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Wills, Trusts, Guardianships, and Fiduciary Administration

by Mary F. Radford*

This Article describes selected cases and significant legislation from the period of June 1, 2014 through May 31, 2015 pertaining to Georgia fiduciary law and estate planning.[1]

I. GEORGIA CASES

A. *Children as Heirs of a Decedent*

In two cases during the survey period, Georgia appellate courts discussed who constitutes a "child" and thus an heir of a decedent who dies without a valid will (intestate). Both of these cases involved unusual fact situations.

In the first of these cases, *In re Estate of Hawkins*,[2] the Georgia Court of Appeals examined the interaction between a relatively new set of Georgia statutes relating to the "voluntary legitimation" of a child born out of wedlock,[3] and section 53-2-3 of the Official Code of Georgia

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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*, 66 MERCER L. REV. 231 (2014).

2. 328 Ga. App. 436, 762 S.E.2d 149 (2014), *cert. denied*, 2014 Ga. LEXIS 870 (2014).

3. *See* O.C.G.A. §§ 19-7-21.1, -22(g), -46.1 (2015).

(O.C.G.A.), which is the Georgia Probate Code statute[4] that describes when a child who is born out of wedlock may inherit from his biological father.[5] When the decedent in this case, James Hawkins, died without a will, his girlfriend petitioned to have her son declared as his sole heir.[6] Both Hawkins and his girlfriend knew that Hawkins was not the biological father of the child. However, the day after the child was born, Hawkins accompanied his girlfriend to the State Vital Records Office and completed a form that stated Hawkins was the child's father and requested that Hawkins be listed as the father on the child's birth certificate. A worker at the records office signed the paternity acknowledgement form as a witness. The same worker's name also appeared on the child's birth certificate, which named Hawkins and his girlfriend as the parents. Hawkins held out the child as his own and named the child as a dependent for his Social Security and Veterans Administration benefits. Hawkins never adopted the child and died five years after the child was born.[7]

The girlfriend claimed the child's status as Hawkins' heir under O.C.G.A. § 53-2-3(2)(A).[8] O.C.G.A. § 53-2-3(2)(A)(iii) allows a child born out of wedlock to inherit from the father if "[t]he father has executed a sworn statement signed by him attesting to the parent-child relationship."[9] O.C.G.A. § 53-2-3(2)(A)(iv) allows a child to inherit from the father if "[t]he father has signed the birth certificate of the child."[10] The probate court refused to recognize the child as Hawkins' heir and the court of appeals affirmed.[11] The court of appeals pointed out that "there were no court proceedings begun before Hawkins' death either to legitimate [the child] or otherwise to establish paternity;"[12] that Hawkins did not sign the child's birth certificate prior to his death (although the court acknowledged that Georgia birth certificates generally are not signed); and that the records office worker who

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4. O.C.G.A. § 53-2-3 (2011).

5. *In re Estate of Hawkins*, 328 Ga. App. at 439, 762 S.E.2d at 152. For an in-depth discussion of the inheritance rights of children born out of wedlock, see MARY F. RADFORD, REDFEARN: WILLS & ADMINISTRATION IN GEORGIA § 9:5 (7th ed. 2008).

6. The decedent was not married when he died. Under O.C.G.A. § 53-2-1(c)(3), if a decedent who dies intestate is not survived by a spouse, the decedent's children and other descendants are the decedent's heirs. O.C.G.A. § 53-2-1(c)(3) (2011).

7. *In re Estate of Hawkins*, 328 Ga. App. at 436-38, 762 S.E.2d at 150-51.

8. *Id.* at 436, 762 S.E.2d at 150.

9. O.C.G.A. § 53-2-3(2)(A)(iii).

10. *Id.* § 53-2-3(2)(A)(iv).

11. *In re Estate of Hawkins*, 328 Ga. App. at 436, 762 S.E.2d at 150.

12. *Id.* at 439, 762 S.E.2d at 152. O.C.G.A. §§ 53-2-3(2)(A)(i) and (ii) allow a child born out of wedlock to inherit if a court has entered an order declaring the child to be legitimate or otherwise entered an order establishing paternity. O.C.G.A. §§ 53-2-3(2)(A)(i)-(ii).

witnessed the acknowledgment was not a notary public or other official who had the authority to administer any oath to Hawkins that would make the paternity acknowledgment a "sworn statement."[13]

Judge Michael Boggs filed a special concurrence in which he discussed at length the voluntary legitimation process that O.C.G.A. §§ 19-7-21.1, -22(g), and -46.1 authorizes.[14] Judge Boggs described the process as "unquestionably inequitable and susceptible to fraud, in irreconcilable conflict with the body of Georgia law on legitimation and adoption, and potentially violative of the constitutional protections guaranteed to biological fathers and their children."[15] Judge Boggs began by pointing out that prior to the enactment of these statutes, a superior court alone had the authority to grant a petition to legitimate a child and to deny the legitimation if it was not in the child's best interest.[16] Judge Boggs lauded the "objective scrutiny" that this judicial process guaranteed.[17] Judge Boggs then described how the new laws established a non-judicial method by which the mother of a child and an individual purporting to be the child's father could make a voluntary acknowledgement of paternity.[18] This legislation prompted the promulgation of the form Hawkins and his girlfriend signed.[19] Judge Boggs explained that this voluntary acknowledgement, without any judicial oversight, could result in significant harm to both the true biological father and the child.[20]

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13. *In re Estate of Hawkins*, 328 Ga. App. at 439-40, 762 S.E.2d at 152-53.

14. *Id.* at 442-43, 762 S.E.2d at 151-52 (Boggs, J., concurring fully and specially).

15. *Id.* at 441, 762 S.E.2d at 154. In writing this opinion, Judge Boggs utilized the research of Atlanta adoption attorney James Outman. *See id.* at 443 n.8, 762 S.E.2d at 154 n.8.

16. *Id.* at 441-42, 762 S.E.2d at 154.

17. *Id.* at 442, 762 S.E.2d at 154.

18. *Id.*

19. *Id.* at 443, 762 S.E.2d at 155.

20. *Id.* at 444, 762 S.E.2d at 156. Judge Boggs explained this harm as follows:

> Opportunities for fraud and collusion abound in this flawed scheme. Not only to establish a false paternity to obtain dependent benefits, as was alleged in this case, but for revenge following a failed relationship, or for monetary gain through obtaining control over a minor child's assets or claim for personal injury. Moreover, a man who signs the form believing himself to be the father, but later determines that he is not, may be bound to pay child support and to reimburse the State for public assistance paid to the mother, while the actual, biological father may be excused from his obligations. In all such cases, the opportunity to establish the true state of affairs and the best interest of the child, as well as due process of law for the child and the biological father, are frustrated by these statutes.

Id. at 445, 762 S.E.2d at 156.

The second of these cases discussed the equitable doctrine of "virtual adoption."[21] Virtual adoption is a declaration the court issues after a decedent has died that allows a child whom the decedent agreed to adopt to be treated, for inheritance purposes, as if the child had been legally adopted.[22]

In *Sanders v. Riley*,[23] the Georgia Supreme Court determined the inheritance rights of a woman who was raised believing that her mother's husband was her biological father, only to find out at age fourteen that her true biological father was a man with whom her mother had been having an affair during her marriage.[24] The evidence showed that the mother, her husband, and the true biological father agreed that the husband would treat the child as his own child, even though he knew she was not his biological daughter. The mother and her husband were estranged but the husband helped support the child, the child used his surname, and the husband held the child out as his own, including on her wedding invitations.[25]

The Georgia Supreme Court examined Georgia's long history of recognizing virtual adoptions and concluded that the probate court erred when it granted summary judgment against the daughter.[26] The supreme court found that there was some evidence to show the required contract to adopt and that the husband had partially performed that contract.[27] In addition, the supreme court addressed the fact that the child did have some contact with her biological father after she learned about his existence even though this contact did not, according to the child, amount to a father-child relationship.[28] The supreme court found "no authority for the proposition that once the child's status has changed in the course of a virtual adoption—where a contract to adopt has been partially performed—the child can then become 'unadopted' simply by developing a relationship later in life with a natural parent."[29] The supreme court concluded, "Just as children, once legally adopted, do not become unadopted by forming a relationship later in life with their biological parents—something that is occurring with increasing

21. *See* Sanders v. Riley, 296 Ga. 693, 693-94, 770 S.E.2d 570, 571 (2016).
22. For an in-depth discussion of virtual adoption, see RADFORD, *supra* note 5, at § 9:4.
23. 296 Ga. 693, 770 S.E.2d 570 (2015).
24. *Id.* at 693-94, 965, 770 S.E.2d at 571-72.
25. *Id.* at 695-96, 770 S.E.2d at 571-72.
26. *Id.* at 703, 770 S.E.2d at 577.
27. *Id.* at 701, 770 S.E.2d at 576.
28. *Id.*
29. *Id.* at 703, 770 S.E.2d at 577.

frequency—children, once virtually adopted, do not become unadopted by developing a relationship later on with their biological parents."[30]

B. *Standing to Offer a Will for Probate*

In *Ray v. Stevens*,[31] the Georgia Supreme Court explored the question of who has standing to offer a will for probate.[32] Under O.C.G.A. § 53-5-2,[33] the right to offer a will for probate belongs to the executor.[34] However, if the executor fails to do so, "any interested person may offer the will for probate."[35] In this case, the executor chose not to offer the will for probate. Shane Stevens, the decedent's brother, then attempted to do so. He claimed to be an "interested person" because he was a creditor of the decedent.[36] The supreme court held, however, that the brother failed to prove that he was an interested person.[37] The court looked to past cases in which heirs of the decedent as well as beneficiaries under the will or a former will, purchasers from or judgment creditors of an heir, and administrators appointed before the will was discovered were deemed interested persons for the purpose of probating or caveating (challenging) a will.[38] The court pointed out that the brother did not fall into any of these categories.[39] The court also noted that, as a creditor of the estate, it was immaterial to the brother whether the will was probated because a creditor can receive payment from an administrator (who is appointed if there is not a will) as well as from an executor.[40]

Unwittingly, perhaps, this holding of the supreme court may divest general creditors of an opportunity to force an estate to be opened in order to address claims when a named executor refuses to offer the will for probate. The court seemed to indicate that a creditor would be able to collect the debt even if an administrator, rather than an executor, was

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30. *Id.*

31. 295 Ga. 895, 764 S.E.2d 809 (2014).

32. *Id.* at 895, 764 S.E.2d at 810. The purpose of the probate process is to establish the will as the true will of the testator, and the law does not recognize a will or the appointment of the executor until the will has been proved before the probate court. *See* Brown v. Newkirk, 239 Ga. 579, 581, 238 S.E.2d 352, 354 (1977). For an in-depth discussion of the probate process, see RADFORD, *supra* note 5, at ch. 6.

33. O.C.G.A. § 53-5-2 (2011).

34. *Id.*

35. *Id.*

36. *Ray*, 295 Ga. at 896, 764 S.E.2d at 810.

37. *Id.* at 898, 764 S.E.2d at 811.

38. *Id.*

39. *Id.*

40. *Id.* at 897-98, 764 S.E.2d at 811.

appointed. But, at least in cases in which the general creditor knows of the existence of a will, the creditor cannot file a petition for the appointment of an administrator because an administrator can only be appointed if there is no valid will.[41]

C. Construction of the Terms of a Will

Courts are sometimes called upon to discern a testator's intent when the words of the will are ambiguous. In *Thompson v. Blackwell*,[42] the question that arose was whether the testator intended to convey a fee simple interest or only a life estate in the property that he devised to his wife.[43] One item in the testator's will stated, "I give, devise and bequeath to my wife, Hattie F. King, all my property, both real and personal, wherever located and whenever acquired, either before or after the making of this my Will, hers in Fee Simple."[44] The next item stated that "[u]pon the death of my said wife," all of his interest in the property would be devised to his son and his son's children.[45]

After looking at the language of the will and examining prior case law, the Georgia Supreme Court held it was the testator's clear intention to convey only a life estate in the property to his wife, with the remainder to be given to his son and grandchildren.[46] The court's reasoning was that all items in the will must be read together and their meaning based on the entire document, not individual items.[47] The court also cited the rule of construction that states that "where property is devised in language sufficient to pass a fee-simple estate, the devise should not be held to convey a lesser estate unless it is clear from a subsequent provision of the will that such was the intention of the testator."[48]

The supreme court distinguished the wording of the testator's will from that in other wills that used phrases such as "in the event [that my wife should die]" or "should [my wife die]."[49] In those cases, the court held the language was found to convey a fee simple because the language referred to the death of the first taker as a contingent event.[50]

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41. *See id.* at 898, 764 S.E.2d at 811. O.C.G.A. § 53-1-2(1) defines an "administrator" as the person who administers an intestate estate. O.C.G.A. § 53-1-2(1) (2011).
42. 296 Ga. 443, 769 S.E.2d 46 (2015).
43. *Id.* at 443, 769 S.E.2d at 47.
44. *Id.* at 443-44, 769 S.E.2d at 47.
45. *Id.* at 444, 769 S.E.2d at 47.
46. *Id.* at 447, 769 S.E.2d at 49.
47. *Id.* at 445-46, 769 S.E.2d at 48-49.
48. *Id.* at 445, 769 S.E.2d at 48 (emphasis omitted) (quoting Watts v. Finley, 187 Ga. 629, 1 S.E.2d 723 (1939)).
49. *Id.* at 446-47, 769 S.E.2d at 49.
50. *Id.* at 447, 769 S.E.2d at 49.

The court construed the language to mean that the subsequent grant would take place only if the first grantee actually died before the testator died.[51] The court focused on the *Thompson* testator's phrase "upon the death of my said wife" and stated that the word "upon" is "an adverb of time, and not of contingency."[52] Thus, the testator clearly was not referring to the possible death of his wife before himself, but rather he intended to give his wife a life estate followed by a remainder to his son and grandchildren.[53]

D. *Modification of Trusts*

In *Strange v. Towns*,[54] the Georgia Court of Appeals examined whether a settlor's actions resulted in a modification of her revocable inter vivos trust.[55] The settlor's trust named herself as trustee. Ten years after setting up the trust, she amended the trust naming three individuals including her son, Tony, as successor co-trustees.[56] The year after amending her trust, the settlor executed a durable financial power of attorney (POA) in which she stated that she wished Tony to be "the executor of her estate and the Trust."[57] Both she and Tony signed the POA and it was notarized. The next year the settlor wrote a letter to a lawyer at the law firm who had revised the trust, stating that the firm had misunderstood her wishes. She stated in the letter that the trust needed to be revised again to show that Tony would be the trustee and executor and the other two named individuals would only be alternates. She also added that she had executed a document to reflect the revisions to the trust should the law firm fail to make the changes prior to her death. The changes were not made and, when she died, the question arose as to who should serve as trustee, or co-trustees, of the trust.[58]

The court of appeals concluded that the settlor's actions clearly showed her intent to amend the trust and resulted in a modification of the trust such that Tony would serve as the sole trustee.[59] The court looked first to O.C.G.A. § 53-12-40(c),[60] which requires a trust modification or

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51. *Id.*
52. *Id.* at 446, 447, 769 S.E.2d at 49 (emphasis omitted).
53. *See id.* at 447, 769 S.E.2d at 49.
54. 330 Ga. App. 876, 769 S.E.2d 604 (2015).
55. *Id.* at 876, 769 S.E.2d at 605.
56. *Id.*
57. *Id.* at 876-77, 769 S.E.2d at 605.
58. *Id.* at 877, 769 S.E.2d at 606.
59. *Id.* at 879, 769 S.E.2d at 607.
60. O.C.G.A. § 53-12-40(c) (2011).

revocation to be in writing and signed by the settlor.[61] The court then looked to the terms of the trust itself, which provided that "[t]he Settlor may at any time by duly executed written instrument alter or amend this Trust in any manner."[62] Apparently, the other individuals named as co-trustees had argued that the POA was not "duly executed" by a notary.[63] The court of appeals pointed out that O.C.G.A. § 53-12-40(c) does not require a notarized writing.[64] However, even if the words of the trust arguably required an authenticated document, the court noted that the notary public had signed the document, stamped it with a stamp that said "Notary Public," and included the notary's name and the state and county of her appointment.[65] The court said that this satisfied the requirements of O.C.G.A. § 45-17-6(a),[66] which allows the use of a stamp for importing the notary's "seal."[67] In addition, the court of appeals was not bothered by the settlor's use of the word "executor" instead of "trustee" in the POA as the other words of the POA showed that she clearly intended for Tony to have "full ownership" of the trust.[68] Finally, the court of appeals rejected the named co-trustees' argument that the settlor's letter to the lawyer indicated that she did not mean for the POA itself to revise the trust.[69] The court of appeals pointed out that the settlor "confirmed" in the letter that she had already made the revision in writing and that she, as settlor, was the only person who had the power to revise the trust.[70] The court of appeals concluded that "[t]he fact that the law firm did not update the Trust to incorporate Pauline's intent did not render the July 9 power of attorney invalid . . . ."[71]

E. Non-probate Property: Multiple Party Accounts

The Georgia statutes relating to multiple party bank accounts[72] govern the ownership of the property in those accounts during the

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61. *Strange*, 330 Ga. App. at 877, 769 S.E.2d at 606; *see also* O.C.G.A. § 53-12-40(c).
62. *Strange*, 330 Ga. App. at 877, 769 S.E.2d at 606 (alteration in original).
63. *Id.*
64. *Id.*
65. *Id.*
66. O.C.G.A. § 45-17-6(a) (2002).
67. *Strange*, 330 Ga. App. at 877-78, 769 S.E.2d at 606; *see also* O.C.G.A. § 45-17-6(a).
68. *Strange*, 330 Ga. App. at 878, 769 S.E.2d at 607.
69. *Id.*
70. *Id.*
71. *Id.*
72. O.C.G.A. §§ 7-1-810 to -821 (2015). For an in-depth discussion of these statutes, see RADFORD, *supra* note 5, at § 2:5.

depositor's life and at death.[73] These statutes are confusing to some because the ownership rights created by these statutes cannot be changed by a decedent's will and apply even if the will gives "all" of the decedent's property to someone else. Even more confusing is that different rules apply depending upon whether the depositor of the funds in the multiple party account is alive or is deceased. In *Howard v. Leonard*,[74] the Georgia Court of Appeals emphasized the difference between these rules.[75] If the account is a "joint account"[76] then while the parties to the account are alive the amounts in the account belong to each party in proportion to his or her contributions unless there is clear and convincing evidence of a contrary intent.[77] When a party dies, the presumption is that the sums then belong to the surviving parties, unless there is clear and convincing evidence of a contrary intent at the time the account was created.[78]

F. Adult Guardianship: Visitation Rights

In *In re Estate of Wertzer*,[79] the Georgia Court of Appeals discussed the interplay between a guardian's authority to make decisions about the ward's welfare and the probate court's authority to guard the ward's retained rights.[80] Grace Wertzer (mother) and Saul Wertzer (father) were divorced in 2004. The mother was granted sole legal and physical custody of their child, Sierra Leigh Wertzer (then a minor), who was incapacitated due to her autism, hearing loss, non-verbal/apraxia, visual impairment, and mental retardation diagnoses. The father was granted limited visitation at the time of the divorce.[81]

In April 2013, the father filed a petition to modify visitation. In response, the mother moved to suspend the father's visitation. In May 2013, the mother filed a Petition for Appointment of a Guardian or Conservator in anticipation of the child turning age eighteen. In response, the father moved to intervene and asked for his visitation

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73. *See* O.C.G.A. §§ 7-1-810 to -821.

74. 330 Ga. App. 331, 765 S.E.2d 466 (2014), *reconsideration denied* (2014), *cert. denied* (2015).

75. *Id.* at 335, 765 S.E.2d at 469.

76. A "joint account" is "an account payable on request to one or more of two or more parties, whether or not mention is made of any right of survivorship." O.C.G.A. § 7-1-810(4) (2015).

77. O.C.G.A. § 7-1-812(a) (2015).

78. O.C.G.A. § 7-1-813(a) (2015).

79. 330 Ga. App. 294, 765 S.E.2d 425 (2014), *reconsideration denied* (2014), *cert. denied* (2015).

80. *Id.* at 294, 765 S.E.2d at 426.

81. *Id.* at 294-95, 294 n.1, 765 S.E.2d at 426-27, 426 n.1.

rights to be extended to include overnight visits and a week-long visitation in the summer. Additionally, the father requested to be notified of any changes in his child's medical conditions, maintenance medications, physicians, and residential status. The probate court granted the mother's petition for guardianship. The mother then moved to dismiss the father's request for increased visitation, saying the probate court lacked authority to "force" Sierra to visit with her father. The probate court denied this motion and granted the father supervised visitation for a few extra hours but denied the request for overnight visitation and the extended summer visitation. The medical notification request was ordered by the probate court, as it was consistent with the divorce settlement, and the probate court added that the mother was required to allow the father access to all of Sierra's medical and educational information.[82] The mother appealed arguing that imposing visitation on an adult ward was outside of the authority of the probate court.[83]

The court of appeals affirmed the visitation ruling of the probate court.[84] The court of appeals pointed out that O.C.G.A. § 29-4-20[85] grants certain rights to all wards, such as the right to a guardian who acts in the best interest of the ward and the right to "[c]ommunicate freely and privately with persons other than the guardian . . . ."[86] This latter right included Sierra's right to visit with her father.[87] The mother also contended that the court erred because the order impeded her duties as a guardian, the required visitation was not in Sierra's best interest, and she (the mother) should not be required to communicate on a regular basis with the father and to confer with him on all important issues regarding Sierra.[88] Pursuant to O.C.G.A. § 15-9-30(a),[89] the probate court has authority to exercise jurisdiction over "[a]ll controversies as to the right of guardianship. . . ."[90] Further, O.C.G.A. § 29-4-13(a)[91] provides that the order granting or denying the guardianship "shall specify" any "limitations on the guardianship."[92] O.C.G.A. § 29-

82. *Id.* at 294, 295, 296, 765 S.E.2d at 427.
83. *Id.* at 296, 765 S.E.2d at 427.
84. *Id.* at 301, 765 S.E.2d at 431.
85. O.C.G.A. § 29-4-20 (2007).
86. *In re Estate of Wertzer*, 330 Ga. App. at 297, 765 S.E.2d at 428 (brackets in original) (quoting O.C.G.A. § 29-4-20(9)(4)).
87. *See id.* at 297, 765 S.E.2d at 429.
88. *Id.* at 296, 765 S.E.2d at 427-28.
89. O.C.G.A. § 15-9-30(a) (2015).
90. *Id.* § 15-9-30(a)(6).
91. O.C.G.A. § 29-4-13(a) (2007).
92. *Id.* § 29-4-13(a)(3).

4-22[93] says that "[e]xcept as otherwise provided by law or by the court, a guardian shall make decisions regarding the ward's support, care, education, health, and welfare."[94] The court of appeals agreed with the probate court that while the guardian has the broad authority to make decisions for the ward, he or she is limited by orders of the court pursuant to these statutes.[95] One of those limitations is the visitation to the father.[96] The court of appeals noted that it previously held that the court could order visitation over the objection of a guardian.[97] The court of appeals gave no credit to the mother's argument that the probate court's order impeded her ability to perform her statutory duty under O.C.G.A. § 29-4-22(b)(2) to "remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the ward's capacities, limitations, needs, opportunities, and physical and mental health."[98] The court of appeals affirmed the probate court's finding that visits with her father were in Sierra's best interest.[99] The court of appeals noted that both Sierra's attorney and the guardian ad litem had suggested that the visitation schedule remain in effect.[100] On one final point, the court of appeals agreed with the mother that the probate court only had the power to require the mother to "inform" the father of certain changes in Sierra's condition but did not have the power to require her to "consult" with the father because doing so would essentially elevate him to the status of co-guardian.[101]

II. GEORGIA LEGISLATION: NEW POLST STATUTE O.C.G.A. § 31-1-14

A Physician Order for Life-Sustaining Treatment (POLST) is a medical order concerning the patient's end of life care that is based on an agreement between a patient who has a serious illness or frailty and the patient's physician.[102] In 2010 Georgia joined a number of other states that have enacted POLST statutes, but with fairly minimalist legisla-

93. O.C.G.A. § 29-4-22 (2007).

94. *Id.* § 29-4-22(a).

95. *In re Estate of Wertzer*, 330 Ga. App. at 298, 765 S.E.2d at 428.

96. *Id.* at 298, 765 S.E.2d at 428-29.

97. *Id.* at 299, 765 S.E.2d at 429; *see also* Mitchum v. Manning, 304 Ga. App. 842, 843, 698 S.E.2d 360, 361 (2010).

98. *In re Estate of Wertzer*, 330 Ga. App. at 299-300, 765 S.E.2d at 430 (quoting O.C.G.A. § 29-4-22(b)(2)).

99. *Id.* at 301, 765 S.E.2d at 431.

100. *Id.*

101. *Id.* at 301-02, 765 S.E.2d at 431.

102. For an in-depth discussion of POLSTs, see MARY F. RADFORD, GUARDIANSHIP AND CONSERVATORSHIP IN GEORGIA § 1:17 (2015-16 ed.).

tion.[103] When O.C.G.A. § 29-4-18[104] was enacted, the statute included a direction to the Georgia Department of Community Health to develop and make available a POLST form.[105] In 2012 this statute was amended to provide immunity for any person acting in good faith in accordance with a POLST.[106] In 2015 the Georgia General Assembly enacted O.C.G.A. § 31-1-14,[107] a full-blown POLST statute.[108] This statute describes the effect and implementation of a POLST and sets out liability and immunity provisions for physicians and other health care providers who act in accordance with the directions in a POLST.[109]

POLSTs begin with a conversation or series of conversations between an attending physician and a patient who has "decision making capacity."[110] The POLST form is typically executed when the patient "has a serious illness or condition and the attending physician's reasoned judgment is that the patient will die within the next 365 days."[111] However, if the patient has been diagnosed with "dementia or another progressive, degenerative disease or condition that attacks the brain and results in impaired memory, thinking, and behavior," the POLST may be executed at any time.[112]

If the patient lacks decision making capacity, the POLST may be consented to and signed by an "authorized person."[113] An authorized person under the POLST statute is anyone who may consent to the patient's medical treatment under O.C.G.A. § 31-39-2,[114] which describes who may consent to a "do not resuscitate" order (DNR) on behalf of a patient.[115] Authorized persons, in order of preference, are as

103. *See* O.C.G.A. § 29-4-14 (Supp. 2015).

104. O.C.G.A. § 29-4-18 (Supp. 2014).

105. O.C.G.A. § 29-4-18(l) (repealed and replaced by Ga. S. Bill 109, Reg. Sess. (2015), which further enacted O.C.G.A. § 31-1-14 (Supp. 2015)).

106. O.C.G.A. § 29-4-18(k)(1)(3) (repealed and replaced by Ga. S. Bill 109, Reg. Sess. (2015), which further enacted O.C.G.A. § 31-1-14).

107. O.C.G.A. § 31-1-14 (Supp. 2015).

108. Ga. S. Bill 109 § 1, Reg. Sess. (2015) (codified as amended at O.C.G.A. § 31-1-14 (Supp. 2015)).

109. *See* O.C.G.A. § 31-1-14.

110. *See id.* § 31-1-14(a)(3). Section 31-1-14(a)(8) defines "decision making capacity" as "the ability to understand and appreciate the nature and consequences of an order regarding end of life care decisions, including the benefits and disadvantages of such an order, and to reach an informed decision regarding the order." *Id.*

111. *Id.* § 31-1-14(b).

112. *Id.*

113. *Id.*

114. O.C.G.A. § 31-39-2 (2012).

115. *Id.* An "order not to resuscitate" is defined in O.C.G.A. § 31-39-2(9) as "an order not to attempt cardiopulmonary resuscitation in the event a patient suffers cardiac or respiratory arrest, or both." *Id.* § 31-39-2(9).

follows: (1) the patient's agent under a health care advance directive or durable health care power of attorney; (2) the patient's spouse; (3) the patient's guardian; (4) an adult child of the patient; (5) a parent of the patient; or (6) an adult sibling of the patient.[116] There are some limitations on the effectiveness of a POLST when the authorized person is someone other than the patient or the agent named in the patient's advance directive for health care.[117]

116. *Id.* § 31-39-2(3).

117. *See, e.g.*, O.C.G.A. §§ 31-39-4(b), 31-39-4(c) (2012 & Supp. 2015).