internal quotation marks omitted).

41. *Id.*

42. *See id.* at 134-35, 686 S.E.2d at 89-90.

and malfeasance.<sup>43</sup> On the other hand, the court went on to hold that it did not follow logically from the court's first conclusion that the widow's share should bear all of the expenses of the litigation.<sup>44</sup> Rather, the widow's share "must suffer the same diminution in value as all other shares" in bearing this expense of administration.<sup>45</sup> The court pointed out in a footnote that its holding did not reach the issue of whether the other beneficiaries had a cause of action against the widow for her role in causing their shares to be diminished in value.<sup>46</sup> Justices Hunstein, Carley, and Thompson wrote a short dissent in which they disagreed with the majority's conclusion that only the "ordinary expenses" of administration were addressed in the testator's will.<sup>47</sup> The dissenters felt that the will clearly immunized the widow's share from paying any expenses of administration, whether ordinary or extraordinary.<sup>48</sup>

#### D. Trust Modification

In *Smith v. Hallum*,<sup>49</sup> the supreme court was asked to approve a trust modification that would have resulted in eliminating distributions to one of the trust beneficiaries.<sup>50</sup> John Dewey Smith created a trust in 1990 that was funded with a life insurance policy on the joint lives of him and his wife, Inez. The face value of the policy was \$800,000.<sup>51</sup> The undisputed purpose of the trust was to "provid[e] for his descendants when he and his wife [were] no longer living."<sup>52</sup> Smith died in 2003, and in 2004 Inez was attacked in her home, shot, and stabbed several times. She survived the attack. One of Smith's grandsons was the alleged assailant. When the instant case was being considered by the supreme court, charges against the grandson were still pending, and there was some question as to whether he was competent to stand trial. Hallum, the trustee, petitioned the superior court to modify the trust so that the grandson would be prohibited from receiving any distributions from the trust.<sup>53</sup>

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43. *Id.* at 135, 686 S.E.2d at 90.

44. *Id.*

45. *Id.* at 136, 686 S.E.2d at 90.

46. *Id.* at 136 n.4, 686 S.E.2d at 90 n.4.

47. *Id.* at 136, 686 S.E.2d at 91 (Hunstein, J., dissenting) (internal quotation marks omitted).

48. *Id.*

49. 286 Ga. 834, 691 S.E.2d 848 (2010).

50. *See id.* at 834, 691 S.E.2d at 848-49.

51. *Id.*

52. *Id.*

53. *Id.* at 834-35, 691 S.E.2d at 849.

O.C.G.A. § 53-12-153,<sup>54</sup> which was the law in effect at the time this case was decided,<sup>55</sup> allowed the court to modify an irrevocable trust “if it is established by clear and convincing evidence that, owing to circumstances not known to or anticipated by the settlor, compliance would defeat or substantially impair the accomplishment of the purposes of the trust.”<sup>56</sup> The trustee alleged in her petition that Smith’s purpose had clearly not been to “incentivize [sic] his grandson to attack his grandmother to speed his receipt of [t]rust benefits.”<sup>57</sup> However, the trustee offered no evidence at trial that the attacks had been motivated by the grandson’s greed rather than simply by the paranoid delusions that resulted from his severely disturbed mental state.<sup>58</sup>

The supreme court noted that the attacks were clearly unanticipated circumstances within the meaning of the statute, as the grandson was only seven years old when the trust was created.<sup>59</sup> However, the court pointed out that the showing of unanticipated circumstances was only part of the proof required by the statute.<sup>60</sup> The trustee must also show that the application of the trust terms without modification would defeat or substantially impair the accomplishment of the trust purposes.<sup>61</sup> The court assumed that the purpose of the trust was to provide for Smith’s descendants and pointed out that removing the grandson as a trust beneficiary “actively *promotes* the defeat of . . . [that] purpose.”<sup>62</sup> The court also observed that the trustee had offered absolutely no evidence that Smith’s intent in creating the trust would be impaired substantially if the modification was not allowed.<sup>63</sup> Thus, the court reasoned that because the trustee failed to produce any such evidence, the court had no need to speculate whether the settlor would have

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54. O.C.G.A. § 53-12-153 (1997 & Supp. 2009) (repealed 2010).

55. See Part II(B) *infra* for a discussion of the Revised Georgia Trust Code of 2010; O.C.G.A. tit. 53, ch. 12 (Supp. 2010).

56. O.C.G.A. § 53-12-153.

57. *Smith*, 286 Ga. at 835, 691 S.E.2d at 849 (first alteration in original) (internal quotation marks omitted).

58. *Id.* The supreme court noted that while the petition to modify the trust was being considered by the trial court, the grandson had not been tried because there were severe doubts as to whether he was competent to stand trial. *Id.* Therefore, there was no actual proof that he had even committed the attack on his grandmother. *Id.* However, in its analysis at the appellate level, the supreme court was willing to assume for the sake of argument that there was clear and convincing evidence that the grandson had committed the crime. *Id.*

59. *Id.* at 835, 691 S.E.2d at 849-50.

60. *Id.* at 836, 691 S.E.2d at 850.

61. *Id.*

62. *Id.*

63. *Id.*

wanted the grandson to continue as a beneficiary given the current situation.<sup>64</sup> Nevertheless, the supreme court then went on to speculate that despite the attacks, Smith might have wanted the grandson to receive trust funds in order to afford treatment for his mental illness.<sup>65</sup> In short, the court concluded that the trustee had not carried her burden of proving by clear and convincing evidence that the trust purpose would be defeated or impaired were the grandson to receive trust funds.<sup>66</sup>

Justice Carley dissented, noting that if the attacks had resulted in the death of Inez, the grandson could have been prohibited from taking trust funds under Georgia's slayer statute, and the supreme court would therefore have been required to modify the trust terms.<sup>67</sup> Justice Carley also noted that courts have recognized far less serious circumstances as justifying a modification, such as a change in tax law.<sup>68</sup> He pointed out that the modification requested by the trustee would not cut out the grandson's descendants—only the grandson himself.<sup>69</sup> Additionally, Justice Carley reasoned that the denial of modification would provide the grandson "with a continuing financial incentive to hasten the death of his grandmother."<sup>70</sup>

#### *E. Spendthrift Trusts*

A "spendthrift trust" is one in which the beneficiaries' interests are insulated from the reach of their creditors.<sup>71</sup> In 1991 Georgia adopted an extensive spendthrift trust statute that provided, among other things, that a settlor who is also the beneficiary of the trust could not apply the spendthrift protections to his own interest in the trust.<sup>72</sup> The spend-

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64. *Id.*

65. *Id.* at 837, 691 S.E.2d at 850. The supreme court found evidence of this illness in the criminal court's deliberations surrounding the grandson's competency to stand trial. *Id.*

66. *Id.* The new Georgia statute dealing with court-ordered modification is similar in wording to the statute at issue in this case, except that it does not include the requirement of clear and convincing evidence. See O.C.G.A. § 53-12-62(a)(1) (Supp. 2010). As the trustee in this case failed to present any evidence, the case would probably have had the same outcome had the Revised Georgia Trust Code of 2010 been applicable.

67. *Smith*, 286 Ga. at 837, 691 S.E.2d at 851 (Carley, J., dissenting). Under O.C.G.A. § 53-1-5 (1997), an individual who feloniously and intentionally kills another individual is barred from taking an interest under any trust created by the decedent. *Id.*

68. *Smith*, 286 Ga. at 837-38, 691 S.E.2d at 851 (Carley, J., dissenting).

69. *Id.* at 838, 691 S.E.2d at 851.

70. *Id.* at 839, 691 S.E.2d at 852.

71. BLACK'S LAW DICTIONARY 1654 (9th ed. 2009). See RADFORD, *supra* note 2, at § 14:6 for a discussion of spendthrift trusts.

72. Ga. H.R. Bill 794, Reg. Sess., 1991 Ga. Laws 810 (codified at O.C.G.A. § 53-12-28(c) (1997)), repealed by Ga. S. Bill 131, Reg. Sess., 2010 Ga. Laws 506 (codified at O.C.G.A. tit.

thrift trust statute in the Revised Georgia Trust Code of 2010<sup>73</sup> contains a similar prohibition.<sup>74</sup>

In *Phillips v. Moore*,<sup>75</sup> the supreme court addressed whether the interests of a settlor in a trust he created were reachable by the settlor's bankruptcy creditors.<sup>76</sup> Phillips created a trust in 1996 to hold certain real estate that he owned. The trust gave Phillips the income for life and a general testamentary power to appoint the trust property to anyone he chose, including his personal estate or his creditors.<sup>77</sup> The trust did not give Phillips any power to appoint the corpus during his lifetime. Specific remaindermen were named in the event Phillips did not exercise the power of appointment. The trust also contained a spendthrift clause. Phillips filed for bankruptcy in 2007, and the bankruptcy trustee claimed the trust property as property of the debtor's bankruptcy estate.<sup>78</sup> The United States Bankruptcy Court for the Southern District of Georgia included Phillips' interest in the trust in his bankruptcy estate, but on appeal, the United States District Court for the Southern District of Georgia concluded that there was no determinative precedent on this issue under Georgia law. The district court certified to the Georgia Supreme Court the question of whether a settlor was the sole beneficiary of a trust that contained provisions like those in the Phillips trust.<sup>79</sup>

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53, ch. 12 (Supp. 2010)).

73. O.C.G.A. tit. 53, ch. 12. See Part II(B) *infra* for a description of the Revised Georgia Trust Code of 2010.

74. See O.C.G.A. § 53-12-80(f) (Supp. 2010).

75. 286 Ga. 619, 690 S.E.2d 620 (2010).

76. *Id.* at 619, 690 S.E.2d at 621.

77. *Id.* A power of appointment in a trust is the power to choose who will receive trust property. BLACK'S LAW DICTIONARY 1290 (9th ed. 2009). See RADFORD, *supra* note 2, at § 15.1 for a discussion of powers of appointment. Under tax law, a power of appointment is "general" if the person holding the power can appoint the property to anyone, without limitation, including herself, her estate, her creditors, or the creditors of her estate. I.R.C. § 2041 (2006). A power is "testamentary" if it can only be exercised by the holder of the power through a designation in that individual's will. See BLACK'S LAW DICTIONARY 1290 (9th ed. 2009). Thus, the holder of a general testamentary power of appointment could not appoint the property to herself during her lifetime, but she could appoint the property to her estate or the creditors of her estate. *Phillips*, 286 Ga. at 619, 690 S.E.2d at 621.

78. *Phillips*, 286 Ga. at 619, 690 S.E.2d at 621. The federal Bankruptcy Code provides that a beneficiary's interest in a trust is includable in the bankruptcy estate of the debtor unless there is a restriction on the transfer of that interest that is enforceable under applicable nonbankruptcy law. 11 U.S.C. § 541(c)(2) (2006).

79. *Phillips*, 286 Ga. at 619, 690 S.E.2d at 621. The question the district court asked the Georgia Supreme Court to answer was as follows:

Whether a settlor of a trust is a sole beneficiary, such that creditors may reach the corpus of the trust, when the trust instrument gives the settlor no right to the

The supreme court noted that a settlor could not protect his own assets from his creditors by putting them into a trust of which he is the sole beneficiary and then trying to shield them with a spendthrift clause.<sup>80</sup> The court determined that even though the trust contained contingent remainder beneficiaries, the trust would pay all of its income to Phillips during his life, and the general power of appointment would allow Phillips to appoint the trust property to his own estate.<sup>81</sup> According to the majority, this combination of powers rendered him the sole beneficiary of the trust.<sup>82</sup> Chief Justice Hunstein dissented, stating that the power of appointment was testamentary only and therefore did not allow Phillips any access to the trust during his lifetime.<sup>83</sup> Thus, the Chief Justice's response to the district court would have been that Phillips was not the sole trust beneficiary.<sup>84</sup>

The ultimate result in this case was that Phillips could not shield his trust interests from his creditors when he had access to the income from the trust property during his life and could appoint it to his estate at death. But while this result may have been justified, the wording of the certified question was unfortunate. The district court asked the supreme court to state that Phillips was the sole beneficiary, which the supreme court ultimately did.<sup>85</sup> However, this conclusion flies in the face of the wording of the trust, which named contingent remainder beneficiaries.<sup>86</sup> It is difficult to believe that the supreme court meant to say that contingent beneficiaries in such trusts have no right to enforce the trust terms or that the trustee owes them no fiduciary duties.

## II. 2010 GEORGIA LEGISLATION

Two significant pieces of legislation were enacted in 2010 by the Georgia General Assembly. The first was necessitated by the unanticipated repeal of the federal estate tax. The second was a comprehensive revision of the Georgia Trust Act.<sup>87</sup>

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corpus during his lifetime but provides him with a general power to appoint the trust corpus as he sees fit in his will and names specific beneficiaries to receive the corpus of the trust in the event that the settlor does not exercise his power of appointment?

*Id.*

80. *Id.* at 620, 690 S.E.2d at 622.

81. *Id.*

82. *Id.*

83. *See id.* at 621, 690 S.E.2d at 622 (Hunstein, J., dissenting).

84. *Id.*

85. *Id.* at 620, 690 S.E.2d at 622 (majority opinion).

86. *Id.* at 619, 690 S.E.2d at 621.

87. O.C.G.A. tit. 53, ch. 12 (1997 & Supp. 2010).

### A. Estate Tax Bill

Since 1916 the United States federal government has imposed a tax on the gratuitous transfer of property at death.<sup>88</sup> The Revenue Act of 1916 created an estate tax,<sup>89</sup> and later additions to the Internal Revenue Code created a generation-skipping transfer tax.<sup>90</sup> These taxes have undergone significant reformation by Congress, with the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA)<sup>91</sup> being the most recent amendment.<sup>92</sup> The tax is levied on the decedent's gross estate minus certain deductions.<sup>93</sup> A commonly used deduction, referred to as the marital deduction, is allowed for property that is transferred to the decedent's surviving spouse.<sup>94</sup> Not every estate is taxable because federal law has always excluded estates of a certain value from the tax.<sup>95</sup>

After the enactment of EGTRRA, the applicable exclusion amount in 2001 was \$1 million, and it increased gradually so that by 2009 estates valued at \$3.5 million and under were not subject to the estate or generation-skipping taxes.<sup>96</sup> However, EGTRRA contained another significant provision: in the year 2010, the estate tax and generation-skipping tax were repealed so that no estates would be subject to the tax.<sup>97</sup> An additional complication is that the taxes will be reinstated in 2011 "as if [EGTRRA] had never been enacted."<sup>98</sup> The prospect of a one-year repeal of these transfer taxes was so bizarre that most

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88. See Revenue Act of 1916, ch. 463, 39 Stat. 756, 777; see also Karen C. Burke & Grayson M.P. McCouch, *Estate Tax Repeal: Through the Looking Glass*, 22 VA. TAX REV. 187, 189 n.7 (2002).

89. 39 Stat. at 777. The estate tax is a tax on the value of the property that is in a decedent's estate and is transferred to others by will, intestacy, or other methods. BLACK'S LAW DICTIONARY 1595 (9th ed. 2009).

90. I.R.C. §§ 2601-2664 (2006). The generation-skipping transfer tax is levied when property is transferred to an individual who is more than one generation below the transferor (for example, a transfer from a grandmother to her grandson). See BLACK'S LAW DICTIONARY 1595 (9th ed. 2009).

91. Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), Pub. L. No. 107-16, 115 Stat. 38.

92. See *id.*

93. I.R.C. § 2051 (2006). The decedent's gross estate is comprised of all the decedent's property "real or personal, tangible or intangible, wherever situated." I.R.C. § 2031(a) (2006).

94. I.R.C. § 2056(a) (2006).

95. See generally I.R.C. § 2010(c) (2006).

96. See *id.*

97. EGTRRA § 501.

98. EGTRRA § 901.

practitioners assumed Congress would act prior to December 31, 2009, to either extend the 2009 exclusion amount or otherwise deal with this impending logistical nightmare.<sup>99</sup> But Congress did not act, so on December 31, 2009, the estate and generation-skipping taxes were repealed with the knowledge that they would be reinstated on January 1, 2011, in their pre-2001 form.<sup>100</sup>

Congress's inaction not only threw the estate-planning bar into a state of utter confusion, but also resulted in a practical problem that few had anticipated because they had simply not expected the repeal to occur. This problem was caused by the wording that was used in many wills for decedents whose estates were large enough that the estate tax or generation-skipping tax was a realistic possibility. The drafters of these clients' wills frequently utilized formulas that would split the estate into portions that would maximize the estate's ability to take advantage of both the applicable exclusion amount and deductions such as the marital deduction.<sup>101</sup> An example would be a clause that would give the spouse the maximum amount the spouse could receive without incurring a federal estate tax on the estate.<sup>102</sup> Simplistically, for a \$5 million estate in 2009, the formula would result in the spouse receiving \$1.5 million. When this amount is deducted from the total value of the estate, the remaining \$3.5 million is not taxed because it does not exceed the allowable exclusion. The problem that arose in 2010 is that these formulas became meaningless because they all are dependent upon the notion that an estate tax is in place.<sup>103</sup>

In response to this problem, the Fiduciary Law Section of the State Bar of Georgia, under the leadership of President Nickola Djuric, asked the legislature to consider a bill that provides the following: for the wills of decedents who die during 2010, the various terms used in the wills that assume the existence of the estate and generation-skipping transfer tax—terms such as “federal estate tax,” “marital deduction,” and “gross estate”—are deemed to refer to the federal tax law that was in effect on December 31, 2009.<sup>104</sup> The bill also provides that any reference to

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99. See, e.g., RAY D. MADOFF ET AL., PRACTICAL GUIDE TO ESTATE PLANNING 5-35 to 5-36 (2010 ed. 2009).

100. *Id.* at 5-36.

101. See *id.* at 6-47.

102. See *id.* at 6-47 to 6-48.

103. See *id.* at 6-47.

104. See Letters from Adam R. Gaslewitz, Chair, Fiduciary Law Section of the State Bar of Georgia, to Matt Patton, Chairman, ACL (Sept. 12, 2007), available at [http://www.gabar.org/public/pdf/sections/fiduciarylaw/trustcodeproposal\\_Sept1207.pdf](http://www.gabar.org/public/pdf/sections/fiduciarylaw/trustcodeproposal_Sept1207.pdf); Ga. S. Bill 461, Reg. Sess., 2010 Ga. Laws 493 (codified at O.C.G.A. § 53-4-75 (Supp. 2010)). The bill enumerated the following terms:

amounts that are exempt from or can pass free of the estate tax or the generation-skipping tax will be deemed to refer to amounts that were exempt under the federal law as of December 31, 2009.<sup>105</sup> The General Assembly enacted this legislation on May 27, 2010.<sup>106</sup> This new legislation<sup>107</sup> added O.C.G.A. § 53-4-75<sup>108</sup> to the Georgia Probate Code.<sup>109</sup>

### B. Georgia Trust Code

During the 2010 session, the General Assembly enacted a comprehensive revision to Georgia's Trust Act, the Revised Georgia Trust Code of 2010,<sup>110</sup> which appears in chapter 12 of title 53 of the O.C.G.A.<sup>111</sup> The revision was proposed by the Fiduciary Law Section of the State Bar of Georgia and was the product of that section's Trust Code Revision Committee (Committee).<sup>112</sup> The instigation for the revision of the Georgia Trust Act, which had been codified in 1991,<sup>113</sup> was the promulgation in 2000 of the Uniform Trust Code (UTC)<sup>114</sup> by the National Conference of Commissioners on Uniform State Laws<sup>115</sup>—now the Uniform Law Commissioners.<sup>116</sup> The Committee examined the existing Georgia law and studied what changes should be recommended in light of the UTC and developments in other state laws. An extensive discussion of the Revised Georgia Trust Code of 2010 (Revised Code) is beyond the scope of this Article.

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federal estate tax, gross estate, unified credit, estate tax exemption, applicable exemption amount, applicable credit amount, deduction, charitable deduction, value for federal estate tax purposes, federal generation-skipping transfer tax, generation-skipping transfer, applicable exclusion amount, generation-skipping transfer tax exemption, GST exemption, skip person, direct skip, transferor, marital deduction, maximum marital deduction, unlimited marital deduction.

*Id.* (internal quotation marks omitted).

105. *Id.*

106. *Id.* at § 2-3, 2010 Ga. Laws at 493.

107. *See* Ga. S. Bill 461 at § 1, 2010 Ga. Laws at § 1.

108. O.C.G.A. § 53-4-75 (Supp. 2010).

109. O.C.G.A. tit. 53 (2007 & Supp. 2010).

110. Ga. S. Bill 131, Reg. Sess., 2010 Ga. Laws 1506 (codified at O.C.G.A. tit. 53, ch. 12 (Supp. 2010)).

111. *See id.*

112. Letter from Adam R. Gaslowitz, *supra* note 104.

113. Ga. H.R. Bill 794, Reg. Sess., 1991 Ga. Laws 390.

114. UNIF. TRUST CODE (amended 2005), available at <http://www.law.upenn.edu/bill/archives/ulc/uta/2005final.pdf>.

115. *Id.*

116. Unif. Law Comm'n, Home Page, UNIF. LAW COMM'N: THE NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, <http://www.nccusl.org/Update/> (last visited Sept. 30, 2010).

The following is a brief outline of some of the major provisions of the Revised Code.

1. The Revised Code addresses the creation and validity of trusts in the following ways:

a) Includes a statute that clarifies which state's laws apply in decisions relating to the validity of a trust and the meaning and effect of trust terms;<sup>117</sup>

b) Adds a provision that allows an agent under a power of attorney to create a trust for the principal if the power of attorney expressly authorizes the agent to do so;<sup>118</sup>

c) Clarifies that a transfer of legal title of property must be made to the trustee in order for property to become trust property;<sup>119</sup>

d) Adds a definition of "qualified beneficiary"<sup>120</sup> and later provides that these beneficiaries are qualified to notice in more circumstances than contingent beneficiaries;<sup>121</sup>

e) Allows a settlor to create a trust for animals (for example, pets);<sup>122</sup> and

f) Clarifies that "[n]o trust shall be considered to be revocable merely because the life beneficiary has a reversion in or a power of appointment over assets of the trust or because the life beneficiary's heirs or estate have a remainder interest therein."<sup>123</sup>

2. The Revised Code addresses modification and termination of trusts in the following ways:

a) Allows for the reformation of a trust by a court to correct mistakes;<sup>124</sup>

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117. O.C.G.A. § 53-12-5 (Supp. 2010). The Revised Code also contains a jurisdictional provision at O.C.G.A. § 53-12-6 (Supp. 2010).

118. O.C.G.A. § 53-12-20(a) (Supp. 2010).

119. O.C.G.A. § 53-12-25(a) (Supp. 2010).

120. O.C.G.A. § 53-12-2(10) (Supp. 2010) (internal quotation marks omitted). A beneficiary is a qualified beneficiary if the beneficiary

(A) Is a distributee or permissible distributee of trust income or principal; (B)

Would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in subparagraph (A) of this paragraph terminated on that date without causing the trust to terminate; or (C) Would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

*Id.*

121. See, e.g., O.C.G.A. § 53-12-242(a) (Supp. 2010) (notice as to existence of a trust).

122. O.C.G.A. § 53-12-28(a) (Supp. 2010).

123. O.C.G.A. § 53-12-44 (Supp. 2010).

124. O.C.G.A. § 53-12-60(a) (Supp. 2010).

- b) Adds more detailed provisions relating to the modification of administrative and dispositive terms of a trust by a court,<sup>125</sup>
- c) Clarifies when a settlor's agent or conservator can modify a revocable trust,<sup>126</sup> and
- d) Adds a provision for the termination of uneconomic trusts, which are trusts of less than \$50,000 of which the trustee's fee is 5% or more.<sup>127</sup>

3. The Revised Code addresses revocable trusts, spendthrift trusts, and creditors' rights in the following ways:

- a) Adds provisions that explain creditors' rights against the interest of a settlor in a revocable or irrevocable trust, both during the settlor's life and at the settlor's death,<sup>128</sup> and
- b) Retains current Georgia spendthrift trust law and adds persons who hold judgments or orders for restitution as a result of a crime committed by the beneficiary to the list of creditors who can reach a beneficiary's interest in a spendthrift trust.<sup>129</sup>

4. The Revised Code addresses notification of the existence of a trust by requiring that "[w]ithin 60 days after the date of creation of an irrevocable trust or of the date on which a revocable trust becomes irrevocable, the trustee . . . notify the qualified beneficiaries of the trust of the existence of the trust and the name and mailing address of the trustee."<sup>130</sup> This requirement can be waived by the settlor of the trust, and "[a]ll irrevocable trusts in existence on [the effective date of the Revised Code] shall be deemed to have waived this [requirement]."<sup>131</sup>

125. O.C.G.A. § 53-12-62 (Supp. 2010).

126. O.C.G.A. § 53-12-43 (Supp. 2010). An agent may exercise this power only if both the trust instrument and the instrument creating the power of attorney authorize the agent to do so. O.C.G.A. § 53-12-43(a). In accordance with O.C.G.A. § 29-5-23 (2007), a conservator may do so only if authorized by the court that has jurisdiction over the conservatorship. O.C.G.A. § 53-12-43(b).

127. O.C.G.A. § 53-12-65(a) (Supp. 2010). This provision does not apply to a trust when the sole purpose of the trust is to use the trust property to care for a cemetery plot. *Id.*

128. O.C.G.A. § 53-12-82 (Supp. 2010).

129. O.C.G.A. § 53-12-80 (Supp. 2010).

130. O.C.G.A. § 53-12-242(a). See *supra* note 118, for a definition of qualified beneficiaries.

131. O.C.G.A. § 53-12-242(b) (Supp. 2010). See O.C.G.A. § 53-12-7 (Supp. 2010) for the list of provisions that may not be varied by the settlor in the trust instrument. The notice requirement of O.C.G.A. § 53-12-242 (Supp. 2010) is not on this list, which indicates that it may be waived by the settlor.

5. The Revised Code addresses statutes of limitations in the following ways:

a) Provides that “[a]ny judicial proceeding to contest the validity of a trust that was revocable immediately before the settlor’s death shall be commenced within two years of the settlor’s death”;<sup>132</sup> and

b) Changes the statute of limitations for bringing actions for breach of trust to two years from the date “a beneficiary has received a written report that adequately discloses the existence of a claim against the trustee for a breach of trust.”<sup>133</sup> However, in all other cases the current statute of limitations, which is “six years after the beneficiary discovered, or reasonably should have discovered, the subject of [the] claim,” stays in place.<sup>134</sup>

6. The Revised Code changes the trustee compensation statute to provide the following trustee compensation in the event no compensation is spelled out in the trust instrument or in an agreement between the settlor and the trustee or the beneficiary and the trustee:

a) With respect to a corporate trustee, its published fee schedule will be its compensation, provided such fees are reasonable under the circumstances;<sup>135</sup> and

b) For individual trustees, the compensation schedule combines 1% of the value of the trust property upon initial funding of the trust and an annual fee progressively decreasing from 1.75% to .50% of the value of the trust assets per year, with the lower percentages applying to the larger trusts.<sup>136</sup>

7. With respect to powers of trustees, the Revised Code provides that a trustee automatically has a broad range of powers to deal with trust property unless the settlor limits those powers.<sup>137</sup>

8. With respect to trust certification, the Revised Code allows a trustee to give a certification of trust rather than the entire trust document to all who request to see the trust, except that trust beneficiaries must be given the entire document.<sup>138</sup>

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132. O.C.G.A. § 53-12-45(a) (Supp. 2010). This statute of limitations did not appear in the former Georgia Trust Act. See O.C.G.A. tit. 53, ch. 12 (1997) (current version at O.C.G.A. tit. 53, ch. 12 (Supp. 2010)).

133. O.C.G.A. § 53-12-307(a) (Supp. 2010).

134. *Id.*

135. O.C.G.A. § 53-12-210(c)(1) (Supp. 2010).

136. O.C.G.A. § 53-12-210(c)(2) (Supp. 2010).

137. See O.C.G.A. § 53-12-261 (Supp. 2010).

138. O.C.G.A. § 53-12-280 (Supp. 2010).

9. The Revised Code addresses investment of trust assets in the following ways:

- a) Adds a provision that describes the trustee's duties in relation to managing the risk of concentrated holdings;<sup>139</sup> and
- b) Replaces the Georgia Principal and Income Act<sup>140</sup> with the Uniform Principal and Income Act's<sup>141</sup> most recent version.<sup>142</sup>

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139. O.C.G.A. § 53-12-341 (Supp. 2010).

140. O.C.G.A. tit. 53, ch. 12, art. 17 (Supp. 2010).

141. UNIF. PRINCIPAL AND INCOME ACT (1997).

142. Compare UNIF. PRINCIPAL AND INCOME ACT, with O.C.G.A. tit. 53, ch. 12, art. 17.

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