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# Wills, Trusts, Guardianships, and Fiduciary Administration

by Mary F. Radford\*

This Article describes the significant Georgia cases and legislation from the period of June 1, 2006 through May 31, 2007 that pertain to Georgia fiduciary law and estate planning. Specifically, this Article covers cases and legislation on matters relating to wills, trusts, the administration of decedents' estates, and the guardianship and conservatorship of minors and incapacitated adults.

## I. SIGNIFICANT GEORGIA CASES

### A. *Right of Parent to Inherit from Child*

As described later in this Article, in 2007 the Georgia inheritance laws were amended to prohibit a parent who has abandoned a minor child from inheriting any portion of that child's estate.<sup>1</sup> Prior to the enactment of this amendment to the inheritance laws, the Georgia Court of Appeals decided two relevant cases: *Blackstone v. Blackstone*<sup>2</sup> and

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1. See discussion *infra* Part II.A. As noted in that section, if an individual dies without a valid will (intestate) and is not survived by a spouse, a child, or any other descendants, the parents of that individual are entitled to share the individual's estate. O.C.G.A. § 53-2-1(c)(4) (Supp. 2007); see also 1 MARY F. RADFORD, REDFEARN: WILLS AND ADMINISTRATION IN GEORGIA § 9-1, at 246 (6th ed. 2000).

2. 282 Ga. App. 515, 639 S.E.2d 369 (2006).

*Baker v. Sweat*.<sup>3</sup> In *Blackstone* the question raised was whether a father who had abused and neglected his child could still recover as the sole heir of the child's estate. The decedent, Corey Blackstone, was killed by a drunk driver at age twenty-four. The only assets that would be in Corey's estate were any potential damages for pain and suffering recovered in legal actions against the driver who had caused Corey's death.<sup>4</sup> Corey had no spouse or children and his mother had predeceased him, and therefore Corey's father, Cal, stood to inherit Corey's entire estate.<sup>5</sup> Cal had been incarcerated throughout most of Corey's life and had abused his wife and his children. Corey and his twin brother went to live with Cal when they were fifteen years old, but the Department of Family and Children's Services stepped in within a few months and took custody of the children. The juvenile court later placed Corey into an older brother's custody. Cal never appealed these actions. Importantly, even though the court deprived Cal of custody and parental power over Corey, Cal's parental rights were never formally terminated; consequently, Cal's inheritance rights remained intact.<sup>6</sup> The trial court granted summary judgment against the father, but the court of appeals ruled that Cal could inherit his son's estate.<sup>7</sup>

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3. 281 Ga. App. 863, 637 S.E.2d 474 (2006).

4. *Blackstone*, 282 Ga. App. at 516, 639 S.E.2d at 370. An action for pain and suffering belongs to the decedent, and the decedent's death prior to the commencement of the action does not cause the action to abate. O.C.G.A. § 9-2-41 (2007). Instead, the decedent's personal representative will bring the action on behalf of the decedent and the proceeds are paid to the decedent's estate. *Id.*; O.C.G.A. § 51-4-5 (2000); see *Complete Auto Transit v. Floyd*, 214 Ga. 232, 237-38, 104 S.E.2d 208, 213 (1958); *Grant v. Ga. Pac. Corp.*, 239 Ga. App. 748, 750-51, 521 S.E.2d 868, 870 (1999); *Smith v. Mem'l Med. Ctr., Inc.*, 208 Ga. App. 26, 27-28, 430 S.E.2d 57, 58-59 (1993); *Walden v. John D. Archbold Mem'l Hosp., Inc.*, 197 Ga. App. 275, 277, 398 S.E.2d 271, 273 (1990). On the other hand, recovery for wrongful death belongs not to the estate but to the persons who are authorized by statute to bring the action. O.C.G.A. sections 19-7-1 and 51-4-4 provide that the surviving parents of a child may bring an action for the homicide of the child. O.C.G.A. § 19-7-1 (Supp. 2007); O.C.G.A. § 51-4-4 (2000).

5. *Blackstone*, 282 Ga. App. at 516-17, 639 S.E.2d at 370-71; see O.C.G.A. § 53-2-1(c)(4).

6. *Blackstone*, 282 Ga. App. at 516-17, 639 S.E.2d at 370-71. Georgia law expressly provides that an order terminating parental rights permanently terminates all of a parent's rights relating to the child, including the right of inheritance. O.C.G.A. § 15-11-93 (2005). In *Taylor v. Taylor*, 280 Ga. 88, 623 S.E.2d 477 (2005), the Georgia Supreme Court had confirmed that the loss of parental power is not the equivalent of a termination of parental rights. *Id.* at 91, 623 S.E.2d at 479 (Hunstein, J., concurring).

7. *Blackstone*, 282 Ga. App. at 517, 639 S.E.2d at 371. The trial court relied on *In re Estate of Lunsford*, 610 S.E.2d 366 (N.C. 2005), a North Carolina case which interpreted a North Carolina statute that specifically provided that a parent would lose inheritance rights in such a situation. *Id.* at 373.

In the month prior to the issuance of the court of appeals decision in *Blackstone*, the court of appeals decided *Baker v. Sweat*.<sup>8</sup> In *Baker* the court held that a father who had never supported or attempted to establish a relationship with his child lacked standing to pursue a wrongful death action for the death of the child.<sup>9</sup> The difference between the holdings of these two cases revolves around an interplay between the wrongful death statute and the loss of parental power statute, an interplay that is not replicated in the inheritance statute. According to the Official Code of Georgia Annotated ("O.C.G.A.") section 51-4-4,<sup>10</sup> the right to recover for the wrongful death of a child "shall be as provided in Code Section 19-7-1."<sup>11</sup> Although O.C.G.A. section 19-7-1<sup>12</sup> deals with loss of parental power and wrongful death recovery rights, it does not expressly provide that a parent who has abandoned a child loses the right to pursue a wrongful death action.<sup>13</sup> The section does provide that a parent who abandons the child loses parental power.<sup>14</sup> Based on this code section the court of appeals concluded that abandonment of a child and the loss of wrongful death recovery rights were closely intertwined.<sup>15</sup> However, in *Blackstone* the court determined that there was no such cross-reference in the inheritance statute.<sup>16</sup> Furthermore, the court pointed to its holding in a previous case that O.C.G.A. section 19-7-1 must be strictly construed, and thus the court refused to expand the reasoning of that statute to cover inheritance situations.<sup>17</sup> Because the later-described 2007 amendment to the inheritance laws applies to abandonment but not abuse, and because it applies only if the child was still a minor when he or she died, that amendment, had it been in effect, would not have prevented Mr. Blackstone from inheriting from his son.<sup>18</sup>

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8. 281 Ga. App. 863, 637 S.E.2d 474 (2006).

9. *Id.* at 863-64, 637 S.E.2d at 475. As noted *supra* note 4, a cause of action and any recovery for the wrongful death of a child belongs directly to the surviving parent, not to the child's estate.

10. O.C.G.A. § 51-4-4 (2000).

11. *Id.*

12. O.C.G.A. § 19-7-1 (Supp. 2007).

13. *Id.*

14. *Id.* § 19-7-1(b)(3).

15. *Baker*, 281 Ga. App. at 867, 637 S.E.2d at 478. The court of appeals had held in past cases that a parent who abandons a child forfeits his or her right to share in the recovery for the child's wrongful death. *Dove v. Carver*, 197 Ga. App. 733, 735, 399 S.E.2d 216, 218-19 (1990); *Ramos v. Ramos*, 173 Ga. App. 30, 31-33, 325 S.E.2d 415, 417-19 (1984).

16. 282 Ga. App. at 517-18, 639 S.E.2d at 371-72.

17. *Id.* (citing *Tolbert v. Maner*, 271 Ga. 207, 208, 518 S.E.2d 423, 424 (1999)).

18. See Ga. H.R. Bill 139, § 2, Reg. Sess. (2007); O.C.G.A. § 53-2-1 (Supp. 2007).

### B. Will Execution Requirements

Georgia law contains specific requirements that must be met for a will to be deemed validly executed and attested. According to O.C.G.A. section 53-4-20(b),<sup>19</sup> two witnesses are required to sign the will in the presence of the testator.<sup>20</sup> In *McCormick v. Jeffers*,<sup>21</sup> the Georgia Supreme Court examined the meaning of the term “presence.”<sup>22</sup> The testator in this case signed her will in the presence of two witnesses and a notary public while seated in a chair in her bedroom. The witnesses and notary public then took the will into the dining room, where they signed it. From her chair in her bedroom, the testator was unable to see the witnesses as they signed the will.<sup>23</sup> The Georgia Supreme Court concluded that the will had not been properly attested because the witnesses had not signed the will in the testator’s presence.<sup>24</sup> The court applied the “line of vision” test to determine whether the witnesses were in the testator’s presence.<sup>25</sup> Under this test, the testator must have been able to see the witnesses if she had looked.<sup>26</sup> The court refused to apply the less stringent “conscious presence” test that is used in some other jurisdictions.<sup>27</sup> The court noted that Georgia’s Revised Probate Code of 1998 had not included the term “conscious” in the statute that required the witnesses’ presence but instead had carried forward the terminology used in the predecessor Probate Code.<sup>28</sup> The court noted that under the pre-1998 Probate Code, it had interpreted the term presence under the line of vision test.<sup>29</sup> The court concluded that it did not have the authority to expand the statute to encompass the conscious presence test.<sup>30</sup>

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19. O.C.G.A. § 53-4-20(b) (1997).

20. *Id.*

21. 281 Ga. 264, 637 S.E.2d 666 (2006).

22. *Id.* at 266-67, 637 S.E.2d at 669-70.

23. *Id.* at 265, 637 S.E.2d at 668.

24. *Id.*

25. *Id.* at 266, 637 S.E.2d at 669.

26. *Id.*

27. *Id.* at 266-67, 637 S.E.2d at 669. Under the conscious presence test, the presence requirement is satisfied if the testator can sense the presence of the witness, for example, by hearing the witness. *Id.* The testator need not see the witness under this test. *Id.*

28. *Id.* at 267, 637 S.E.2d at 669.

29. *Id.*

30. *Id.*

### C. *Lack of Capacity and Undue Influence*

The Georgia appellate courts continue to face appeals of cases in which a transferor of property (whether by deed or by will) is alleged to have been of a weakened mental capacity<sup>31</sup> and to have succumbed to the undue influence of a third party.<sup>32</sup> The Georgia appellate courts discussed these issues in six cases that were decided during the 2006-2007 reporting period.<sup>33</sup> Although the decisions in these cases are peculiar to the facts of those cases, the appellate courts' discussions of the factors examined on appeal are enlightening but, at times, also confusing.

**1. Undue Influence.** The major topic on which the courts continue to provoke more questions than answers is the topic concerning which factors will give rise to a presumption of undue influence.<sup>34</sup> Georgia statutory law requires that a will be "freely and voluntarily executed" and provides that a will is invalid "if anything destroys the testator's freedom of volition, such as . . . undue influence whereby the will of another is substituted for the wishes of the testator."<sup>35</sup> While the party who alleges undue influence has the burden of proving it, a rebuttable presumption of undue influence may arise if certain factors are shown.<sup>36</sup> In prior cases, the Georgia Supreme Court has held that this presumption arises if some combination of the following three factors exists: 1) there is a confidential relationship<sup>37</sup> between the transferor and the beneficiary, 2) the beneficiary is not a natural object of the

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31. See RADFORD, WILLS & ADMINISTRATION, *supra* note 1, §§ 4-2 to -5 (discussing testamentary capacity).

32. See *id.* § 4-8 (discussing undue influence).

33. Lillard v. Owens, 281 Ga. 619, 641 S.E.2d 511 (2007); Smith v. Smith, 281 Ga. 380, 637 S.E.2d 632 (2006); King v. Brown, 280 Ga. 747, 632 S.E.2d 638 (2006); Pope v. McWilliams, 280 Ga. 741, 632 S.E.2d 640 (2006); Smith v. Liney, 280 Ga. 600, 631 S.E.2d 648 (2006); Chesser v. Chesser, 284 Ga. App. 381, 643 S.E.2d 764 (2007).

34. See, e.g., Pope, 280 Ga. 741, 632 S.E.2d 640; Liney, 280 Ga. 600, 631 S.E.2d 648.

35. O.C.G.A. § 53-4-12 (1997).

36. See Bryan v. Norton, 245 Ga. 347, 348, 265 S.E.2d 282, 283 (1980).

37. According to O.C.G.A. section 23-2-58, a confidential relationship is defined as follows:

Any relationship shall be deemed confidential, whether arising from nature, created by law, or resulting from contracts, where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners, principal and agent, etc.

O.C.G.A. § 23-2-58 (1982).

transferor's bounty, and 3) the beneficiary takes an active part in the procurement of the will or other instrument of transfer.<sup>38</sup> However, the supreme court has vacillated about whether all three of the components are necessary. For example, in *White v. Regions Bank*,<sup>39</sup> the court required only the existence of a confidential relationship,<sup>40</sup> whereas in *Harper v. Harper*,<sup>41</sup> the court stated that the existence of a confidential relationship alone did not raise the presumption.<sup>42</sup> In *Bryan v. Norton*<sup>43</sup> and *Andrews v. Rentz*,<sup>44</sup> the court required two of the three factors to raise the presumption of undue influence: a confidential relationship and the active participation by the beneficiary in procuring the will.<sup>45</sup>

The Georgia Supreme Court again discussed which factors give rise to the presumption of undue influence during the 2006-2007 reporting period in *Smith v. Liney*<sup>46</sup> and *Pope v. McWilliams*.<sup>47</sup> In *Liney* a mother had left the bulk of her estate to her daughter and had only left a few personal items to her son. The son claimed that his sister had unduly influenced his mother.<sup>48</sup> The supreme court affirmed the trial court's finding that the will was not the product of undue influence.<sup>49</sup> In its opinion, the supreme court did not discuss whether a confidential relationship existed between the mother and the daughter.<sup>50</sup> Instead, the court determined that the daughter was the natural object of the mother's bounty and had not actively participated in the preparation and execution of the will.<sup>51</sup> Thus, the court held a presumption of undue influence did not arise.<sup>52</sup>

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38. See, e.g., *Bailey v. Edmondson*, 280 Ga. 528, 529, 630 S.E.2d 396, 398 (2006); *McConnell v. Moore*, 267 Ga. 839, 839-40, 483 S.E.2d 578, 579 (1997).

39. 275 Ga. 38, 561 S.E.2d 806 (2002).

40. *Id.* at 40, 561 S.E.2d at 808.

41. 274 Ga. 542, 554 S.E.2d 454 (2001).

42. *Id.* at 544, 554 S.E.2d at 456. *White* and *Harper* are discussed in Mary F. Radford, *Wills, Trusts & Administration of Estates*, 54 MERCER L. REV. 583, 588-92 (2002).

43. 245 Ga. 347, 265 S.E.2d 282 (1980).

44. 266 Ga. 782, 470 S.E.2d 669 (1996).

45. *Id.* at 783-84, 470 S.E.2d at 671; *Bryan*, 245 Ga. at 348, 265 S.E.2d at 283.

46. 280 Ga. 600, 631 S.E.2d 648 (2006).

47. 280 Ga. 741, 632 S.E.2d 640 (2006).

48. *Liney*, 280 Ga. at 600, 631 S.E.2d at 648.

49. *Id.* at 600-01, 631 S.E.2d at 648-49. The jury could not reach a verdict at trial, so the trial judge granted the daughter's motion for a judgment notwithstanding the verdict. *Id.*

50. See *id.* at 600-02, 631 S.E.2d at 648-49.

51. *Id.* at 601-02, 631 S.E.2d at 649.

52. *Id.*

*Pope* was handed down by the Georgia Supreme Court a month after the decision in *Liney*.<sup>53</sup> *Pope* concerned a challenge by the testator's nephew who claimed that the testator's sister had exerted undue influence on the testator, causing the testator to write a will that left the bulk of his estate to his sister.<sup>54</sup> In this case, the court cited all three of the undue influence factors.<sup>55</sup> The court determined that the sister had not actively participated in the preparation of the will, that she was an object of the testator's bounty, and that their relationship was not a confidential relationship but rather, was one of mutual trust.<sup>56</sup> Thus, while it remains clear that these three factors are components of a presumption of undue influence, it is still unclear what combination of these factors must be present in a particular case.

**2. Lack of Capacity.** Georgia law requires that an adult be of a certain mental state in order for a transfer of property by that adult to be valid.<sup>57</sup> "Testamentary capacity," or the capacity to make a will, "exists when the testator has a decided and rational desire as to the disposition of property."<sup>58</sup> Although Georgia case law indicates that making a deed requires a higher level of capacity than that required to make a will,<sup>59</sup> the case law describes the capacity to make a deed in similar terms to that of testamentary capacity.<sup>60</sup> Four cases that were

53. *Liney* was handed down by the supreme court on June 12, 2006. *Pope* was handed down on July 13, 2006.

54. 280 Ga. at 742, 632 S.E.2d at 642.

55. *Id.* at 743-44, 632 S.E.2d at 642-43.

56. *Id.*, 632 S.E.2d at 643. The court defined a confidential relationship as "one where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another. Evidence showing only that the deceased placed a general trust and confidence in the primary beneficiary is not sufficient to trigger the rebuttable presumption that undue influence was exercised . . . . In order to give rise to the rebuttable presumption . . . , the evidence must show a confidential relationship wherein the primary beneficiary was capable of exerting the power of leadership over the submissive testator."

*Id.* at 744, 632 S.E.2d at 643 (alterations in original) (quoting *Holland v. Holland*, 277 Ga. 792, 793-94, 596 S.E.2d 123, 126 (2004)).

57. O.C.G.A. § 53-4-11 (1997).

58. *Id.* § 53-4-11(a).

59. See *Joiner v. Joiner*, 225 Ga. 699, 703, 171 S.E.2d 297, 300 (1969).

60. See, e.g., *Thomas v. Lockwood*, 198 Ga. 437, 448-49, 31 S.E.2d 791, 798 (1944). The court in *Thomas* approved the following jury instruction on the capacity to make a deed:

"If one should have mind and reason sufficient to have a decided and rational desire as to what disposition he wishes to make of his property and to clearly understand and appreciate the nature and consequences of his act in making a deed of gift and he should make such a deed of conveyance of his property, having at the time such decided and rational desire to do so, and mind and reason to



decided during the 2006-2007 reporting period emphasize the importance of the observations of medical personnel in helping the fact-finder determine whether a transferor had legal capacity.<sup>61</sup>

In *King v. Brown*,<sup>62</sup> the Georgia Supreme Court upheld a jury finding that a testator's will was invalid.<sup>63</sup> The testator was suffering from dementia, and as evidence of his weakened mental state, the court cited to the testimony and medical records of a psychiatrist.<sup>64</sup>

In *Lillard v. Owens*,<sup>65</sup> the supreme court considered the evidence of a hospice worker who had seen the testator two days before the will was executed and had noted the testator's confusion and forgetfulness in the hospice records.<sup>66</sup> The court also pointed out that a pharmacological expert had testified that someone taking the combination of drugs that the testator was taking "would not be rationally sane."<sup>67</sup>

In *Smith v. Smith*,<sup>68</sup> a case concerning the capacity to make a deed, the supreme court affirmed the trial court's finding that the transferor lacked capacity and considered the evidence given by four witnesses, all of whom were registered nurses who had provided care for the transferor.<sup>69</sup> The court stated that these nurses were qualified to give expert testimony regarding matters within their own expertise as well as to give factual testimony regarding their observations of the transferor.<sup>70</sup>

Finally, in *Chesser v. Chesser*,<sup>71</sup> the court of appeals considered two competing doctors' assessments of the transferor's mental state.<sup>72</sup> Two days after the transferor executed the deed in question, her own doctor declared in writing that she was "mentally competent to manage her

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clearly understand that the nature of his act was to execute a deed to his property and that the consequence of his act was to divest it in another, he would be capable of making a deed of gift under the laws of this State though he might not have had a greater mental capacity than that."

*Id.*

61. *Lillard v. Owens*, 281 Ga. 619, 641 S.E.2d 511 (2007); *Smith v. Smith*, 281 Ga. 380, 637 S.E.2d 662 (2006); *King v. Brown*, 280 Ga. 747, 632 S.E.2d 638 (2006); *Chesser v. Chesser*, 284 Ga. App. 381, 643 S.E.2d 764 (2007).

62. 280 Ga. 747, 632 S.E.2d 638 (2006).

63. *Id.* at 747-49, 632 S.E.2d at 639-40.

64. *Id.* at 748, 632 S.E.2d at 639. Other witnesses also testified that the testator exhibited symptoms associated with dementia. *Id.*

65. 281 Ga. 619, 641 S.E.2d 511 (2007).

66. *Id.* at 620-21, 641 S.E.2d at 513.

67. *Id.* at 620, 641 S.E.2d at 513.

68. 281 Ga. 380, 637 S.E.2d 662 (2006).

69. *Id.* at 382, 637 S.E.2d at 664.

70. *Id.*

71. 284 Ga. App. 381, 643 S.E.2d 764 (2007).

72. *Id.* at 382-83, 643 S.E.2d at 765-66.

own affairs.”<sup>73</sup> Less than a month later, a court-appointed psychiatrist, who had evaluated the transferor after her son filed a petition to be appointed her guardian and conservator, reported to the court that the transferor was suffering from dementia and was incapacitated.<sup>74</sup> The court of appeals concluded that the evidence given by the transferor’s doctor about her mental state soon after she executed the deed was sufficient to support the trial court’s verdict that the deed was valid.<sup>75</sup>

#### D. *Standing to Sue*

Last year this Author reported the decision of the Georgia Court of Appeals in *Morgan v. Johns*.<sup>76</sup> That case involved causes of action that were brought in the probate court and superior court by the children of a testator who had disinherited them in favor of his caretaker, Morgan. On the day that the testator died, he transferred to Morgan a check for \$734,250, which the testator had received from the sale of some of his real property. Morgan deposited the check that same afternoon, a few hours before the testator died. When Morgan sought to have the testator’s will admitted to probate, the children filed a caveat to the probate proceeding. They also filed a complaint in the superior court in which they alleged fraud, conversion, and breach of fiduciary duty, and they sought to have the superior court enjoin Morgan from spending or transferring the money she had received from the testator.<sup>77</sup> The superior court granted the injunction, but the court of appeals reversed.<sup>78</sup> The court of appeals refused to accept the children’s argument that they were persons who were “interested in the estate” and thus had standing to seek the intervention of the equity court under O.C.G.A. section 23-2-91.<sup>79</sup> The court of appeals stated that the children had no interest in the estate unless and until the probate court determined that the testator’s will was not valid.<sup>80</sup> At the time the children filed their claim in the superior court, the court of appeals held

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73. *Id.* at 382, 643 S.E.2d at 765.

74. *Id.*

75. *Id.* at 383, 643 S.E.2d at 765-66.

76. 276 Ga. App. 366, 623 S.E.2d 219 (2005), *rev’d*, 281 Ga. 51, 635 S.E.2d 753 (2006). The decision of the court of appeals was discussed in Mary F. Radford, *Wills, Trusts, Guardianships, and Fiduciary Administration*, 58 MERCER L. REV. 423, 436-38 (2006).

77. *Morgan*, 276 Ga. App. at 367, 623 S.E.2d at 220.

78. *Id.* at 369, 623 S.E.2d at 221.

79. *Id.* at 367, 369, 623 S.E.2d at 220, 221 (quoting O.C.G.A. § 23-2-91 (1982)); O.C.G.A. § 23-2-91 (1982).

80. *Morgan*, 276 Ga. App. at 369, 623 S.E.2d at 221.

that the children had nothing more than an “expected inheritance.”<sup>81</sup> In October 2006 the supreme court reversed the holding of the court of appeals.<sup>82</sup> The supreme court held that “[c]ertainly, a superior court may become involved in matters relating to the administration of estates where there is a danger of loss or other injury to a party’s interest, or where equitable interference is required for the complete protection of the rights of the parties in interest.”<sup>83</sup>

#### *E. Attorney Liability to Third Party for Negligent Drafting of a Will*

Can a lawyer who drafts a will for a testator ever be held liable by a third party who does not receive what the testator intended her to receive under the will? Until 2007, Georgia case law contained no definitive answer to this question.<sup>84</sup> In *Young v. Williams*,<sup>85</sup> the Georgia Court of Appeals allowed a third party to recover against a lawyer in a legal malpractice claim in which the third party was clearly intended to be a third-party beneficiary of the lawyer-client contractual arrangement, and it was also clear that the lawyer’s lack of care was the proximate cause of the damages to the third party.<sup>86</sup> The testator, Williams, hired Young to draft his will.<sup>87</sup> After conversations with Williams, Young drafted a will that left \$250,000 and other personal property to Betsy, Williams’s second wife, and the remainder of the testator’s personal property to his children from his first marriage. The will contained no residuary clause and apparently no clause relating to real property.<sup>88</sup> When Young and Williams were reviewing the will together, Young commented that he was surprised that Betsy was not getting more from Williams’s estate, to which Williams responded that she was getting “a million dollar house free and clear.”<sup>89</sup> When Williams died, however, because his real property was not disposed of by

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81. *Id.* at 368-69, 623 S.E.2d at 221 (quoting *Julian v. Brooks*, 269 Ga. 167, 167, 495 S.E.2d 569, 569 (1998)).

82. *Johns v. Morgan*, 281 Ga. 51, 54, 635 S.E.2d 753, 756 (2006).

83. *Id.*, 635 S.E.2d at 755.

84. For a discussion of cases relevant to this issue, see RADFORD, WILLS & ADMINISTRATION, *supra* note 1, § 4-11.

85. 285 Ga. App. 208, 645 S.E.2d 624 (2007).

86. *Id.* at 210, 645 S.E.2d at 626.

87. *Id.* at 209, 645 S.E.2d at 625. There was no written contract between the lawyer and his client, such as an engagement letter, but the court was satisfied that the lawyer’s testimony made the parameters of their agreement quite clear. *Id.* at 209-10, 645 S.E.2d at 625-26.

88. *See id.* at 208-10, 645 S.E.2d at 625-26.

89. *Id.* at 210, 645 S.E.2d at 625.

his will, the house passed by intestacy, one-third to Betsy and the remaining two-thirds to his children.<sup>90</sup>

Generally speaking, "To support a claim for legal malpractice, [the plaintiff] must show that (1) he or she employed the attorney; (2) the attorney failed to exercise ordinary care, skill, and diligence; and (3) such negligence proximately caused the [plaintiff] damages."<sup>91</sup> In *Young* the attorney did not deny that Williams had made it clear that he intended for Betsy to have his residence after his death. The attorney also testified that he had violated his own standard of care by omitting a residuary clause.<sup>92</sup> However, he asserted that Betsy could not sue him for malpractice because no attorney-client relationship (privity of contract) had existed between him and Betsy.<sup>93</sup> The trial court granted partial summary judgment for Betsy on this issue, and the court of appeals affirmed.<sup>94</sup> The court of appeals cited Georgia cases dealing with real property and corporate transactions for its conclusion that, although a malpractice suit is generally inappropriate if there is no attorney-client relationship, there can be situations in which a nonclient can sue as a third-party beneficiary of the contract between the attorney and his or her actual client.<sup>95</sup> This type of malpractice action will only be allowed if the contract was clearly intended for the nonclient's benefit.<sup>96</sup> The court of appeals held that Young had been hired to write a will that would benefit the testator's wife, Betsy, and that "in drafting a will, he owed to the intended beneficiaries a duty similar to the duty he owed the testator in making sure the testator's intent is carried out."<sup>97</sup> The court of appeals also addressed Young's assertion that Betsy had not proven that his negligence was the proximate cause of any

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90. *Id.* at 208-09, 645 S.E.2d at 625. According to O.C.G.A. section 53-2-1(c)(1), a decedent's estate will be divided equally among the decedent's surviving spouse and children but the spouse will not take less than a one-third share. O.C.G.A. § 53-2-1(c)(1) (Supp. 2007) (formerly O.C.G.A. § 53-2-1(b)(1) (1997)).

91. *Graivier v. Dreger & McClelland*, 280 Ga. App. 74, 76-77, 633 S.E.2d 406, 410 (2006).

92. *Young*, 285 Ga. App. at 210, 645 S.E.2d at 625-26. An expert witness also testified by affidavit that omitting a residuary clause was a violation of the standard of care required of attorneys. *Id.*

93. *Id.*, 645 S.E.2d at 626.

94. *Id.*

95. *Id.* at 209, 645 S.E.2d 625 (citing *Backus v. Chilivis*, 236 Ga. 500, 502, 224 S.E.2d 370, 372-73 (1976); *Graivier*, 280 Ga. App. at 76, 633 S.E.2d at 409; *Legacy Homes, Inc. v. Cole*, 205 Ga. App. 34, 35, 421 S.E.2d 127, 129 (1992); *Berman v. Ruben*, 138 Ga. App. 849, 852, 227 S.E.2d 802, 805 (1976)).

96. *Id.*

97. *Id.* at 210, 645 S.E.2d at 626.

damage to her.<sup>98</sup> The court of appeals held that his negligence clearly resulted in her losing the two-thirds interest in the home.<sup>99</sup> Finally, the court pointed out that the fact that Williams had read the will before signing it did not insulate Young from liability for Young's negligence.<sup>100</sup>

## II. 2007 LEGISLATION

### A. *Parent Prohibited from Inheriting from Abandoned Child*

The rules for the distribution of an estate that apply when the decedent has died intestate (that is, without a valid will) are contained in O.C.G.A. section 53-2-1.<sup>101</sup> If an individual dies intestate and is not survived by a spouse, a child, or any other descendants, the parents of that individual are entitled to share the individual's estate.<sup>102</sup> This rule was amended in 2007<sup>103</sup> to prohibit a parent from inheriting from a minor child<sup>104</sup> if the parent has "willfully abandoned" the child.<sup>105</sup> In such a case, the parent is also prohibited from acting as the personal representative of the child's estate.<sup>106</sup> A parent willfully abandons a child if the parent "without justifiable cause, fails to communicate with the minor child, care for the minor child, and provide for the minor child's support as required by law or judicial decree for a period of at least one year immediately prior to the date of the death of the minor."<sup>107</sup> The abandonment must be proven by the person asserting it by clear and convincing evidence at a hearing conducted for that purpose.<sup>108</sup> If a parent lost custody due to a court order but substantially complied with the support requirements of that order, the parent

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98. *Id.*

99. *Id.*

100. *Id.*

101. O.C.G.A. § 53-2-1 (Supp. 2007). These rules are described in detail in RADFORD, WILLS & ADMINISTRATION, *supra* note 1, §§ 9-1 to -9.

102. O.C.G.A. § 53-2-1(c)(4). The inheritance rights of the parents of a child who was born out of wedlock are set forth in O.C.G.A. section 53-2-4. O.C.G.A. § 53-2-4 (Supp. 2007).

103. Ga. H.R. Bill 139, § 2, Reg. Sess. (2007).

104. A minor child is defined as a child who is under age eighteen. O.C.G.A. § 53-2-1(a)(2). The prohibition against inheritance seems to apply only if the child is still a minor when the child dies. *Id.* § 53-2-1(d).

105. *Id.* § 53-2-1(d). If the parent cannot inherit due to this prohibition, the parent's share of the minor's estate will be distributed as if the parent had predeceased the minor child. *Id.* § 53-2-1(g).

106. *Id.* § 53-2-1(d).

107. *Id.* § 53-2-1(a)(1)(A).

108. *Id.* § 53-2-1(e).

may inherit from the minor in the event of the child's death.<sup>109</sup> This amendment does not apply to recovery by a parent in a wrongful death suit. That situation is dealt with separately in O.C.G.A. section 51-4-4.<sup>110</sup>

### B. Georgia Advance Directive for Health Care

Georgia law allows an individual to plan ahead for health care decision-making in the event that individual loses the capacity to make those important decisions for himself or herself. Typically, lawyers have recommended that clients execute one or both of two documents: a living will and a durable health care power of attorney. A living will is designed solely for the purpose of allowing the individual to direct what, if any, measures should be taken in the end stages of a terminal condition or if that individual is in a state of permanent unconsciousness.<sup>111</sup> The durable health care power of attorney allows an individual to appoint an agent to make health care decisions for him or her if he or she is not able to do so.<sup>112</sup> Prior to the 2007 legislation, the O.C.G.A. provided statutory forms for both of these documents.<sup>113</sup> In 2007 the Georgia legislature enacted the Georgia Advance Directive for Health Care Act (the "Act").<sup>114</sup> This Act gives individuals a suggested form, called an "advance directive for health care," that combines the two documents described above into one document and expands the possible treatment options that an individual can choose in his or her directive.<sup>115</sup> The Act became effective July 1, 2007, and does not affect or invalidate living wills, durable health care powers of attorney, or other similar documents executed before that date, unless such documents are revoked or replaced by the new form.<sup>116</sup>

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109. *Id.* § 53-2-1(d).

110. O.C.G.A. § 51-4-4 (2000). For a description of two recent cases that distinguish between a parent's right to inherit from a child's estate and a parent's right to recover for the wrongful death of a child, see *supra* text accompanying notes 1-18.

111. Prior to the 2007 legislation, the laws relating to living wills appeared at Chapter 32 of Title 31 of the O.C.G.A.

112. Prior to the 2007 legislation, the laws relating to health care powers of attorney appeared at Chapter 36 of Title 31 of the O.C.G.A.

113. The statutory form for the living will appeared at O.C.G.A. section 31-32-3. O.C.G.A. § 31-32-3 (2006). The statutory form for the health care power of attorney appeared at O.C.G.A. section 31-36-10. O.C.G.A. § 31-36-10 (2006).

114. Ga. H.R. Bill 24, § 2, Reg. Sess. (2007). This Act is found in Chapter 32 of Title 31 of the O.C.G.A.

115. The new advance directive form is contained in O.C.G.A. section 31-32-4. O.C.G.A. § 31-32-4 (Supp. 2007).

116. O.C.G.A. § 31-32-3 (Supp. 2007).

There are four parts to the advance directive document.<sup>117</sup> The declarant<sup>118</sup> need not complete all four parts.<sup>119</sup> For example, Part One will be effective even if Parts Two or Three are not completed and vice versa.<sup>120</sup>

Part One allows the declarant to appoint a health care agent and one or more back-up agents.<sup>121</sup> Part One lists the powers of the health care agent and includes the appointment of the agent as the declarant's representative for laws relating to medical privacy, including the Health Insurance Portability and Accountability Act of 1996.<sup>122</sup> This part also makes it clear that the agent cannot make health care decisions regarding psychosurgery, sterilization, or treatment or involuntary hospitalization for mental illness, mental retardation, or addiction.<sup>123</sup> The form specifically states that the agent may accompany the declarant in an ambulance or air ambulance and visit the declarant in a hospital or other health care facility, if the protocol of that facility permits visitation.<sup>124</sup> Part One directs the health care agent to look to Part Two, which is entitled "Treatment Preferences,"<sup>125</sup> for guidance in making decisions, and to consider the declarant's previous statements, health care actions, religious and other beliefs, and values.<sup>126</sup> If after this consideration it remains unclear what the declarant would do in a particular situation, then the agent is to make a decision that is in the declarant's best interest, "considering the benefits, burdens, and risks of [the declarant's] current circumstances and treatment options."<sup>127</sup> Part One allows the declarant to give the agent the authority to make post-

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117. O.C.G.A. § 31-32-4.

118. A declarant is any person of sound mind who is at least age eighteen or emancipated. O.C.G.A. § 31-32-5(a) (Supp. 2007).

119. O.C.G.A. § 31-32-4.

120. *Id.*

121. O.C.G.A. § 31-32-4, pt. One(1), (2). This part points out that a physician or other health care provider who is directly involved in the declarant's health care may not serve as the agent, nor may an ex-spouse. Marriage after the directive has been signed will revoke the appointment of the agent unless the agent is the declarant's new spouse. *Id.* § 31-32-4, pt. One.

122. *Id.* § 31-32-4, pt. One(3); Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified in scattered sections of 18, 26, 29, and 42 U.S.C.).

123. O.C.G.A. § 31-32-4, pt. One.

124. *Id.*

125. *Id.* § 31-32-4, pt. Two.

126. *Id.* § 31-32-4, pt. One(4).

127. *Id.*

death decisions about autopsies and disposition of the declarant's organs or entire body, including organ donations.<sup>128</sup>

Part Two of the advance directive for health care form replaces the former "living will" form. If this part is completed, it is only effective if the declarant is unable to communicate his or her own wishes.<sup>129</sup> As well, Part Two applies only if the declarant is in a "terminal condition"<sup>130</sup> or a "state of permanent unconsciousness."<sup>131</sup> Part Two gives the declarant three options for treatment.<sup>132</sup> The first option is extension of life as long as possible using medications, machines, and other medical procedures.<sup>133</sup> This option makes it clear that nutrition and fluids by tube or other means are to be continued.<sup>134</sup> The second option is allowing a natural death without medications, machines, and procedures when the only purpose is to prolong life.<sup>135</sup> This option makes it clear that nutrition and hydration by tube or other means are not to be continued unless needed to provide pain medication.<sup>136</sup> The third option is allowing the declarant to choose which procedures should be continued.<sup>137</sup> The choices (any or all of which may be chosen) are the following: nutrition, fluids, ventilator, and cardio-pulmonary resuscitation.<sup>138</sup>

Part Two also allows the declarant the option to make additional statements to provide guidance concerning his or her treatment preferences.<sup>139</sup> Part Two provides that it will be effective when the declarant is pregnant only if the declarant initials a statement that says: "I want PART TWO to be carried out if my fetus is not viable."<sup>140</sup>

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128. *Id.* § 31-32-4, pt. One(5).

129. *Id.* § 31-32-4, pt. Two. The introduction to this part makes clear that if a health care agent has been appointed, the agent may be guided by the preferences stated in Part Two, but the agent retains the ultimate authority to make all health care decisions. *Id.*

130. *Id.* § 31-32-4, pt. Two(6). A terminal condition is defined as "an incurable or irreversible condition that will result in . . . death in a relatively short period of time." *Id.*

131. *Id.* A state of permanent unconsciousness is defined as "an incurable or irreversible condition in which I am not aware of myself or my environment and I show no behavioral response to my environment." *Id.*

132. *Id.* § 31-32-4, pt. Two(7).

133. *Id.*

134. *See id.*

135. *Id.*

136. *See id.*

137. *Id.*

138. *Id.*

139. *Id.* § 31-32-4, pt. Two(8).

140. *Id.* § 31-32-4, pt. Two(9).



Part Three of the advance directive form allows the declarant to nominate an individual to serve as his or her guardian.<sup>141</sup> Under O.C.G.A. section 29-4-3,<sup>142</sup> the probate court may not override that designation in a guardianship proceeding without good cause.<sup>143</sup> This part allows the declarant to choose the health care agent or any other individual as guardian.<sup>144</sup>

Part Four, which is entitled "Effectiveness and Signatures," must be completed for the advance directive to be valid.<sup>145</sup> Part Four clarifies that this document revokes any other advance directive, health care power of attorney, or living will made by the declarant.<sup>146</sup> This part makes the directive effective on the date of execution unless the declarant provides an alternative effective date or event.<sup>147</sup> Part Four requires the document to be signed or acknowledged in the presence of two witnesses who are at least eighteen years old; however, the witnesses do not have to be in each other's presence when they sign the document.<sup>148</sup>

An advance directive may be revoked by a new form, which revokes the older document expressly or by inconsistency, by being destroyed (burned, torn, or obliterated), by a written revocation, or by an oral or other clear expression.<sup>149</sup> As noted above, marriage revokes the designation of anyone as health care agent other than the individual who becomes the declarant's spouse.<sup>150</sup> The appointment of a guardian or receiver for the declarant does not revoke the advance directive, and the agent's authority will supersede that of the guardian on all matters covered by the advance directive.<sup>151</sup>

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141. *Id.* § 31-32-4, pt. Three.

142. O.C.G.A. § 29-4-3 (2007).

143. This provision of the Georgia Guardianship Code is discussed in MARY F. RADFORD, *GUARDIANSHIPS AND CONSERVATORSHIPS IN GEORGIA* § 4-5, at 199 (2005).

144. O.C.G.A. § 31-32-4, pt. Three(10).

145. *Id.* § 31-32-4, pt. Four.

146. *Id.*

147. *Id.*

148. *Id.* Part Four states that the following cannot serve as witnesses: a) the health care agent, b) a person who will inherit from or gain any other financial benefit due to the declarant's death, or c) a person who is directly involved in the declarant's health care. *Id.* Also, only one of the witnesses may be an employee, agent, or medical staff member of the facility if the declarant is receiving health care from a facility at the time of the execution of the document. *Id.*

149. O.C.G.A. § 31-32-6(a) (Supp. 2007).

150. *Id.* § 31-32-6(b).

151. *Id.* § 31-32-6(c). The issue of medical consents for individuals for whom a guardian has been appointed is discussed in detail in RADFORD, *GUARDIANSHIPS AND CONSERVATORSHIPS*, *supra* note 143, § 4-7, at 213.