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# Wills, Trusts, Guardianships, and Fiduciary Administration

by Mary F. Radford\*

This Article describes selected cases and significant legislation from June 1, 2013 through May 31, 2014 pertaining to Georgia fiduciary law and estate planning.<sup>1</sup>

## I. GEORGIA CASES

### A. Will Construction

The case of *Banner v. Vandeford*<sup>2</sup> confirms the long-standing rule that if a will is clear and unambiguous on its face, a court will not, by construction, reform the will to give it a different meaning or effect.<sup>3</sup> In this case, the Georgia Supreme Court was asked to construe a will that

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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*, 65 *MERCER L. REV.* 295 (2013).

2. 293 Ga. 654, 748 S.E.2d 927 (2013).

3. *Id.* at 655, 748 S.E.2d at 929; See *v. Mitchell*, 287 Ga. 551, 553, 700 S.E.2d 338 (2010); *Folsom v. Rowell*, 281 Ga. 494, 498, 640 S.E.2d 5, 8 (2007); *DuBose v. Box*, 246 Ga. 660, 663, 273 S.E.2d 101, 106 (1980); *First Nat'l Bank of Atlanta v. Robinson*, 209 Ga. 582, 586, 74 S.E.2d 875, 878 (1953); *Stahl v. Russell*, 206 Ga. 699, 701, 58 S.E.2d 135, 136 (1950).

contained no residuary clause.<sup>4</sup> The testator, John Huscusson, was survived by three adult daughters: Tina, Deborah, and Karen.<sup>5</sup> John executed a will in 2006 that left his entire estate to his three daughters equally. In 2012, John executed another will, specifically revoking his previous will. The 2012 will expressed his extreme disappointment with Deborah and Karen, leaving bequests of \$10 to each of them. He did not give Tina a bequest of money, but he did name her as executrix of his estate.<sup>6</sup> The appellant's brief<sup>7</sup> explained that the original draft of the will contained a residuary clause that left the remainder of John's estate to his daughter Tina. The testator made a revision on the first page, which the testator's lawyer incorporated into the draft. Unfortunately, the lawyer then printed only the first page on which the revision had been made, not realizing that the residuary clause had been pushed to the second page.<sup>8</sup>

The supreme court noted that the 2012 will consisted of seven consecutively numbered pages that were each initialed by John, contained no incomplete sentences, and was made up of numbered paragraphs that appeared to properly follow each other.<sup>9</sup> Deborah and Karen filed a declaratory judgment action in probate court seeking an interpretation of the will. The probate court found that the will was plain and unambiguous and that without a residuary clause, the gift of the residue lapsed and was required to pass by intestacy.<sup>10</sup> The intestate heirs<sup>11</sup> of the testator were all three of the daughters. Tina appealed to the supreme court. She first argued that the probate court did not follow John's true intentions in that he desired to disinherit Deborah and Karen. She claimed the probate court should have interpreted the will as leaving the residue of the estate to her alone.<sup>12</sup>

The supreme court disagreed and affirmed the probate court's ruling.<sup>13</sup> The court noted that courts do not have the authority to

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4. *Banner*, 293 Ga. at 654, 748 S.E.2d at 928. "A residuary testamentary gift includes all the property of the estate that is not effectively disposed of by other provisions of the will." O.C.G.A. § 53-4-59 (2011).

5. *Banner*, 293 Ga. at 654, 748 S.E.2d at 928.

6. *Id.*

7. Brief of Appellant, *Banner*, 293 Ga. 654, 748 S.E.2d 927 (No. S13A1291), 2013 WL 2337169.

8. *Id.* at \*4.

9. *Banner*, 293 Ga. at 654, 748 S.E.2d at 928.

10. *Id.*

11. See O.C.G.A. §§ 53-2-1(c)(3), -4-65(b) (2011).

12. *Banner*, 293 Ga. at 654-55, 748 S.E.2d at 928.

13. *Id.*

rewrite, by construction, an unambiguous will.<sup>14</sup> The paramount object of construction is to determine “the intention of the testator by looking to [the] four corners [of the will] and giving consideration to all of its parts.”<sup>15</sup> Here, the will flowed clearly, did not have any page or paragraph breaks, and its terms were plain and unambiguous; thus, its terms must control.<sup>16</sup> The court recognized that, while it is unusual for a testator to omit a residuary clause, the court could not supply one.<sup>17</sup> Tina tried to persuade the court that the will’s residuary distribution scheme was ambiguous because it provided that “[i]f . . . no beneficiaries . . . survive me, I give all my estate to those persons who would have been entitled thereto under the laws of descent and distribution . . . as if I had died intestate.”<sup>18</sup> However, the court found the provision shed no light on John’s intention regarding how the remainder should be distributed to the named beneficiaries who did actually survive him.<sup>19</sup> Finally, Tina contended that the probate court erred in refusing to allow the attorney who drafted John’s will to testify that John wanted Tina to inherit the remainder of his estate.<sup>20</sup> The court held that, because the will contained no ambiguities, parol evidence could not be introduced to contradict its terms even if the terms express a meaning that is entirely at variance with the real intention of the testator.<sup>21</sup> Without that rule, the court noted that no will would be able to “hold up to parol evidence of witnesses who come forward after the testator’s demise.”<sup>22</sup>

### B. *Trusts and Trustees*

During the reporting period, the Georgia appellate courts dealt with four trust cases that discussed whether the trustees had breached their fiduciary duties and, in that context, examined the statute of limitations for bringing actions for such a breach. Two of these cases, *Reliance Trust Co. v. Candler*<sup>23</sup> and *Rollins v. Rollins*,<sup>24</sup> had already been reviewed by the supreme court and have been discussed in previous

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14. *Id.* at 654, 748 S.E.2d at 928.

15. *Id.* (quoting *Lewis v. Mitchell*, 216 Ga. 526, 527, 117 S.E.2d 901, 902 (1961)) (internal quotation marks omitted).

16. *Id.*

17. *Id.* at 655, 748 S.E.2d at 929.

18. *Id.*

19. *Id.* at 655, 748 S.E.2d at 929.

20. *Id.* at 656, 748 S.E.2d at 929.

21. *Id.*

22. *Id.*

23. 294 Ga. 15, 751 S.E.2d 47 (2013).

24. 294 Ga. 711, 755 S.E.2d 727 (2014).

issues of the *Mercer Law Review*.<sup>25</sup> The decision in *Rollins* is discussed in this year's Annual Survey of Georgia Law by Crystal J. Clark and Kristi K. North,<sup>26</sup> and the decision in *Reliance* is discussed below. The other two cases, *Hasty v. Castleberry*<sup>27</sup> and *Smith v. SunTrust Bank*,<sup>28</sup> were appealed from the trial courts to the Georgia Supreme Court and the Georgia Court of Appeals respectively.

**1. Statute of Limitations.** Section 53-12-307 of the Official Code of Georgia Annotated (O.C.G.A.)<sup>29</sup> provides that the statute of limitations for actions against a trustee will be either two or six years.<sup>30</sup> The six-year period begins to run at the time "the beneficiary discovered, or reasonably should have discovered, the subject of such claim."<sup>31</sup> The six-year period is narrowed to two years if the beneficiary "received a report which adequately discloses the existence of a claim against the trustee for a breach of trust."<sup>32</sup>

The trustee in *Hasty v. Castleberry* was sued by his sister for breach of fiduciary duty, mismanagement of the trust's assets, and the collection of excessive trustee fees. The trust was designed to support the children's mother for her life and then pay the remainder to the trustee, his sister, and another sibling.<sup>33</sup> The support provided for the mother consisted of both a mandatory payment to her of the income from the trust and any encroachments on the trust corpus that the trustee deemed necessary to provide for the mother's "proper support [or] maintenance, or to enable her to meet any difficulty produced by sickness, accident, or similar cause."<sup>34</sup> While the mother was alive, the trustee, who was the co-chair of a fundraising campaign for a local university, used trust funds to make a \$1 million donation to the university on his mother's behalf.<sup>35</sup> The trial court granted partial

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25. For a discussion of *Reliance*, see Mary F. Radford, *Wills, Trusts, Guardianships, and Fiduciary Administration*, *Annual Survey of Georgia Law*, 64 *MERCER L. REV.* 325, 328-32 (2012). For a discussion of *Rollins*, see Crystal J. Clark, *Business Associations*, *Annual Survey of Georgia Law*, 65 *MERCER L. REV.* 55, 55-56 (2013).

26. Crystal J. Clarke & Kristi K. North, *Business Associations*, *Annual Survey of Georgia*, 66 *MERCER L. REV.* 15 (2014).

27. 293 Ga. 727, 749 S.E.2d 676 (2013).

28. 325 Ga. App. 531, 754 S.E.2d 117 (2014).

29. O.C.G.A. § 53-12-307 (2011).

30. *Id.*

31. O.C.G.A. § 53-12-307(a).

32. *Id.*

33. *Hasty*, 293 Ga. at 727-28, 749 S.E.2d at 679.

34. *Id.* at 728, 749 S.E.2d at 679 (alteration in original).

35. *Id.* In *Reinhardt University v. Castleberry*, 318 Ga. App. 416, 734 S.E.2d 117 (2012), the court of appeals affirmed the imposition of a constructive trust on the \$1 million

summary judgment to the sister, and the trustee appealed. When sued by his sister, the trustee contended that she had failed to file her claim within the applicable statute of limitations of two years. The trustee claimed that an accountant's letter, which he showed his sister and which disclosed the donation, constituted a sufficient report to narrow the statute of limitations to two years.<sup>36</sup> Although the term "report" is not defined in that particular statute,<sup>37</sup> the supreme court adopted a definition from the statute on trustee accounting, O.C.G.A. § 53-12-243(a),<sup>38</sup> which requires a report from a trustee to a beneficiary to include "the assets, liabilities, receipts, and disbursements of the trust, . . . including the trust provisions that describe or affect such beneficiary's interest."<sup>39</sup> The supreme court held that the accountant's letter, which was simply a general correspondence without any details, did not constitute a sufficient report to shorten the statute of limitations and that the sister filed her claim within the six-year time frame.<sup>40</sup>

The co-trustees in *Smith v. SunTrust Bank* were the co-trustees of the 1969 Fisher Family trust. The sole original asset of the trust was a 15% interest in a piece of Atlanta real estate, "Century Center," which was under a ninety-year lease for a large office park development. The trust established three subtrusts: Trust A, Trust B, and Trust C.<sup>41</sup> The income from Trust A was allocated to Fisher's only child, Emily Fisher Crum. Trust B's income was to be equally distributed among seventeen named beneficiaries or their descendants per stirpes.<sup>42</sup> The income of Trust C was to be distributed to any one or more of a group consisting of the Trust A and Trust B beneficiaries as the corporate trustee, SunTrust, determined "necessary for the maintenance, health, support and education of each member of such group, taking into consideration any means of support which any such member is known by [SunTrust] to have, and accumulating any income not so paid."<sup>43</sup> The trust required an annual accounting to the beneficiaries who held a present interest in the subtrust. Emily and another individual were named as

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donation despite the university's contention that it had not engaged in any wrongdoing. *Id.* at 419, 734 S.E.2d at 119. This case is discussed in Radford, *supra* note 1, at 303.

36. *Hasty*, 293 Ga. at 727, 730, 749 S.E.2d at 678, 680-81.

37. *Id.* at 731-32, 749 S.E.2d at 681; *see also* O.C.G.A. § 53-12-307.

38. O.C.G.A. § 53-12-243(a) (2011).

39. *Hasty*, 293 Ga. at 731-32, 749 S.E.2d at 681 (quoting O.C.G.A. § 53-12-243(a)).

40. *Id.* at 732, 749 S.E.2d at 681.

41. *Smith*, 325 Ga. App. at 531-32, 754 S.E.2d at 119. The trust allocated 10% of the trust's interest in Century Center to Trust A, 60% to Trust B, and 30% to Trust C. *Id.* at 532, 754 S.E.2d at 119.

42. *Id.* at 531-32, 754 S.E.2d at 119.

43. *Id.* at 532, 754 S.E.2d at 120 (alteration in original).

individual trustees, and SunTrust was named as the corporate trustee. The complaining beneficiaries were Rob Smith, one of the seventeen named B beneficiaries, and the three children of Roy Smith, Sr., who was one of the seventeen named B beneficiaries.<sup>44</sup>

On October 1, 1979, the trustees conveyed the trust's entire interest in the Century Center property to the settlor's widow, Bessie, for \$300,000, the appraisal price from five months earlier. Minutes later, Bessie conveyed the property interest to Emily and her husband.<sup>45</sup> The trust account statements for the fourth quarter of 1979 contained a notation stating that the property had been "Sold to Bessie."<sup>46</sup> Rob Smith contended he never received this statement; however, the remaining beneficiaries conceded that their father received the statement. All four beneficiaries claimed they did not know of the "straw-man" conveyance that occurred until this litigation commenced in 2011. The beneficiaries also alleged that the property interest, which had not been otherwise exposed to the market, was substantially undervalued at \$300,000. In addition, they contended that SunTrust breached its fiduciary duty by distributing all of Trust C's income to Emily, beginning in 1969, despite the means test applicable to distributions from Trust C.<sup>47</sup> A trust officer sent a letter to the current beneficiaries of Trust C on June 5, 1990, explaining the trust's distributions. The letter noted that SunTrust had not received any other requests for the income but that the beneficiaries should contact them if they would like SunTrust to consider a distribution to them. None of the beneficiaries responded or complained. Rob Smith contended that he never received this letter; however, the remaining beneficiaries admitted they had received it. The beneficiaries claimed that they never received income distributions from Trust C or any accounting statements

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44. *Id.* at 531-32, 534 & n.4, 754 S.E.2d at 119, 121 & n.4.

45. *Id.* at 533, 754 S.E.2d at 120.

46. *Id.* at 534, 754 S.E.2d at 121.

47. *Id.* at 534-35, 754 S.E.2d at 120-21. Originally, Emily requested the income to help pay estate taxes levied on her father's estate following his death, which was granted without any regard for the means test. The other beneficiaries claimed that SunTrust never informed them that it was paying all of the income to Emily during this time. In 1989, SunTrust assigned a new trust officer to Trust C, who discontinued the automatic payments to Emily until she provided financial information showing her need for continued distributions. Emily refused, and the officer ultimately resumed the distributions without receiving the financial information necessary to apply the means test. In 1998, a new officer was assigned to administer Trust C, and that new officer described the income distributions as a "debacle," but determined that it was best left "as is." *Id.* at 534-36, 754 S.E.2d at 121-22.

for Trust C reflecting the income distributions to Emily to the exclusion of all other beneficiaries.<sup>48</sup>

In August 2011, the trustees filed a Petition for Trust Modification and Termination of the Trust because the list of beneficiaries, which was lengthy at the trust's inception, had grown to include the multiple lineal descendants of deceased named beneficiaries, which resulted in a dramatic increase in administrative costs and burdens compared to the values of Trust B and Trust C (at that time, B was valued at \$305,000 and C was valued at \$79,200). In March 2012, the beneficiaries filed their objection, claiming that the trustees breached their fiduciary duty due to the Century Center straw-man transaction and the distributions to Emily. The beneficiaries sought equitable relief, which included requiring Emily to transfer the Century Center property back to the trust. The trustees then moved for summary judgment on several grounds, including that the breach of fiduciary duty claims were barred by the statute of limitations.<sup>49</sup> The beneficiaries argued that there were genuine issues of material fact whether the trustees had fraudulently concealed the breaches, and therefore, the limitation period had been tolled under O.C.G.A. § 9-3-96,<sup>50</sup> which says that "the period of limitation shall run only from the time of the plaintiff's discovery of the fraud."<sup>51</sup> After a hearing, the trial court granted the trustees' motion for summary judgment on the statute of limitations issue, and the beneficiaries appealed to the court of appeals.<sup>52</sup>

Regarding the Century Center property straw-man transaction, the court of appeals reversed the trial court's ruling.<sup>53</sup> The court noted that "[g]enerally speaking, the question of whether there was fraudulent concealment justifying the tolling of the limitation period 'is a proper question for determination by a jury.'"<sup>54</sup> In this case, the beneficiaries presented some evidence that the trustees fraudulently concealed their breach of fiduciary duty. The beneficiaries focused on the general rule that a trustee cannot purchase the property belonging to a trust estate, that beneficiaries have the same rights when a transaction occurred with the use of a straw-man as they would if the sale had been direct to the trustee, and that the account statements suggested that the trustees

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48. *Id.* at 535-36, 754 S.E.2d at 121-22.

49. *Id.* at 536-37, 754 S.E.2d at 122-23. For a discussion of the statute of limitations for suits against trustees, see *supra* notes 29-32 and accompanying text.

50. O.C.G.A. § 9-3-96 (2007).

51. *Smith*, 325 Ga. App. at 537-38, 754 S.E.2d at 123 (quoting O.C.G.A. § 9-3-96).

52. *Id.* at 537, 754 S.E.2d at 123.

53. *Id.* at 546, 754 S.E.2d at 129.

54. *Id.* at 539, 754 S.E.2d at 124 (quoting *Brown v. Brown*, 209 Ga. 620, 622, 75 S.E.2d 13, 17 (1953)).



were complying with the provisions of the trust in an above-board transaction.<sup>55</sup>

Accordingly, the court held that a genuine issue of material fact existed pertaining to whether there was fraudulent concealment and whether the limitation period had tolled.<sup>56</sup> The court also noted that the fourth-quarter statements that contained the notation "Sold to Bessie," without more, did not constitute a written report that adequately disclosed the existence of a claim to the beneficiaries.<sup>57</sup> However, the court also held that there was a genuine issue of material fact regarding whether the beneficiaries exercised due diligence to discover the trustees' fraudulent conveyance of the property.<sup>58</sup>

Next, the court addressed the distributions to Emily.<sup>59</sup> The court held that a genuine issue of material fact existed, regarding only Rob Smith, on the question of whether SunTrust had fraudulently concealed the distributions to Emily to the exclusion of all of the other beneficiaries.<sup>60</sup> The court noted that Rob Smith presented some evidence of the fraudulent concealment in his testimony:

SunTrust never provided him with a copy of the Trust instrument so that he would know his rights to disbursement with respect to Trust C, never informed him that he was potentially entitled to distributions as a beneficiary of Trust C, and never provided him with an annual accounting of the disbursements from Trust C despite being required to do so by the Trust.<sup>61</sup>

Further, a genuine issue of material fact existed regarding whether Rob Smith received the June 5, 1990 letter that would have put him on notice of the distributions and would thus show that he failed to exercise due diligence to discover the misconduct.<sup>62</sup>

However, the court held that the statutes of limitations on the remaining beneficiaries' breach claims "were not tolled because, as a matter of law, they failed to exercise due diligence to discover" the disbursements and thus could not establish fraudulent concealment.<sup>63</sup>

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55. *Id.* at 539-40, 542, 754 S.E.2d at 124, 126.

56. *Id.* at 542, 754 S.E.2d at 126.

57. *Id.* at 534, 541, 754 S.E.2d at 121, 125 (adopting the same definition of report that was used in *Hasty*, 293 Ga. at 731-32, 749 S.E.2d at 681). For a discussion of *Hasty* and the definition of report, see *supra* notes 33-40 and accompanying text.

58. *Smith*, 215 Ga. App. at 541, 754 S.E.2d at 125.

59. *Id.* at 542, 754 S.E.2d at 126.

60. *Id.* at 543, 754 S.E.2d at 126-27.

61. *Id.* at 543, 754 S.E.2d at 126.

62. *Id.* at 543, 754 S.E.2d at 127.

63. *Id.*

The court noted that these beneficiaries admitted to receiving the June 5, 1990 letter from SunTrust, which specifically informed them of the distributions, over twenty years before making the claims in this litigation.<sup>64</sup> However, the court held that the beneficiaries would still be able to assert their breach claims for the distributions that occurred within six years of filing the claims in this case because each income distribution by SunTrust to Emily that harmed them constituted a separate cause of action for breach of fiduciary duty.<sup>65</sup>

Finally, the court addressed the issue of whether the limitations period was tolled because SunTrust fraudulently concealed that the bank was breaching its duty to provide all beneficiaries with an annual accounting of the income distributions from Trust C.<sup>66</sup> The court reversed the trial court's summary judgment ruling and held that a genuine issue of material fact existed regarding this issue with respect to Rob Smith, based on the same reasons as stated above.<sup>67</sup> Further, the court again reached a different result for the remaining beneficiaries, who were put on notice in the June 5, 1990 letter but took no action to obtain a copy of the trust instrument until this litigation.<sup>68</sup> Again, the court noted that this group's claims for SunTrust's failure to provide them with an annual accounting within the six years prior to filing their claims would not be barred.<sup>69</sup>

**2. Breach of Fiduciary Duty.** In 2012, in *Reliance Trust Co. v. Candler*,<sup>70</sup> the court of appeals affirmed a jury verdict of over \$1 million against the trustee and in favor of the remainder beneficiaries.<sup>71</sup> The major question<sup>72</sup> addressed by the supreme court was whether the jury

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64. *Id.* at 544, 754 S.E.2d at 127.

65. *Id.* at 544-45, 754 S.E.2d at 127-28.

66. *Id.* at 545, 754 S.E.2d at 128.

67. *Id.* at 545-46, 754 S.E.2d at 128.

68. *Id.* at 546, 754 S.E.2d at 128.

69. *Id.*

70. 315 Ga. App. 495, 726 S.E.2d 636 (2012). The remainder beneficiaries were the grandchildren of a wife who set up a trust that would benefit her husband for his life. The trust required the trustee to pay the income to the husband annually and additionally gave the trustee discretion to make encroachments on the trust corpus in favor of the husband. The trustee made several encroachments for the husband and, when he died, the remainder beneficiaries sued to recoup those encroachments because the trustee abused its discretion in making them. *Reliance*, 294 Ga. at 15, 16, 751 S.E.2d at 48-49.

71. *Reliance*, 315 Ga. App. at 501, 726 S.E.2d at 641.

72. The supreme court also addressed the court of appeals holding that *Reliance* should be required to pay interest measured from the date of each encroachment on the trust corpus. *Reliance*, 294 Ga. at 19, 751 S.E.2d at 51. The supreme court reversed the court of appeals, stating that because the amounts that were paid out as encroachments

applied an improper standard of care in finding a breach of fiduciary duty even though the jury also found that the trustee did not act in bad faith.<sup>73</sup> The jury was given the following instruction:

[A] court will interfere whenever the exercise of discretion by the trustee 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. The courts will not ordinarily interpose to restrain the execution of a power, except where abuse of discretion, bad faith, or fraud is shown, or where the power is attempted to be exercised in a manner different from that authorized by the donor.<sup>74</sup>

The court of appeals noted evidence showing that the actions of Reliance Trust Co. (Reliance) were "infected with . . . arbitrariness, as well as oppression of the beneficiary [remaindermen]," and thus affirmed the jury's verdict.<sup>75</sup> On appeal to the supreme court, Reliance argued that a trustee who is given absolute discretion can only breach its fiduciary duty if it did not act in good faith.<sup>76</sup> Reliance based this argument on the wording of O.C.G.A. § 53-12-260,<sup>77</sup> which states, "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."<sup>78</sup> While "[a]ssuming without deciding that this is a correct statement of the law," the supreme court held that Reliance waived this ground for appeal because it was Reliance that requested the jury instruction that contained the improper standard.<sup>79</sup>

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remained in the trust and earned interest, this interest would have been paid to the life beneficiary pursuant to the trust terms and thus would not have added value to the corpus that would eventually go to the remaindermen. *Id.*

73. *Id.* at 16-17, 751 S.E.2d at 49.

74. *Id.* at 17, 751 S.E.2d at 49 (alteration in original). The supreme court noted that this instruction, which was essentially a quote from an older Georgia case, had "been widely applied by Georgia courts." *Id.*

75. *Reliance*, 315 Ga. App. at 500, 501, 726 S.E.2d at 641 (first alteration in original) (quoting *McPherson v. McPherson*, 307 Ga. App. 548, 552, 705 S.E.2d 314, 319 (2011)) (internal quotation marks omitted).

76. *Reliance*, 294 Ga. at 16, 751 S.E.2d at 49.

77. O.C.G.A. § 53-12-260 (2011).

78. *Id.*; *Reliance*, 294 Ga. at 16, 751 S.E.2d at 49. The supreme court noted in a footnote that this statute had not been enacted until after the trial took place but said that the parties seemed not to dispute whether the statute applied to the trust in question. *Reliance*, 294 Ga. at 16 n.1, 751 S.E.2d at 49 n.1.

79. *Reliance*, 294 Ga. at 16, 18, 751 S.E.2d at 49, 50. The supreme court also "[a]ssum[ed] without deciding" that the discretion given to the trust in this case was "absolute." *Id.* at 16, 751 S.E.2d at 49.

In *Hasty v. Castleberry*, regarding the question of the propriety of the \$1 million donation, the supreme court affirmed the trial court's grant of summary judgment for the sister, finding that the trustee had breached his fiduciary duty by failing to administer the trust in accordance with its terms and purpose—as required by O.C.G.A. § 53-12-241<sup>80</sup>—and by failing to balance fairly the interest of the life beneficiary against the interest of the remainder beneficiaries.<sup>81</sup> The trustee attempted to excuse his actions by claiming that he had been relying on professional advice when he made the charitable contribution.<sup>82</sup> The supreme court responded that while a trustee may rely on professional advice to help exercise the powers that the trust gives a trustee, he could not rely on professional advice to excuse the exercise of powers that simply did not exist.<sup>83</sup> The supreme court reversed the trial court's grant of summary judgment to the sister on the question whether the trustee had acted under an inherent conflict of interest as a matter of law when he served both as co-chair of the fundraising campaign and as trustee of the trust.<sup>84</sup> The court stated the trustee received no tangible personal benefit from the donation and that his position with the university did not automatically put him in a position that was antagonistic to the interest of the trust beneficiaries.<sup>85</sup> However, the court went on to state that the trustee “*created* a breach of trust by *choosing* to take money from the corpus of the Trust” to make the donation.<sup>86</sup>

The supreme court also examined whether the trustee mismanaged the trust assets by leaving the bulk of the assets invested in one bank's stock that decreased precipitously in value.<sup>87</sup> The trust provided that “any investment made or retained by [the trustee] in good faith and with reasonable prudence shall be proper.”<sup>88</sup> The trustee argued first that corporate investors and insiders also failed to diversify their holdings in the bank's stock, and second that the stock's historically high dividends helped pay for the mother's expensive and prolonged health-care costs

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80. O.C.G.A. § 53-12-241 (2011).

81. *Hasty*, 293 Ga. at 733, 749 S.E.2d at 682. For the facts of this case, see *supra* notes 33-40 and accompanying text

82. *Hasty*, 293 Ga. at 734, 749 S.E.2d at 683.

83. *Id.*

84. *Id.* at 735, 749 S.E.2d at 684.

85. *Id.* at 736, 749 S.E.2d at 684.

86. *Id.*

87. *Id.* at 736-37, 749 S.E.2d at 684-85.

88. *Id.* at 733, 749 S.E.2d at 682. O.C.G.A. §§ 53-12-340 and 53-12-341, which were enacted in 2010 and deal expressly with a trustee's investment duties, were not cited by the court. O.C.G.A. §§ 53-12-340 to -341 (2011).

and preserve the trust corpus. Additionally, the trustee contended that he was merely abiding by his father's dying wish, given orally, not to sell the stock.<sup>89</sup> The sister responded with expert testimony, which explained "that a large concentration of assets in a single security may constitute an unacceptably high risk for a trustee" who has the duty to preserve the principle of the trust for the remainder beneficiaries.<sup>90</sup> While noting that "[t]he fact that the stock value decreased precipitously over time does not automatically mean that [the trustee] did not act prudently by maintaining the [bank] stock as a trust asset," the supreme court held that the trial court correctly reserved this question for the jury because there remained genuinely disputed issues of fact.<sup>91</sup> Further, the court dismissed the trustee's oral-agreement claim because oral agreements are "inadmissible as proof of a separate agreement unless: (1) the written agreement . . . is silent as to the subject matter of the instructions; (2) the oral instructions are not inconsistent with the terms of the written agreement; and (3) the written agreement is not the final agreement between the parties."<sup>92</sup> The court also affirmed the trial court's refusal to grant summary judgment to the trustee regarding the issue of whether he had collected excessive trustee fees.<sup>93</sup>

### C. Choice of Law Governing Trust

O.C.G.A. § 53-12-5<sup>94</sup> provides that if a settlor designates in the trust instrument that a jurisdiction's laws will govern the meaning and effect of the provisions of the trust, that designation will be respected "unless the effect of the designation is contrary to the public policy of the jurisdiction having the most significant relationship to the matter at issue."<sup>95</sup> In the trust in *Morris v. Morris*,<sup>96</sup> the settlor chose Georgia as the state whose laws would govern his trust. The trust provided that in the event the settlor died intestate, the trust property should be distributed to his living lineal descendants, if any, and if none, to his living siblings.<sup>97</sup>

The settlor married and had one child. The trust was established and administered in Georgia. The settlor and his wife moved to North

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89. *Hasty*, 293 Ga. at 736-37, 737 n.5, 749 S.E.2d at 684-85, 685 n.5.

90. *Id.* at 736-37, 749 S.E.2d at 684.

91. *Id.* at 736-37, 737 n.4, 749 S.E.2d at 684-85, 685 n.4.

92. *Id.* at 737 n.5, 749 S.E.2d at 685 n.5.

93. *Id.* at 738, 749 S.E.2d at 685.

94. O.C.G.A. § 53-12-5 (2011).

95. O.C.G.A. § 53-12-5(1).

96. 326 Ga. App. 378, 756 S.E.2d 616 (2014).

97. *Id.* at 379-80, 756 S.E.2d at 618.

Carolina but were later estranged. Sometime after their estrangement, the settlor shot his minor daughter and then killed himself. He died intestate. The mother brought a successful wrongful death action in North Carolina against the father's estate and also sought to have the trust assets distributed to the daughter's estate.<sup>98</sup>

Both Georgia and North Carolina have "slayer" statutes that address what happens when an individual is killed by someone who will take some sort of benefit at the victim's death.<sup>99</sup> Georgia's statute simply provides that the slayer forfeits any right to take property from the victim's estate.<sup>100</sup> The North Carolina statute provides, more broadly, that the slayer is deemed to have predeceased the victim.<sup>101</sup> Thus, under North Carolina law, the child would be deemed to have survived her father and thus be the "living lineal descendant[]" who would take the trust property.<sup>102</sup>

The court of appeals noted that the trust designated Georgia as the governing law, the trust was established in Georgia while all parties to the trust resided in Georgia, and the trust assets had always been kept and managed in Georgia.<sup>103</sup> Thus, the court applied Georgia law and determined that the child could not be deemed to have outlived her father.<sup>104</sup> The mother also tried to reach the trust assets by claiming that the wrongful death judgment made her a creditor of the settlor.<sup>105</sup> She cited O.C.G.A. § 53-12-82(2),<sup>106</sup> which allows the creditors of a settlor of an irrevocable trust to "reach the maximum amount that . . . could have been distributed to or for the settlor's benefit immediately prior to the settlor's death."<sup>107</sup> The court of appeals, strictly construing the statute, held that the mother was not a creditor of the settlor at the

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98. *Id.* at 378-79, 756 S.E.2d at 617.

99. O.C.G.A. § 53-1-5 (2011); N.C. GEN. STAT. § 28A-24-5 (2013).

100. O.C.G.A. § 53-1-5(a).

101. N.C. GEN. STAT. § 28A-24-5 provides,

Notwithstanding any other provisions of this Article, solely for the purpose of determining whether the victim is entitled to any right or benefit that depends on surviving the death of a slayer under G.S. 31A-3, the slayer is deemed to have predeceased the victim and the victim is deemed to have survived the slayer by at least 120 hours (or any greater survival period required of the victim under the slayer's will or other governing instrument) unless it is established by clear and convincing evidence that the slayer survived the victim by at least 120 hours.

N.C. GEN. STAT. § 28A-24-5.

102. *Morris*, 326 Ga. App. at 380, 756 S.E.2d at 618.

103. *Id.* at 381, 756 S.E.2d at 619.

104. *Id.* at 381-82, 756 S.E.2d at 619.

105. *Id.* at 383, 756 S.E.2d at 620.

106. O.C.G.A. § 53-12-82(2) (2011).

107. *Id.*; *Morris*, 326 Ga. App. at 383, 756 S.E.2d at 620.

time of his death.<sup>108</sup> The court of appeals went further and determined that a holder of a tort judgment is not a creditor under Georgia law but rather that the term applies narrowly to one who holds a claim in contract.<sup>109</sup>

## II. GEORGIA LEGISLATION

### A. Testamentary Guardians

A “testamentary guardian” is an individual who is nominated in the will of a parent to serve as the guardian of the parent’s minor<sup>110</sup> child or children in the event the parent dies while the child is still a minor.<sup>111</sup> The probate court will appoint the individual who is nominated in the parent’s will only if the other parent is no longer alive.<sup>112</sup> Prior to 2014, O.C.G.A. § 29-2-4<sup>113</sup> required the probate judge to issue letters of testamentary guardianship to the parent’s nominee without notice or a hearing.<sup>114</sup> In other words, the surviving parent’s nominee became the guardian of the minor without any questioning by the court whether the appointment of that nominee would be in the child’s best interests.<sup>115</sup> This principle was seen as an extension of parents’ constitutionally protected liberty interest in raising their children without state interference.<sup>116</sup>

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108. *Morris*, 326 Ga. App. at 384, 756 S.E.2d at 620-21.

109. *Id.* at 384, 756 S.E.2d at 621.

110. A “minor” is defined as an individual who is under age eighteen and not emancipated. O.C.G.A. § 29-1-1(11) (2007).

111. O.C.G.A. § 29-2-4 (2007 & Supp. 2014). For a general discussion of testamentary guardians, see MARY F. RADFORD, *GEORGIA GUARDIANSHIP & CONSERVATORSHIP* § 2:7 (2013-14 ed.). The Revised Georgia Guardianship Code of 2005 also provides for the appointment of a temporary conservator to handle the property that the minor child inherits from the parent. O.C.G.A. § 29-3-5 (2007). The new legislation discussed in this subsection does not apply to testamentary conservators.

112. O.C.G.A. § 29-2-4(b).

113. O.C.G.A. § 29-2-4.

114. *Id.*

115. *See id.*

116. This interest was discussed at length in *Brooks v. Parkerson*, 265 Ga. 189, 454 S.E.2d 769 (1995), a case that involved grandparents’ visitation rights. *Id.* at 189, 454 S.E.2d at 770. *Zinkhan v. Bruce*, 305 Ga. App. 510, 699 S.E.2d 833 (2010) quoted *Brooks*. *Id.* at 515, 699 S.E.2d at 837. In *Zinkhan*, both parents named the father’s brother as testamentary guardian in their wills. The father murdered the mother and later killed himself. The mother’s relatives sought and were granted custody of the children in their county of residence. The probate court granted letters of testamentary guardianship to the brother without notice or a hearing. *Id.* at 510-11, 699 S.E.2d at 834. The court of appeals affirmed that the probate court did not have to hold a hearing to consider the best interest of the children before granting the letters because the guardian had been chosen by the

O.C.G.A. § 29-2-4,<sup>117</sup> as amended in 2014, now requires that, upon the parent's death, notice must be given to certain relatives of the minor who then have the opportunity to file objections to the appointment of the parent's nominee.<sup>118</sup> If objections are filed, the amended statute also requires that a hearing be held.<sup>119</sup> Under the new statute, when a will that would result in the appointment of a testamentary guardian is filed for probate, notice is to be served on the minor's adult siblings and grandparents.<sup>120</sup> If there are no adult siblings or grandparents, notice is to be given to "such child's great-grandparents, aunts, uncles, great aunts, or great uncles, insofar as any such relative exists."<sup>121</sup> Any individual who receives notice and wishes to object must do so within ten days of being served with notice.<sup>122</sup> The objection may not be merely a broad objection (for example, a statement that the named guardian is not fit to be guardian) but must instead "include allegations and facts [stating] with reasonable specificity why the nominated testamentary guardian is unfit to serve."<sup>123</sup> If an objection is filed, the probate court must hold an "expedited hearing" within thirty days of the date the last objection is filed.<sup>124</sup> At the hearing, the burden is on the objecting party to show by clear and convincing evidence that the individual nominated by the parent "is unfit to serve as testamentary guardian."<sup>125</sup> If such a showing is not made, the court must award letters of testamentary guardianship to the nominated testamentary guardian.<sup>126</sup> The amended statute provides further that "[a]ny proceeding relating to the appointment of a testamentary guardian shall not affect or delay the probating of a will."<sup>127</sup>

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children's parents. *Id.* at 511, 699 S.E.2d at 834. But see *Stills v. Johnson*, 272 Ga. 645, 533 S.E.2d 695 (2000), in which the supreme court diverted from the long-standing presumption in favor of a parent's right to choose who would be the custodian of a minor child and applied a "best interest of the child" standard. *Id.* at 645, 533 S.E.2d at 697. See also *McFalls v. Onsager*, 316 Ga. App. 190, 728 S.E.2d 820 (2012), in which the court of appeals, citing *Stills*, applied the best interest standard and awarded custody to relatives other than the relative chosen by the parents of the minor. *Id.* at 191-92, 728 S.E.2d at 821-22.

117. O.C.G.A. § 29-2-4 (Supp. 2014).

118. O.C.G.A. § 29-2-4(b)(1)-(3).

119. O.C.G.A. § 29-2-4(b).

120. O.C.G.A. § 29-2-4(b)(2).

121. *Id.*

122. O.C.G.A. § 29-2-4(b)(3).

123. *Id.*

124. O.C.G.A. § 29-2-4(b)(4).

125. *Id.*

126. *Id.*

127. O.C.G.A. § 29-2-4(b)(5).



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