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Wills, Trusts, Guardianships, and Fiduciary Administration

Mary F. Radford

Wills, Trusts, Guardianships, and Fiduciary Administration

by Mary F. Radford*

This Article describes significant cases decided by the Georgia Court of Appeals during the period of June 1, 2020, through May 31, 2019, that pertain to Georgia fiduciary law and estate planning. Due to the COVID-19 pandemic, the Georgia General Assembly suspended its 2020 session and thus no significant legislation was enacted during the reporting period.[1] This report does however discuss relevant legislation that was pending during the reporting period and describes the Governor's Order issued in April 2020 that permitted remote notarization and witnessing of estate planning documents during the pandemic.

I. GEORGIA CASES

A. Proof of Proper Attestation of Wills

In order to be admitted to probate in Georgia, a will must be signed by the testator and attested by two witnesses who also sign the will.[2] In *Wilbur v. Floyd*,[3] the court of appeals vacated a summary judgment granted by the trial court, stating that that court had erred in finding that, as a matter of law, the will did not comply with the attestation

* Professor Emerita, Georgia State University College of Law. Newcomb College of Tulane University (B.A., 1974); Emory University (J.D., 1981). Reporter, Probate Code Revision Committee, Guardianship Code Revision Committee, Trust Code Revision Committee of the Fiduciary Section of the State Bar of Georgia. Past President, American College of Trust and Estate Counsel (ACTEC). Author, GEORGIA GUARDIANSHIPS AND CONSERVATORSHIPS (West, 2020–2021 ed.); REDFEARN: WILLS AND ADMINISTRATION IN GEORGIA (West, 2020–21 ed.); GEORGIA TRUSTS & TRUSTEES (West, 2020–2021 ed.). The author is grateful to Georgia State University College of Law graduates Laura Shoop and Daylan Green for their valuable research assistance.

[1] For an analysis of wills and trusts during the prior survey period, *see* Mary F. Radford, *Wills, Trusts, Guardianships, and Fiduciary Administration*, *Annual Survey of Georgia Law*, 71 MERCER L. REV. 327 (2019).

[2] O.C.G.A. § 53-4-20 (2020).

[3] 353 Ga. App. 864, 839 S.E.2d 675 (2020).

requirements.[4] The problem in this case was that the page containing the witnesses' signatures was missing.[5]

In December 2014, Gwen Wilbur executed a will naming her son, Jeffrey, as the sole beneficiary and excluding her daughter, Patricia. The attorney who drafted the will and his secretary were the attesting witnesses. After Ms. Wilbur died in February 2015, Jeffrey filed a petition to probate his mother's will. The original will that was attached to his petition contained the testator's signature and the initials of both the testator and the witnesses on each page. However, the attestation page that contained the witnesses' signatures was missing from the will.[6]

Patricia filed a caveat, arguing that the will was invalid because it did not include an attestation page and thus lacked the required formalities.[7] The drafting attorney then submitted an amended petition, including another copy of the will and an affidavit signed by him stating that he and his secretary had witnessed the testator signing the will. Unfortunately, the copy of the will attached to the amended petition also lacked the attestation page. The drafting attorney then filed a second affidavit and attached a copy of the will that contained the attestation page.[8] (The court of appeals noted that, apart from the missing attestation page, the original will that lacked the attestation page and the copy of the will that contained the attestation page were identical.)[9] At the probate court hearing, the drafting attorney and his secretary both testified that they had witnessed the testator's signature, had initialed each page of the will next to the testator's initials, and had signed their names to an attestation clause. The probate court granted Patricia's motion to dismiss, stating that the will lacked the necessary formalities.[10]

Jeffrey appealed to the superior court and filed a motion for summary judgment, arguing that the will was valid in form and that he had included a copy of the attestation page in his amended petition. Patricia countered with a motion for summary judgment, stating that the will lacked testamentary formalities and that Jeffrey could not probate a copy

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[4] *Id.* at 864, 839 S.E.2d at 676.

[5] *Id.* at 866, 839 S.E.2d at 677.

[6] *Id.* at 865, 839 S.E.2d at 677.

[7] *Id.* at 865, 839 S.E.2d at 677. Patricia also contended that the testator lacked testamentary capacity, that Jeffrey had unduly influenced and coerced the testator to change her will, and that the testator's purported signature on the will was forged. *Id.*

[8] *Id.* at 865–66, 839 S.E.2d at 677. In the affidavit, the drafting attorney stated that he thought the entire will, including the attestation page, had been filed with the probate court because he had a copy containing the attestation page that was stamped "filed in office on March 17, 2015." *Id.* at 866, 839 S.E.2d at 677.

[9] *Id.* at 870, n.2, 839 S.E.2d at 680, n. 2.

[10] *Id.* at 866, 839 S.E.2d at 677–78.

of the will in lieu of the original because the original will was not missing in its entirety.[11] Similarly to the probate court, the superior court held that the will was invalid and granted Patricia's motion for summary judgment.[12] The superior court agreed with Patricia that a copy of the will could not be used to show that the testamentary formalities had been met because the original will had not been lost.[13]

Jeffrey appealed to the court of appeals, contending that the copy of the will with the attestation page satisfied the required testamentary formalities and established the will's validity.[14] The court of appeals first reiterated that the "sole question" in a probate proceeding is "whether the paper propounded is, or is not, the last will and testament of the deceased."[15] To make the determination, courts must consider, among other things, "whether the document was properly executed."[16] The court of appeals, citing O.C.G.A. § 53-4-55,[17] stated that the court's focus should be to "seek diligently" for the testator's intent and give it effect to the extent that it is consistent with the law.[18] To preserve individuals' rights to determine the disposition of their property after their death, "the rules relating to execution have remained simple and issues of proper attestation have generally presented fact issues for a jury."[19]

The court of appeals held that the superior court erred in granting Patricia's motion for summary judgment because a question of fact remained as to whether the testamentary formalities were satisfied.[20] O.C.G.A. § 53-4-20(b),[21] which establishes the requirements for proper attestation, states: "A will shall be attested and subscribed . . . by two or more competent witnesses. A witness to a will may attest by mark."[22] The court of appeals noted that the statute only required that the witnesses' signatures be "affixed to the writing," indicating that an attestation clause is not required for attestation to be proper.[23] Moreover, the court

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[11] O.C.G.A. § 53-4-46(b) (2020) provides in part that "A copy of a will may be offered for probate in accordance with Chapter 5 of this title in lieu of the original will if the original cannot be found to probate . . . ."

[12] *Wilbur*, 353 Ga. App. at 866, 839 S.E.2d at 678.

[13] *Id.* at 866, 839 S.E.2d at 678.

[14] *Id.* at 867, 839 S.E.2d at 678.

[15] *Id.* (quoting McDaniel v. McDaniel, 288 Ga. 711, 715, 707 S.E.2d 60, 64 (2011)).

[16] *Id.*

[17] O.C.G.A. § 53-4-55 (2020).

[18] *Wilbur*, 353 Ga. App. at 868, 839 S.E.2d at 679.

[19] *Id.* at 868, 839 S.E.2d at 678.

[20] *Id.* at 870, 839 S.E.2d at 680.

[21] O.C.G.A. § 53-4-20(b) (2020).

[22] *Id.*

[23] *Wilbur*, 353 Ga. App. at 868, 839 S.E.2d at 679.

noted that O.C.G.A. § 53-4-20(b) allows a witness to attest "by mark."[24] Thus, a mark is sufficient to accomplish attestation or subscription; no specific language is required. Therefore, the witnesses' initials located next to the testator's initials could themselves suffice as attestation and thus validate the will.[25] The court of appeals also found that O.C.G.A. § 53-5-21[26] allows a will to be proved upon the witnesses' testimony or "proof of their signatures."[27] Therefore, "taking or procuring of testimony . . . shall be sufficient for all purposes of the probate proceedings, notwithstanding any other statute."[28] The drafting attorney's affidavit, his testimony and that of his secretary, their initials on each page of the will, and the testator's signature on the will all provided evidence of a factual question regarding whether the will's execution satisfied the testamentary formalities.[29]

The court of appeals thus concluded that, in light of the overarching principle of "the sanctity of the right to make a will," the statutory language that allows a witness to sign by mark, and the absence of any requirement that attestation be in a specific form, as well as the fact that questions of proper formalities are for juries, the superior court erred when it found that there was no question of fact as to whether the will complied with necessary formalities.[30] The court of appeals noted that "[t]o conclude otherwise would essentially ignore the plain language of the statute, as well as the testator's intent, and deprive her of her right to dispose of her property as she wished."[31]

B. When a House is Not a Home

It is not uncommon for a married testator to include in the will a clause that allows the surviving spouse to continue to stay in their marital home until the spouse dies or remarries or some other stated event occurs. It was the meaning of just such a devise that led to litigation in *DeMott v. DeMott*.[32] Richard DeMott died testate in 2015, survived by his children and grandchildren from a prior marriage and his wife of less than two years, Cynthia. Richard named his brother, Douglas, executor of his estate and devised most of his property to his children and grandchildren. However, his will included a clause that would allow his surviving wife

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[24] *Id.*

[25] *Id.* at 869, 839 S.E.2d at 679.

[26] O.C.G.A. § 53-5-21 (2020).

[27] *Wilbur*, 353 Ga. App. at 869, 839 S.E.2d at 679.

[28] *Id.*

[29] *Id.* at 869, 839 S.E.2d at 679–80.

[30] *Id.* at 869, 839 S.E.2d at 680.

[31] *Id.* at 870, 839 S.E.2d at 680.

[32] 353 Ga. App. 190, 836 S.E.2d 612 (2019).

to stay in their marital residence. Their marital residence was one of fourteen houses located on property belonging to Gin Creek, LLC, which had been owned by the decedent and Douglas. They used the property to host events and rent houses to clients.[33] The devise read, in pertinent part, that Cynthia had the right to live in the house "for as long as she so desires provided that she resides in the home as her primary residence for at least nine months out of the year."[34] The will went on to say that if Cynthia "fails to live in our home as her primary residence for at least nine months out of the year," the property would pass to the LLC.[35]

In early 2017, Douglas's counsel ordered Cynthia to move out of the house because she had only been physically present in the house for sixty days during the previous year and thus had not met the condition set forth in the will.[36] Cynthia refused and filed a complaint for declaratory judgment, seeking interpretation of the portion of the will relating to her ability to stay in the house. Both parties stipulated that the language of the will was unambiguous and thus the trial court need not consider parol evidence but rather could interpret the will as a matter of law.[37] The trial court found that the will did not require Cynthia to reside in the house physically but rather only that she intend to use it as her primary residence for the specified amount of time.[38] Douglas appealed, contending that the will required Cynthia to occupy the house physically for nine months out of the year.[39]

Despite the parties' stipulation to the contrary, the court of appeals held that the will's language was ambiguous and thus remanded the case for the trial court to examine parol evidence to determine the testator's intent.[40] The court of appeals examined several sentences in the will before concluding that the will was ambiguous.[41] According to the court, the sentence requiring Cynthia to "reside[] in the home as her primary residence for at least nine months out of the year" could be reasonably interpreted, based upon the legal definition of "reside," to require only that Cynthia maintain the house as her legal residence for the specified

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[33] *Id.* at 190, 836 S.E.2d at 613.

[34] *Id.*

[35] *Id.*

[36] *Id.* at 190, 836 S.E.2d at 613–14. In his concurring opinion, Chief Judge McFadden alluded to the fact that Cynthia was absent from her home because she was caring for her ailing mother. *Id.* at 196, 836 S.E.2d at 617.

[37] *Id.* at 191, 836 S.E.2d at 614. O.C.G.A. § 53-4-56 (2020) provides: "In construing a will, the court may hear parol evidence of the circumstances surrounding the testator at the time of execution to explain all ambiguities, whether latent or patent."

[38] *Demott*, 350 Ga. App. at 191, 836 S.E.2d at 614.

[39] *Id.*

[40] *Id.* at 192–93, 836 S.E.2d at 615.

[41] *Id.* 191, at 836 S.E.2d at 614.

time.[42] However, the following sentence supported Douglas's contention that the will required Cynthia to be physically present because it required Cynthia to "live" in the house. The court of appeals pointed out that "live" is a nonlegal verb, defined as occupying, dwelling, or residing.[43] Furthermore, a separate section of the will gave Cynthia the right to use household items as long as she "remains in the house," also suggesting physical presence.[44] Because the will used words that could have multiple meanings, the court of appeals concluded that parol evidence was necessary to determine the testator's intent and reversed and remanded the case for the trial court to consider any available parol evidence.[45]

In his concurring opinion, Chief Judge McFadden agreed that the case should be remanded but differed with the majority regarding the reason for the remand.[46] He determined that the trial court should first determine whether Cynthia had another primary residence. According to Judge McFadden, the language of the will, considered in the context of the will as a whole as well as the law "[disfavoring] conditions remediable by forfeiture[,]" unambiguously established that Cynthia's having another residence was a precondition to forfeiture.[47] The issue regarding the amount of time that Cynthia resided in the McNeal house was irrelevant unless it was established that she had another residence. Because the trial court had not determined whether Cynthia had another residence, he also concluded that remand was appropriate.[48]

C. Modification of Trusts

In 2017, the General Assembly amended the Revised Georgia Trust Code of 2010 and, among other things, expanded the procedures by which the beneficiaries of an irrevocable trust can unite to amend the trust.[49] As amended, O.C.G.A. § 53-12-61(c)[50] states that, after the settlor has died, a petition by the beneficiaries to modify the trust shall be approved by the court provided "all the beneficiaries consent, the trustee has received notice of the proposed modification, and the court concludes that

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[42] *Id.* at 191–92, 836 S.E.2d at 614.

[43] *Id.* at 192, 836 S.E.2d at 614.

[44] *Id.*

[45] *Id.* at 192–93, 836 S.E.2d at 615.

[46] *Id.* at 193, 836 S.E.2d at 615.

[47] *Id.* at 196, 836 S.E.2d at 617.

[48] *Id.*

[49] Ga. H.R. Bill 121, Reg. Sess., 2018 Ga. Laws 262. These amendments are discussed in Mary F. Radford, *Wills, Trusts, Guardianships, and Fiduciary Administration*, *Annual Survey of Georgia Law*, 70 Mercer L. Rev. 275, 278–79 (2018).

[50] O.C.G.A. § 53-12-61(c) (2019).

modification is not inconsistent with any material purpose of such trust."[51] In 2020 in *Glass v. Faircloth*[52] (which was the first case to discuss this new statute), the court of appeals determined that the trust beneficiaries had correctly and successfully employed this procedure to modify an irrevocable trust.[53] The Glass Dynasty Trust (Trust) had been established in 2005 by Shirley Glass for the benefit of her husband's (Sherwin's) sons, the sons' descendants, and various Jewish charities. The original trustees were Shirley Glass, Faircloth, and Sexton. Faircloth and Sexton were officers in Sherwin's businesses. In 2008, the trustees signed a resolution that authorized immediate payment of trustees' compensation (styled as their first payment) of $180,000 each and "reasonable compensation" for prior years. After Shirley died, one of the sons replaced her as trustee.[54] In 2012, after Faircloth and Sexton filed a petition seeking an accounting, the court entered a consent judgment that amended the trust to provide for "reasonable compensation" to the trustees.[55] In April 2019, the beneficiaries filed a petition in the superior court in which they sought to amend the trust pursuant to O.C.G.A. § 53-12-61(c). The amendment would allow the removal of any trustee by a majority of the most senior generation of Sherwin's descendant beneficiaries.[56] The trustees were given notice and, after a hearing, the trial court granted the petition.[57] Sexton and Faircloth were removed pursuant to this amendment and replaced by a corporate trustee.[58]

The court of appeals upheld the trial court's finding that the amendment was valid, noting that the trial court had rendered a "well-reasoned and thorough order."[59] The court of appeals focused its discussion on the third prong of the modification statute, the question of whether the modification was inconsistent with any material provision of the trust.[60] The court of appeals held that the purpose of the trust was

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[51] *Id.*

[52] 354 Ga. App. 326, 840 S.E.2d 724 (2020). (A petition for writ of certiorari in this case was filed with the Georgia Supreme Court on June 15, 2020.)

[53] *Id.* at 326, 840 S.E.2d at 726. The *Glass* case was a consolidation of two cases arising out of the Glass Dynasty Trust. In the first case, the court of appeals affirmed a trial court's denial of an interlocutory injunction that would have prevented the trustees from paying fees to themselves and their attorneys during litigation of the beneficiaries' claims. *Id.* The court of appeals determined that the denial was correct because the beneficiaries had not shown that they would suffer irreparable harm without the injunction. *Id.* at 328–29, 840 S.E.2d at 727.

[54] *Id.* at 326, 840 S.E.2d at 726.

[55] *Id.* at 326–27, 840 S.E.2d at 726.

[56] *Id.* at 327, 840 S.E.2d at 726–27.

[57] *Id.* at 330, 840 S.E.2d at 728.

[58] *Id.*

[59] *Id.*

[60] *Id.*

to support Sherwin's descendants and the charities and its purpose was "'*not*,' as noted by the superior court, 'to provide for the well-being of the independent trustees.'"[61] Faircloth and Sexton had based their argument on O.C.G.A. § 53-12-221(a),[62] which allows for removal of a trustee "(1) In accordance with the provisions of the trust instrument; or (2) Upon petition to the court by any interested person showing good cause."[63] They posited that allowing the beneficiaries to modify the Trust's removal provisions would render their quoted statute "meaningless."[64] The court of appeals responded that the two statutes "operate in different ways."[65] The court of appeals pointed out that the modification statute operates only after the settlor of the trust has died, whereas the removal statute operates at any time.[66] Thus, the modification statute allows for the addressing of concerns that the settlor might not have anticipated.[67] The court of appeals noted that a removal petition does not require the beneficiaries' consent and can be brought by any interested person at any time.[68] The court of appeals concluded that "these two provisions address different scenarios and are not inherently inconsistent, and there is no ambiguity or practical effect that frustrates the purpose of either provision."[69] Finally, the court of appeals pointed out that, when the General Assembly amended the modification statute in 2018 to allow for modification with beneficiary consent, it knew that the removal statute was in place and it could have either limited the modification statute with respect to removal of a trustee or changed the language in the removal statute.[70] The court of appeals, looking at the "plain statutory language" of the modification statute, declined to "read into the Code a limitation that is absent."[71]

D. Trustee Who Holds a Power of Appointment Over Trust Assets

It is not uncommon for the settlor of a trust to grant to certain individuals the power to direct who will ultimately receive the trust

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[61] *Id.* at 330–31, 840 S.E.2d at 728.

[62] O.C.G.A. § 53-12-221(a) (2019).

[63] *Id.* at 331, 840 S.E.2d at 728–29 (quoting O.C.G.A. § 53-12-221(a)).

[64] *Id.* at 331, 840 S.E.2d at 729.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.* at 331–32, 840 S.E.2d at 729.

[71] *Id.* at 332, 840 S.E.2d at 729.

assets. This is referred to as a "power of appointment."[72] The holder of a power of appointment over trust property may also be a beneficiary or even the trustee of a trust. That is what occurred in *Peterson v. Peterson*,[73] a case that illustrates the confusion that can arise when one individual is assigned more than one role in a trust.[74]

This is the second appearance of the Peterson family before the court of appeals, with an interim decision by the Georgia Supreme Court. The first published opinion in this case was issued by the supreme court in 2018 in *Peterson v. Peterson*[75] (*Peterson II*), following an unpublished opinion by the court of appeals in 2018 (*Peterson I*).[76] The current opinion was handed down in 2019 by the court of appeals (*Peterson III*).[77]

In 1994, Charles Hugh Peterson died testate, survived by his wife, Mary Peterson (Mary), and his three sons, Alex, David, and Calhoun. His will devised property to two testamentary trusts. The first was a marital trust primarily for Mary's benefit; the second was a by-pass trust for the benefit of Mary and the three sons with the income to go to Mary during her lifetime and the remainder of the property to pass to the sons upon her death. Mary and all three sons were named as the co-trustees of both the marital and by-pass trusts as well as co-executors for Mr. Peterson's will. The will stated that decisions made by a majority of the executors or trustees would be controlling, as long as Mary was among the majority.[78]

The marital trust granted Mary the right to receive all the trust income and the power to appoint any of the trust property to herself or to any of the descendants or their spouses. Any property remaining in the marital trust upon Mary's death would pass to the by-pass trust or, if it no longer existed, to the sons or their descendants.[79]

The by-pass trust also provided that the trust income would go to Mary but allowed the trustees to encroach on the principle as the Trustees may deem necessary "to provide for the support in reasonable comfort of my wife and to provide for the proper support and education of my descendants taking into account and consideration any other means of support they or any of them may have to the knowledge of the

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[72] For a discussion of powers of appointment, *see* MARY F. RADFORD, REDFEARN: WILLS AND ADMINISTRATION IN GEORGIA §§15:1–15:3 (2019–2020 ed. 2019).

[73] 352 Ga. App. 675, 835 S.E.2d 651 (2019).

[74] *See id.*

[75] 303 Ga. 211, 811 S.E.2d 309 (2018).

[76] Ga. App. Case #A17A2025 (February 27, 2018).

[77] *Peterson III*, 352 Ga. App. 675, 835 S.E.2d 651.

[78] *Id.* at 676–77, 835 S.E.2d at 653.

[79] *Id.* at 677, 835 S.E.2d at 653.

Trustees."[80] Mary could not appoint property from the by-pass trust to herself, but she could appoint the trust property to any descendant. Notably, the by-pass trust contained a statement that Mr. Peterson's "primary desire is that my wife be supported in reasonable comfort during her lifetime and that my children be supported in reasonable comfort during their lives[,]" and his "secondary desire" was for the trust principal to be "preserved as well as possible consonant with the consummation of my primary objective."[81]

After the will was admitted to probate, the family began arguing about how to administer the by-pass trust, with Mary and her son, Calhoun, on one side of the dispute and sons David and Alex on the other. The latter sued the former in separate petitions in separate courts for damages for breach of fiduciary duty and sought to remove Mary and Calhoun as trustees. The cases were consolidated by the superior court and that court granted Mary and Calhoun's motions for summary judgment. Alex and David appealed.[82]

The grants of summary judgment to Calhoun and Mary were both reversed.[83] In *Peterson II*, the supreme court pointed out that, at the point in time when the case was appealed, Mary had not exercised her powers of appointment in both trusts in the manner required by the terms of the trust (by a writing delivered to the trustees).[84] Consequently, Mary retained a fiduciary duty over the trust assets as long as she was serving as trustee. Specifically, the supreme court stated:

> Mary's mere right as a beneficiary to direct that property be turned over to her or a descendant by a written instrument given to the trustees does not diminish her duty as an executor and trustee not to waste property of the estate or trusts while that property, as the record currently shows, remains a part of the estate or trust.[85]

While the appeals were being considered, Mary attempted to exercise her powers of appointment under the marital and by-pass trusts to transfer all the marital trust assets to herself and all the by-pass trust assets to Calhoun. However, Alex and David refused to sign the necessary documentation to complete the transfer. In response, Calhoun filed a petition to remove Alex and David as trustees or alternatively to

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[80] *Peterson II*, 303 Ga. at 212, 811 S.E.2d at 311.

[81] *Peterson III*, 352 Ga. App. at 677, 835 S.E.2d at 653.

[82] *Id.* at 677, 835 S.E.2d at 653–54.

[83] *Id.* at 678, 835 S.E.2d at 654. Calhoun's case was appealed to the court of appeals and the grant of summary judgment was reversed in *Peterson I*. Mary's case was appealed to the supreme court and the grant of summary judgment was reversed in *Peterson II*. *Id.*

[84] *Peterson II*, 303 Ga. at 216, 811 S.E.2d 313.

[85] *Id.* at 216, 811 S.E.2d at 313–14.

compel them to execute the necessary documents for the transfer. Calhoun and Mary also filed new motions for summary judgment with the superior court as to nearly all the claims pending under Alex and David's lawsuit.[86]

The superior court granted Calhoun's petition as well as his and Mary's motions for summary judgment, ordering Alex and David to execute the documents within fifteen days or be removed as trustees.[87] Citing a Connecticut case, *Connecticut Bank & Trust Co. v. Lyman*,[88] the superior court concluded that Mary, as a beneficiary who held powers of appointment over the trust assets, did not owe Alex and David a fiduciary duty as trustee while acting in her capacity as beneficiary and thus could freely exercise her power of appointment to transfer the trusts' assets to herself and Calhoun "without regard to any fiduciary duty she may have as a trustee."[89]

In *Peterson III*, the court of appeals found the superior court's ruling that Mary did not owe the beneficiaries a fiduciary duty when she exercised her power of appointment under the marital and by-pass trusts to be in error.[90] The court of appeals began its analysis by distinguishing the Connecticut case relied upon by the superior court on the ground that the wife in that case was the beneficiary of the trust but not a trustee, as was Mary.[91] Moreover, even the Connecticut case stated that where the beneficiary is also a trustee, the beneficiary has a quasi-fiduciary or fiduciary relationship with co-beneficiaries.[92]

The court of appeals noted that trustees are bound to administer trusts impartially and "solely in the interests of the beneficiaries" according to the provisions and purposes within the trust.[93] The court of appeals stated that powers of appointment "are peculiarly subjects of equitable supervision."[94] The court of appeals quoted that following passage from the 1977 supreme court case of *Ringer v. Lockhart:*[95]

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[86] *Peterson III*, 352 Ga. App. at 678, 835 S.E.2d at 654.

[87] *Id.*

[88] 170 A.2d 130 (Conn. 1961).

[89] *Peterson III*, 352 Ga. App. at 678, 835 S.E.2d at 654.

[90] *Id.* at 678–79, 835 S.E.2d at 654.

[91] *Id.* at 679, 835 S.E.2d at 654.

[92] *Id.*

[93] *Id.* at 679, 835 S.E.2d at 655. *See* O.C.G.A. § 53-12-246(a) which provides: "A trustee shall administer the trust solely in the interests of the beneficiaries."

[94] *Id.* at 679, 835 S.E.2d at 654. O.C.G.A. § 23-2-110 provides: "Powers, especially of appointment, being always founded on trust or confidence, are peculiarly subjects of equitable supervision."

[95] 240 Ga. 82, 239 S.E.2d 349 (1977).

> It is generally, if not always, humanly impossible for the same person to act fairly in two capacities and on behalf of two interests in the same transaction. Consciously or unconsciously he will favor one side as against the other, where there is or may be a conflict of interest. If one of the interests involved is that of the trustee personally, selfishness is apt to lead him to give himself an advantage. If permitted to represent antagonistic interests the trustee is placed under temptation and is apt in many cases to yield to the natural prompting to give himself the benefit of all doubts, or to make decisions which favor the third person who is competing with the beneficiary.[96]

The court of appeals also stated that "[i]t is not necessary to show that the fiduciary succumbed to temptation, but rather, it is sufficient to show that the fiduciary allowed herself to be placed in a position where her personal interest might conflict with the interests of other beneficiaries."[97] Here, the "litany of litigation that has transcended decades"[98] among the parties demonstrated to the court of appeals that the potential for Mary's exercise of her power of appointment to transfer all assets in the by-pass trust to Calhoun was in conflict with the interests of the other beneficiaries.[99] Accordingly, the court of appeals held that Mary could not act exclusively as a beneficiary, nor could she be excused from her fiduciary duties while acting as a beneficiary in exercising her powers of appointment.[100]

The court of appeals also held the superior court's order to be incongruent with the prior decisions of the supreme court and court of appeals, both of which had found that the primary purpose of the by-pass trust was to support Mr. Peterson's three sons as well as Mary.[101] The court of appeals pointed out that the "cardinal rule in construing a trust instrument" is to determine and effectuate the settlor's intent.[102] Quoting language from the supreme court's opinion in *Peterson II*, the court of appeals reiterated that Mary was not permitted to disregard the primary purpose of the by-pass trust to support the sons just because the other primary purpose of the trust was to support her.[103] As concluded by the supreme court, Mary's power of appointment as beneficiary did not "diminish her duty as an executor and trustee not to waste property of

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[96] *Peterson III*, 352 Ga. App. at 679, 835 S.E.2d at 655 (quoting Ringer v. Lockhart, 240 Ga. 82, 84, 239 S.E.2d 349, 351 (1977)).

[97] *Peterson III*, 352 Ga. App at 680, 835 S.E.2d at 655.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.*

the estate or trusts."[104] Therefore, Mary's fiduciary duties to other beneficiaries of the trust remained in effect despite her right as a beneficiary to exercise the power of appointment.[105]

Moreover, because the court of appeals found the superior court had erred as to the first issue, the by-pass and marital trusts were still intact and thus summary judgment as to Alex and David's claims for breach of fiduciary duty was improper.[106] Both the court of appeals and the supreme court had previously ruled that issues of material fact existed as to waste of trust assets and failure to fund the trusts properly.[107] Because those issues had not yet been determined in superior court on remand, the granting of Mary and Calhoun's second motions for summary judgment violated the law of the case rule.[108]

E. Proposed Ward Who Has Contacts with More Than One State

In 2016, Georgia enacted the "Uniform Adult Guardianship and Conservatorship Proceedings Jurisdiction Act" (Guardianship Jurisdiction Act).[109] Article 2 of the Guardianship Jurisdiction Act addresses the problems that may arise when it is unclear which of two or more states has jurisdiction over the imposition of a guardianship or conservatorship. The Guardianship Jurisdiction Act creates a three-tiered approach to jurisdictional issues. Under this approach, the state court that may have jurisdiction would be in order of priority: (1) the court in the "respondent's"[110] home state; (2) the court of a state with which the respondent has a significant connection; or (3) a third state that is neither the home state nor a significant-connection state.[111] In 2019, the court of appeals handed down two decisions, *In re Estate of Hanson*[112] and *Steen-Jorgensen v. Huff,*[113] that discussed whether the courts below had properly applied the factors listed in the Guardianship

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[104] *Id.* (quoting Peterson v. Peterson, 303 Ga. at 215–16, 811 S.E.2d 309, 314 (2018)).

[105] *Peterson II*, 303 Ga. at 216, 811 S.E.2d at 314.

[106] *Peterson III*, 352 Ga. App at 681, 835 S.E.2d at 656.

[107] *Id.*

[108] *Id.*

[109] Ga. H.B. Bill 954, Reg. Sess., 2016 Ga. Laws 486. The Georgia act was modeled after the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, copyright © 2007, National Conference of Commissioners on Uniform State Laws. The law is codified as Chapter 11 of Title 29 of the Georgia Code.

[110] The "respondent" is an adult over whom a guardianship or conservatorship is sought. O.C.G.A. § 29-11-2(12) (2020). For a detailed discussion of the Georgia law pertaining to the guardianship and conservatorship of adults *see* MARY F. RADFORD, GEORGIA GUARDIANSHIP & CONSERVATORSHIP Ch. 4 & 5 (Thomson-Reuters, 2019).

[111] O.C.G.A. § 29-11-12 (2020).

[112] 353 Ga. App. 61, 834 S.E.2d 615 (2019).

[113] 352 Ga. App. 727, 835 S.E.2d 707 (2019).

Jurisdiction Act when determining whether Georgia is a "significant-connection state" for purposes of exercising jurisdiction.[114]

"Significant-connection state" is defined as one "with which [the] respondent has a significant connection other than mere physical presence and in which substantial evidence concerning the respondent is available."[115] Per O.C.G.A. § 29-11-10,[116] factors a court should consider when determining whether a respondent has a significant connection to a state are:

> (1) The location of the respondent's family and other persons required to be notified of the guardianship proceeding or conservatorship proceeding; (2) The length of time the respondent at any time was physically present in the state and the duration of any absence; (3) The location of the respondent's property; (4) The extent to which the respondent has ties to the state such as voting registration, state or local tax return filing, vehicle registration, driver's license, social relationship, and receipt of services; and (5) The extent to which the respondent considers or, in the absence of an impairment of mental faculties, would consider himself or herself to have a significant connection with the state.[117]

The significant-connection state "may decline to exercise its jurisdiction if it determines at any time that a court of another state is a more appropriate forum."[118] O.C.G.A. § 29-11-15(c)[119] lists the following factors that a court must consider when determining whether a state is an appropriate forum:

> (1) Any expressed preference of the respondent; (2) Whether abuse, neglect, or exploitation of the respondent has occurred or is likely to occur and which state could best protect the respondent from the abuse, neglect, or exploitation; (3) The length of time the respondent was physically present in or was a legal resident of this or another state; (4) The distance of the respondent from the court in each state; (5) The financial circumstances of the respondent's estate; (6) The nature and location of the evidence; (7) The ability of the court in each state to decide the issue expeditiously and the procedures necessary to present evidence; (8) The familiarity of the court of each state with the facts and issues in the proceeding; and (9) If an appointment were

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[114] *See In re Estate of Hanson*, 353 Ga. App. at 64, 834 S.E.2d at 617; *Steen-Jorgensen*, 352 Ga. App. at 731–32, 835 S.E.2d at 710–11.

[115] O.C.G.A. **§** 29-11-2(13) (2020).

[116] O.C.G.A. § 29-11-10 (2019).

[117] O.C.G.A. § 29-11-10 (2020).

[118] O.C.G.A. § 29-11-15(a) (2020).

[119] O.C.G.A. § 29-11-15(c) (2020).

> made, the court's ability to monitor the conduct of the guardian or conservator.[120]

In *In Re Estate of Hanson*, the adult over whom the guardianship was sought, Kevin Hanson, was badly injured in an accident in Florida, where he lived with his girlfriend. After receiving treatment in Florida, Kevin was taken to the Shepherd Center in Atlanta for treatment. While he was still in Atlanta, Kevin's parents petitioned a Georgia probate court for emergency guardianship and conservatorship, which the probate court granted. Kevin's parents then filed a petition for permanent guardianship and conservatorship and an additional emergency petition. The probate court granted both of these petitions.[121] The court found, among other things, that Georgia had jurisdiction to hear the case because Kevin had a significant connection to Georgia due to his treatment at the Shepherd Center, despite the undisputed fact that Georgia was not Kevin's home state.[122]

Even though the probate court did not state expressly which section of the Guardianship Jurisdiction Act it was applying, the court of appeals concluded that the court had found jurisdiction under O.C.G.A. § 29-11-12[123] because it was a significant connection state.[124] The court of appeals pointed out that, under O.C.G.A. § 29-11-12(2)(B),[125] the probate court could have jurisdiction despite the fact that Georgia was not Kevin's home state if several conditions were met.[126] Per O.C.G.A. § 29-11-12(2)(B)(i)–(iii),[127] the probate court would have to have considered whether "(1) a petition for appointment or order was filed in Florida, (2) an objection to Georgia's jurisdiction had been filed by a person required to be notified of the proceeding, or (3) whether Georgia was an appropriate forum under the factors set forth in O.C.G.A. § 29-11-15."[128]

The court of appeals also stated that, to determine whether Georgia is a significant-connection state to Kevin, the court was required to have considered the five factors listed in O.C.G.A. § 29-11-10.[129] Specifically, according to the court of appeals, although courts are not required to make specific findings of fact as to each of the factors, the "trial court

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[120] *Id.*

[121] *In re Estate of Hanson*, 353 Ga. App. at 61–62, 834 S.E.2d at 616.

[122] 353 Ga. App. at 62, 834 S.E.2d at 616.

[123] O.C.G.A. § 29-11-12 (2019).

[124] *In re Estate of Hanson*, 353 Ga. App. at 62, 834 S.E.2d at 616.

[125] O.C.G.A. § 29-11-12(2)(B) (2019).

[126] *In re Estate of Hanson*, 353 Ga. App. at 62, 834 S.E.2d at 616.

[127] O.C.G.A. § 29-11-12(2)(B)(i)–(iii) (2019).

[128] *In re Estate of Hanson*, 353 Ga. App. at 64, 834 S.E.2d at 617.

[129] *Id.* at 63, 834 S.E.2d at 617.

must set out upon the record the essential reasoning that forms the basis for its exercise of discretion" so that an appellate court can determine whether its exercise of discretion was proper.[130] The level of detail necessary to satisfy this requirement depends upon "the peculiar circumstances of the case, the closeness of the questions involved, and the ground upon which the court decides the motion."[131] Because the probate court's order did not show that the probate court had considered the required factors set out in O.C.G.A. § 29-11-10, nor did it show that the probate court had considered the factors in O.C.G.A. § 29-11-12(2)(B)(i)–(iii), the court of appeals vacated the appointment of the parents as Kevin's guardians and remanded the case for the probate court to consider the factors it was required to consider before establishing jurisdiction.[132]

The individual on whom a guardianship was sought to be imposed in *Steen-Jorgensen v. Huff* was Robert Sydney Brown, Jr., who had lived in Georgia for nearly fifty years. He and his first wife, who had divorced in the 1990s, had one daughter, Rebecca Steen-Jorgensen. In 2001, Mr. Brown married Deborah, who also had a daughter from a previous marriage, Toni Kay Huff.[133] When Deborah's health declined in 2017, the Browns left Georgia and moved to an assisted living facility selected by Huff that was located in North Carolina, where Huff lived. When Mr. Brown was later diagnosed with dementia, he and his wife were moved into the facility's memory care unit in different rooms.[134] Steen-Jorgensen, who lived in Florida, visited her father in North Carolina. While there and after having interactions with Huff over the care of her father, Steen-Jorgensen concluded that Huff was acting in the best interests of herself and her mother but not of Mr. Brown.[135] She and her husband filed a petition for guardianship and conservatorship over her father in Georgia.[136] The trial court declined to exercise jurisdiction and dismissed the case, finding that Georgia was Mr. Brown's home state but that North Carolina, where Mr. Brown lived, was a more appropriate forum.[137]

The court of appeals vacated the order of the trial court.[138] As noted above, O.C.G.A. § 29-11-15(c) sets forth the factors courts should consider

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[130] *Id.*

[131] *Id.* at 63–64, 834 S.E.2d at 617.

[132] *Id.* at 64, 834 S.E.2d at 617.

[133] *Steen-Jorgensen*, 352 Ga. App. at 727, 835 S.E.2d 708.

[134] *Id.* at 727–28, 835 S.E.2d at 708.

[135] *Id.* at 728, 835 S.E.2d at 708–09.

[136] *Id.* at 728, 835 S.E.2d at 709.

[137] *Id.* at 729, 835 S.E.2d at 709.

[138] *Id.* at 732, 835 S.E.2d at 711.

when determining whether another state is a more appropriate forum. The trial court stated that it had considered each of the nine factors in O.C.G.A. § 29-11-15(c).[139] However, according to the court of appeals, the trial court failed to "apply the enumerated factors to the facts"[140] and state which factors supported its decision.[141] The court of appeals found that, although the statute does not "expressly require" courts to make "specific findings on each factor, . . . the trial court must at a minimum set out the essential reasoning that forms the basis for its exercise of discretion[,]"[142] so that the appellate court can have a basis for determining whether the trial court's exercise of discretion was "reasoned and reasonable."[143]

II. LEGISLATION AND GOVERNOR'S ORDER DURING THE COVID-19 PANDEMIC

Due to the COVID-19 pandemic, the Georgia General Assembly suspended its 2020 session in March 2020, and thus no significant legislation was enacted during the reporting period. It should be noted, however, that the General Assembly did enact extensive revisions to the Georgia statutes pertaining to wills, trusts, and estate administration when it reconvened in June 2020. These revisions had been prepared by the Fiduciary Law Section of the State Bar of Georgia and passed by the Georgia House of Representatives prior to the suspension of the legislative session.[144] The Georgia State Senate approved this bill on June 25, 2020. These revised statutes will be discussed in next year's report, which will cover the period from June 1, 2020 through May 31, 2021. The revisions are effective January 1, 2021.

In addition to the delay of expected legislation, another challenge faced estate planning attorneys during the COVID-19 crisis. Many of the basic estate planning documents including wills, financial powers of attorney, advance directives for health care, and deeds require that the maker sign the document in the "presence" of witnesses and a notary public.[145] During the pandemic, the gathering together of people for a signing ceremony became problematic. Shelter-in-place orders and general fear of infection caused lawyers, their staff personnel, and clients to be reluctant to risk the type of person-to-person contact that caused the

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[139] *Id.* at 731, 835 S.E.2d at 710–11.

[140] *Id.* at 731, 835 S.E.2d at 710.

[141] *Id.* at 731–32, 835 S.E.2d at 710–11.

[142] *Id.* at 731, 835 S.E.2d at 710.

[143] *Id.*

[144] Ga. H.R. Bill 865, Reg. Sess. (2020).

[145] For a discussion of the "presence" requirement, *see* MARY F. RADFORD, REDFEARN: WILLS & ADMINISTRATION IN GEORGIA § 5.4 (2019–2020 ed. 2019).

virus to be spread. In addition, nursing homes and other senior living facilities imposed strict restrictions on visits by outsiders, making it difficult for lawyers to have access to their clients.

On April 9, 2020, the Governor issued Exec. Order No. 04.09.20.01,[146] effective immediately and through the end of the day on the date the Public Health State of Emergency Order[147] terminated or ceased to be renewed. Exec. Order No. 04.09.20.01 allows for the remote witnessing and notarization of a variety of documents.[148] The section of the Order that deals with remote notarizations includes these requirements: (1) "[t]he notary public [must] use[] real-time [video] . . . technology . . . that allows the parties to communicate with each other simultaneously by sight and sound . . . .;" (2) the notary public must be a Georgia attorney or be operating under the supervision of a Georgia attorney; (3) the individual whose signature is to be notarized must provide appropriate proof of identity; (4) the notary public must be "physically located in . . . Georgia;" and (5) the individual whose signature is to be notarized must send the document to the notary public on the same day that it is signed.[149] The Order lists certain documents that may require the physical presence of witnesses under Georgia law[150] and states that the witnessing requirement "may be satisfied by the use of audio-video communication technology or any similar real-time means of electronic video conferencing that allows all of the parties to communicate with each other simultaneously by sight and sound."[151] The final sections state that the official date and time of the notarization or witnessing shall be the date and time of execution by the notary or witnesses and also require

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[146] Exec. Order No. 04.09.20.01 (April 9, 2020). Executive Order 04.09.20.01 is available on the 2020 Georgia Executive Orders website, https://gov.georgia.gov/executive-action/executive-orders/2020-executive-orders.

[147] Exec. Order No. 03.14.20.01 (March 14, 2020). Governor Brian Kemp declared a statewide Public Health State of Emergency on March 14, 2020, with Executive Order 03.14.20.01. The Order was extended several times and continued in place through the summer of 2020.

[148] Exec. Order No. 03.31.20.01 (March 31, 2020). Earlier, on March 31, 2020, the Governor had issued Executive Order 03.31.20.01 that authorizes remote notarization of real estate documents.

[149] Exec. Order No. 04.09.20.01 (April 9, 2020).

[150] *Id.* The Order listed the following Georgia Code sections and documents: "Code Sections 10-6B-5, 15-9-86, 19-3-62, 19-8-4, 19-8-5, 19-8-6,19-8-7, 29-2-11, 29-4-3, 29-5-3, 31-32-5, 44-5-128, 44-5-143, 44-5-144, 44-5-145, or 53-4-20, including a power of attorney, verified petition filed in probate court, antenuptial agreement, surrender of rights for adoption, return filed in probate court, standby guardian designation, nomination of guardian, nomination of conservator, advance directive for health care, designation of successor custodian, will, codicil, or other document . . . ."

[151] *Id.*

that the notary and witnesses must sign on the same date as the signer signed the document.[152]

At the request of the State Bar of Georgia, the Fiduciary Law Section of the State Bar of Georgia produced a set of "Suggested Procedures for Remote Notarization and Attestation of Estate Planning Documents in Georgia."[153] These were released on April 13, 2020. The State Bar of Georgia also issued its own "General Best Practices under Executive Order 04.09.20.01 and FAQs" for complying with Executive Order 04.09.20.01.[154] The Fiduciary Law Section "Suggested Procedures" contain procedures that "must" be followed (pursuant to the EO) and procedures that "should" be followed. The Fiduciary Law Section "Suggested Procedures" are as follows:

> 1. The audio-video communication technology ("AVCT") must allow for simultaneous (real-time) communication among the individual signing the document ("the signer") and the witness(es) and/or notary public ("the witness(es)") by sight and sound.
>
> 2. For notarization, the notary public must be an attorney licensed to practice law in Georgia or be operating under the supervision of an attorney licensed to practice law in Georgia. ("Supervision" means that the notary public "is an employee, independent contractor, agent, or other representative of an attorney or an attorney observes the execution of documents either in person or via the real-time audio-video communication technology.")
>
> 3. The signer should be physically located in Georgia during the AVCT session.
>
> 4. The witness(es) should be physically located in Georgia during the AVCT session. (For notarization, the notary public must be physically located in Georgia.)
>
> 5. If the signer is not personally known to the witness(es), the signer should present valid photo identification during the AVCT session. (For notarization, the signer must present "satisfactory evidence of identity as required in Code Section 45-17-8, while connected to the real-time audio-video communication technology.")

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[152] *Id.*

[153] THE STATE BAR OF GEORGIA FIDUCIARY LAW SECTION, SUGGESTED PROCEDURES FOR REMOTE NOTARIZATION AND ATTESTATION OF ESTATE PLANNING DOCUMENTS IN GEORGIA (2020).

[154] *Id.*

6. The signer should affirmatively state during the AVCT session the nature of the document the signer is signing.

7. Each page of the document being witnessed should be shown to the witness(es) and initialed by the signer. The signer's act of initialing should be sufficiently visible during the AVCT session for the witness(es) to observe.

8. The document should be signed and dated (with time of signature) by the signer. The signer's act of signing the document should be sufficiently visible during the AVCT session for the witness(es) to observe.

9. After signing, the signer should transmit (by electronic communication, fax, or courier) a legible copy of the entire signed document directly to the witness(es) on the same calendar day that the signer signs.

10. The witness(es) should sign and date the transmitted copy of the document as witness(es) on the same calendar day that the signer signs. If there is a requirement that the document be attested in the presence of the signer, the witness's act of signing the document should be sufficiently visible during the AVCT session for the signer to observe.

11. For a document requiring more than one witness, each witness may participate in the AVCT session(s) with the signer and other witness(es) from different locations, and the signed document may be transmitted from the signer to a witness and then to subsequent witness(es) so that each party will have signed on the same copy of the document.

12. The document, including any attestation, jurat, acknowledgment, or certificate signed by the witness(es), should state that the applicable requirement under Georgia law was satisfied under the authority of Executive Order 04.09.20.01.

13. After signing, the witness(es) should deliver (by courier, U.S. Mail, or express delivery) the entire document signed by the witness(es) to the signer (or the signer's attorney) within a reasonable period of time.

14. The Executive Order provides: "[T]he official date and time of the notarization or witnessing . . . shall be the date and time when the notary and/or witness(es) witness the signature via the video conference technology."

> 15. When feasible, a document signed pursuant to these procedures should be re-executed under ordinary procedures at a later time.[155]

[155] *Id.* (alterations in original).