Wills, Trusts, Guardianships, and Fiduciary Administration

by Mary F. Radford*

This Article examines the major cases decided and legislation enacted from June 1, 2003 through May 31, 2004. The cases and statutes discussed cover the substantive law relating to decedents' estates, trusts, and guardianships, and to the fiduciaries who administer these entities.

I. CASES OF NOTE

A. Year's Support

Year's support is the financial protection that Georgia law offers to the surviving spouse and minor children of a decedent.[1] In recent cases[2] the Georgia Court of Appeals has strictly construed the statutory requirement that the year's support award be only that "amount sufficient to maintain the standard of living that the surviving spouse and each minor child had prior to the death of the decedent."[3] The

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1. O.C.G.A. § 53-3-7 (1997). For a discussion of year's support, see MARY F. RADFORD, REDFEARN: WILLS AND ADMINISTRATION IN GEORGIA §§ 10-1 to -13 (6th ed. 2000).

2. For a discussion of these cases, see Mary F. Radford, *Wills, Trusts, Guardianships, and Fiduciary Administration*, 55 MERCER L. REV. 459, 459-61 (2003).

3. O.C.G.A. § 53-3-7. If no objection is filed to a spouse's or minor child's petition for year's support, the probate court must award the petitioner the amount requested in the petition. *Id.* However, if an objection is filed, the probate court then makes a determination of the appropriate amount. The court must take into consideration:

> (1) The support available to the individual for whom the property is to be set apart from sources other than year's support, including but not limited to the principal of any separate estate and the income and earning capacity of that

court repeated this approach in two cases during the reporting period: *Allgood v. Allgood*[4] and *Holland v. Holland.*[5] Both cases involved jury awards of year's support to the decedent's surviving spouse.[6] In both cases the court examined the income and expenses of each couple in the year before the decedent's death, the income and expenses of the spouse in the year after death, and the other resources available to the spouse.[7] In both cases the court of appeals determined that the amount awarded by the jury was excessive because the surviving spouse had not proved a need for the full amount that was awarded when weighed against the statutory standard.[8]

B. Intestacy—Children of an Intestate Decedent

When an individual dies intestate and is survived by one or more children, Georgia law provides that those children will be heirs of the decedent's estate.[9] Georgia courts are often faced with determining

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individual;

(2) The solvency of the estate; and

(3) Such other relevant criteria as the court deems equitable and proper.

Id.

4. 263 Ga. App. 177, 587 S.E.2d 377 (2003).

5. 267 Ga. App. 251, 599 S.E.2d 242 (2004). The decedent's will was also the subject of a caveat and an appeal to the Georgia Supreme Court. *See* Holland v. Holland, 277 Ga. 792, 596 S.E.2d 123 (2004), discussed *infra* at text accompanying notes 63-75.

6. In *Allgood* the jury awarded the spouse, who received only a car under her husband's will, cash and property valued at $158,000. *Allgood*, 263 Ga. App. at 178, 587 S.E.2d at 378. In *Holland* the jury awarded the spouse three parcels of real property located in three counties, tools and farming equipment, personal property, four vehicles, furnishings and appliances, and two certificates of deposit. *Holland,* 267 Ga. App. at 252, 599 S.E.2d at 244.

7. In *Allgood* the court of appeals noted that the wife had received $126,000 at her husband's death due to survivorship rights in joint accounts. She incurred expenses of around $60,000 the year following his death but received income of $22,019. *Allgood*, 263 Ga. App. at 179, 587 S.E.2d at 379. The wife claimed that during that year she "didn't go lacking for anything . . . ." *Id.* at 178, 587 S.E.2d at 378. Finally, on her petition for year's support, she refused to describe the actual property that she wanted to be awarded, and at trial she refused to quantify the amount of money she needed. *Id.* at 177-79, 587 S.E.2d at 378. In *Holland* the court noted that while the husband was alive, the couple had income of $46,000 and expenses of $51,000 (including an "unusual" expense of $18,000 for a new truck). In the year after the husband's death, the surviving spouse had income of $29,000 and expenses of $28,000. *Holland,* 267 Ga. App. at 255, 599 S.E.2d at 245-46.

8. *Allgood*, 263 Ga. App. at 180, 587 S.E.2d at 379; *Holland*, 267 Ga. App. at 256-57, 599 S.E.2d at 246-47. Under Georgia law, "[t]he petitioner for year's support shall have the burden of proof in showing the amount necessary for year's support." O.C.G.A. § 53-3-7(c) (1997).

9. O.C.G.A. § 53-2-1 (Supp. 2004). If the decedent is also survived by a spouse, the spouse and lineal descendants share the decedent's estate. *Id.*

who constitutes a "child" of a decedent for inheritance purposes.[10] The two cases discussed in this section deal with statutes and equitable doctrines that are sometimes invoked to establish an individual's status as a child, and thus an heir, of a decedent.

In 2003, after a hiatus of over six years, the Georgia Supreme Court again faced the issue of "virtual" or "equitable" adoption. The doctrine of virtual adoption is an equitable doctrine by which a court deems an adoption to have taken place for inheritance purposes, although the formalities of the adoption did not occur.[11] In the 1994 case, *O'Neal v. Wilkes*,[12] the Georgia Supreme Court held that it would not recognize a virtual adoption unless a valid contract to adopt existed between the adoptive parent(s) and those individuals who were authorized to contract for the child's adoption.[13]

The case of *Hulsey v. Carter,*[14] decided in 2003, was no exception. The claimant, Tommie Jean Hulsey, was the stepdaughter of Carson. Tommie's biological parents were divorced, and Tommie and her sister lived with their stepfather, Carson, from the time he married their mother until they were adults. Carson did not formally adopt the children. They kept their biological father's last name, and Tommie listed her biological father as her father on formal legal documents. Tommie had some contact with her biological father before his death and maintained contact with his extended family. When Carson died intestate, Tommie claimed to be Carson's daughter and heir by application of the doctrine of virtual adoption.[15]

At trial the court granted summary judgment against Tommie, and the Georgia Supreme Court affirmed.[16] The supreme court stated that for a virtual adoption to be recognized, a contract to adopt must have existed between Tommie's biological parents and her stepfather.[17] The

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10. Possible "children" of a decedent are the decedent's biological children (born in or out of wedlock), children who have been formally adopted by the decedent or who are treated by the court as having been adopted, children conceived by artificial reproduction techniques, and posthumous children. For a discussion of the legal definition of "child," see RADFORD, *supra* note 1, at § 9-3.

11. For a general discussion of virtual adoption, see RADFORD, *supra* note 1, at § 9-4.

12. 263 Ga. 850, 439 S.E.2d 490 (1994).

13. *Id.* at 851, 439 S.E.2d at 491. The court in *O'neal* was so adamant about this requirement that a virtual adoption would not be recognized even though there was no living individual who had the actual authority to consent to the child's adoption. Justice Leah Sears, joined by Justice Carol Hunstein, wrote a heated dissent, which called for the abandonment of the contract requirement. *Id.* at 853, 439 S.E.2d at 493.

14. 277 Ga. 321, 588 S.E.2d 717 (2003).

15. *Id.* at 321-22, 588 S.E.2d at 717.

16. *Id.* at 321, 588 S.E.2d at 718.

17. *Id.* at 322, 588 S.E.2d at 718.

court concluded there was no evidence of such an agreement.[18] Tommie attempted to establish the existence of an adoption agreement with evidence that her mother claimed that upon her marriage to Carson, he became Tommie's father, and that Carson had told relatives that he planned to adopt the two children.[19] The court stated that Tommie's mother could have made such a contract without their father's consent only if Tommie's father had abandoned the children or acquiesced in their adoption.[20] However, the court stated that neither of these circumstances had occurred and noted that there was no evidence that Tommie's father had acquiesced to the adoption.[21]

Virtual legitimation is another equitable doctrine by which a court recognizes an individual as the child (and consequently an heir) of a decedent even if the parent-child relationship has not been formally established.[22] Historically, a child born out of wedlock was the heir of the child's mother only, unless the father formally legitimated the child.[23] The doctrine of virtual legitimation developed as the courts encountered situations in which it was clear that a child was the biological child of the deceased father, although the parent-child relationship was not formally recognized.[24] The Official Code of Georgia Annotated ("O.C.G.A.") was eventually expanded to delineate a number of circumstances in which a nonmarital child could inherit from the father even if paternity was not formally established.[25] Included

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18. *Id.*

19. *Id.*

20. *Id.* at 323, 588 S.E.2d at 718. *See* Williams v. Murray, 239 Ga. 276, 236 S.E.2d 624 (1977).

21. *Hulsey*, 277 Ga. at 323, 588 S.E.2d at 719. The court pointed out that Tommie maintained contact with her biological father up until his death when she was 28 years old and had continued contact with his family. *Id.*

22. For a discussion of virtual legitimation, see RADFORD, *supra* note 1, at § 9-4.

23. For a general discussion of virtual or equitable legitimation and the inheritance rights of children born out of wedlock, see RADFORD, *supra* note 1, at §§ 9-4 to -5.

24. *See, e.g.*, Prince v. Black, 256 Ga. 79, 344 S.E.2d 411 (1986).

25. *See* O.C.G.A. §§ 53-2-3 to -4 (1997). O.C.G.A. section 53-2-3 provides in part:

> (2)(A) A child born out of wedlock may not inherit from or through the child's father, the other children of the father, or any paternal kin by reason of the paternal kinship, unless:
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> (i) A court of competent jurisdiction has entered an order declaring the child to be legitimate, under the authority of Code Section 19-7-22 or such other authority as may be provided by law;
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> (ii) A court of competent jurisdiction has otherwise entered a court order establishing paternity;
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> (iii) The father has executed a sworn statement signed by him attesting to the parent-child relationship;
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> (iv) The father has signed the birth certificate of the child; or

among these circumstances are cases in which there is "clear and convincing evidence that the child is the child of the father."[26]

In *Moore v. Mack*,[27] the child was born before the expansion of the O.C.G.A., and thus, the child's claim to his putative father's estate was based on the doctrine of virtual legitimation.[28] Rather than resorting

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(v) There is other clear and convincing evidence that the child is the child of the father.

(B)(i) Subparagraph (A) of this paragraph notwithstanding, a child born out of wedlock may inherit from or through the father, other children of the father, or any paternal kin by reason of the paternal kinship if evidence of the rebuttable presumption of paternity described in this subparagraph is filed with the court before which proceedings on the estate are pending and the presumption is not overcome to the satisfaction of the trier of fact by clear and convincing evidence.

(ii) There shall exist a rebuttable presumption of paternity of a child born out of wedlock if parentage-determination genetic testing establishes at least a 97 percent probability of paternity. Parentage-determination genetic testing shall include, but not be limited to, red cell antigen, human leucocyte antigen (HLA), red cell enzyme, and serum protein electrophoresis tests or testing by deoxyribonucleic acid (DNA) probes.

(C) If any one of the requirements of divisions (i) through (v) of subparagraph (A) of this paragraph is fulfilled, or if the presumption of paternity set forth in subparagraph (B) of this paragraph shall have been established and shall not have been rebutted by clear and convincing evidence, a child born out of wedlock may inherit in the same manner as though legitimate from and through the child's father, the other children of his or her father, and any other paternal kin;

Id.

26. *Id.* § 53-2-3(2)(A)(v).

27. 266 Ga. App. 847, 598 S.E.2d 525 (2004).

28. *Id.* at 847, 598 S.E.2d at 525. The father in this case died intestate in 1996. His widow filed for letters of administration and named only herself and their son as his heirs. She was appointed, administered the estate, and was then discharged in February 1998. Mack, who claimed to be James's son by virtual or equitable legitimation, found out in 2000 that James's estate had been administered and Ms. Coney had been discharged. *Id.* at 847-48, 598 S.E.2d at 527. He first filed a "Petition to Determine Heirs," and the superior court found that he was an heir of James by application of the doctrine of "virtual or equitable legitimation." *Id.* at 848, 598 S.E.2d at 527 (citing Prince v. Black, 256 Ga. App. 79, 344 S.E.2d 582 (1986)). Next, Mack filed a "Petition to Open Estate" in the probate court. He stated that Ms. Coney had not only known of his existence but had lied to him by telling him that she did not want her husband's estate administered while she was still alive. *Id.* The probate court found that Ms. Coney's failure to name Mack on the petition was "fraud, accident or mistake," set aside the order discharging her, and ordered the estate reopened. *Id.* Ms. Coney's guardian appealed to the superior court on the ground that Mack's Petition to Open Estate was time-barred. *Id.* at 849, 598 S.E.2d at 527. The superior court granted summary judgment in Mack's favor. *Id.*, 598 S.E.2d at 528. The court of appeals reversed and remanded. *Id.* at 852, 598 S.E.2d at 530. The court treated the petition as a motion to set aside judgment. *Id.* at 849, 598 S.E.2d at 528. Subsection (f) of O.C.G.A. section 9-11-60 sets a three-year limitation "from entry of the judgment complained of." O.C.G.A. § 9-11-60(f) (Supp. 2004). The "judgment complained of" was the

to the equitable doctrine, the court of appeals applied the statute that was in effect at the time of the father's death, stating that the statute had codified the doctrine of virtual legitimation as it had been developed by the Georgia courts.[29] However, the court did not interpret this statute correctly. The pertinent section of the statute provided as follows:

> A child born out of wedlock may not inherit from or through [the child's] father or any paternal kin by reason of the paternal kinship unless, *during the lifetime of the father*[30] and after the conception of the child: . . .
> (E) There is clear and convincing evidence that the child is the child of the father and that the father intended for the child to share in the father's intestate estate in the same manner in which the child would have shared if legitimate.[31]

The court of appeals said that the son could not inherit from this father because his "efforts to procure an order establishing paternity were not made during the father's life."[32] In other words the court inferred from the statute that the son had to establish his legitimacy during his father's life.[33] This reading of the statute was erroneous because in articulating the doctrine of virtual legitimation, the court cited a case in which the paternity was not established during the father's life.[34] The case cited was *Prince v. Black*,[35] in which the child had lived with his father and the father had treated him as his son, but no formal adjudication of paternity occurred during the father's lifetime.[36]

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order that discharged Ms. Coney as administrator, and the son's petition did not fall within the three-year time bar. Mack claimed that Ms. Coney's fraud had tolled the three-year limitation period. *Moore*, 266 Ga. App. at 849, 598 S.E.2d at 528. The court stated that in order to toll the statute, the fraud must involve some type of "trick or artifice" that prevents the individual from inquiring or investigating the claim. *Id.* at 850, 598 S.E.2d at 528. Here, the actions by the widow did not prevent the son from pursuing his own claims against the estate. *Id.*

29. *Moore,* 266 Ga. App. at 851 n.11, 598 S.E.2d at 529 n.11. In this note the court said that a portion of the statute "is the doctrine of virtual or equitable legitimation, articulated by the Supreme Court of Georgia in *Prince*, supra, and subsequently codified as former O.C.G.A. § 53-4-4(c)(1)(E)." *Id.* The statute that was in effect at the time the father died was replaced in 1998 by O.C.G.A. section 53-2-2.

30. The italicized phrase does not appear in the current version of the statute. *See* O.C.G.A. § 53-2-3.

31. O.C.G.A. § 53-4-4(c)(1)(E) (1997) (repealed Jan. 1, 1998).

32. *Moore,* 266 Ga. App. at 851, 598 S.E.2d at 529.

33. *Id.* at 850-51, 598 S.E.2d at 529.

34. *Id.*

35. 256 Ga. 79, 344 S.E.2d 411 (1986).

36. *Id.* at 79, 344 S.E.2d at 412.

C. Wills

1. Execution and Attestation. Section 53-4-20 of the O.C.G.A.[37] contains the following execution and attestation requirements for wills: (1) the will must be in writing; (2) the will must be signed by the testator; (3) the testator must either sign the will or acknowledge his or her signature in the presence of two or more witnesses; and (4) the witnesses must sign the will in the testator's presence, but not necessarily in the presence of each other.[38] Georgia law also provides a procedure whereby a will can be made "self-proved."[39] A self-proved will is presumed to be validly executed and may be admitted to probate without the testimony of the subscribing witnesses.[40] To make a will self-proved, the testator and the two subscribing witnesses must sign an affidavit that certifies that the will was properly executed and attested.[41] The affidavit is signed before a notary public, who then signs the affidavit and affixes an official seal.[42] The will may be made self-proved at the time of the original execution and attestation, or at any time thereafter during the lifetime of the testator and the witnesses.[43]

In *Miles v. Bryant*,[44] the execution and attestation requirements described above were honored, at best, in the breach. The probate court granted summary judgment in favor of Bryant, who argued that the will was not properly attested.[45] However, the Georgia Supreme Court reversed the summary judgment order, stating that a genuine issue of material fact existed on whether the will was properly attested.[46] The will, which consisted of six typed pages, was signed by the testator after the last paragraph. The attestation clause followed the testator's signature and was signed by two witnesses, one of whom was Cooper, a long-time friend of the testator. The self-proving clause was on the same page and followed the witnesses' signatures. The clause was signed by Cooper, by an individual other than the one who had signed as a witness to the will, and by a notary public. Testimony at trial showed that

37. O.C.G.A. § 53-4-20 (1997).
38. *Id.* For a general discussion of the execution and attestation requirements of Georgia law, see RADFORD, *supra* note 1, at § 5.
39. *See* O.C.G.A. § 53-4-24 (1997).
40. *Id.*
41. *Id.*
42. *Id.* This code section contains the recommended language for the affidavit.
43. *Id.*
44. 277 Ga. 362, 589 S.E.2d 86 (2003).
45. *Id.* at 362, 589 S.E.2d at 86.
46. *Id.*

Cooper had visited the testator in her hospital room and saw the testator and the notary public signing some papers. Cooper realized that the papers were the testator's will. The testator told Cooper that she and the notary had already signed the will, and she showed Cooper where to sign. Cooper signed in the presence of the testator and the notary. The notary, who often notarized wills at that hospital, recalled seeing the testator sign the self-proving clause. The notary, however, did not witness the other signators. Apparently, Cooper later procured the signatures of two other people who had never even met the testator. One signature appeared after the attestation clause, and the other appeared in the self-proving affidavit.[47]

The supreme court, after reciting the elements of proper execution and attestation of a will, stated that a jury must decide whether the will was properly executed and attested.[48] The court determined that Georgia law does not require the testator to sign in a particular place on the will.[49] The court also noted that Cooper and the notary had signed the will in the presence of the testator and thus could be proper witnesses to the will.[50] In a stinging dissent, Justice Benham stated that "the majority opinion in this case ignores the fraud upon the court in which the will in this case originated and approves of the manufacture of a valid will from a collection of invalid parts."[51] Justice Benham noted that the other two "witnesses," the one who signed the attestation clause and the one who signed the self-proving affidavit, had never seen the testator sign the will, and they had never even met the testator.[52] Furthermore, Cooper admitted that she procured the fraudulent signatures.[53] Justice Benham concluded:

> The majority's reversal of the well-reasoned decision of the trial court establishes a new low-water mark for appellate consideration of wills, approving the fabrication of a will from fraud-riddled bits and pieces. Because the decision in this case encourages deception perpetrated on the courts and invents questions of fact where none exist, I dissent.[54]

The majority, on the other hand, seemed less concerned about fraud than about protecting the testator's right to make a valid will. The majority stated that "[t]he opportunity to determine the disposition of

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47. *Id.* at 363, 589 S.E.2d at 86-87.
48. *Id.* at 365, 589 S.E.2d at 87.
49. *Id.* at 364, 589 S.E.2d at 88.
50. *Id.*
51. *Id.* at 367, 589 S.E.2d at 89 (Benham, J., dissenting).
52. *Id.* (Benham, J., dissenting).
53. *Id.* (Benham, J., dissenting).
54. *Id.* at 367-68, 589 S.E.2d at 90 (Benham, J., dissenting).

one's property at death by means of a will has long been a valuable right in this state,"[55] and one way to preserve this right is to let a jury decide whether the will had been properly executed and attested.[56]

2. Undue Influence and Confidential Relationships. Georgia statutory law requires that a will be freely executed and not be the product of "undue influence whereby the will of another is substituted for the wishes of the testator."[57] Georgia case law[58] provides that a presumption of undue influence may arise if the testator and the individual, who purportedly influenced the testator, were in a confidential relationship.[59] The presumption of undue influence has been recognized not only in cases relating to wills, but also in cases that questioned whether another individual had exerted undue influence on the maker of a deed or the donor of a gift.[60] Before 2002, however, will

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55. *Id.* at 363, 589 S.E.2d at 87. This is the second time the Georgia Supreme Court has refused to invalidate a will merely because the execution and attestation requirements were not strictly followed. In *Hickox v. Wilson*, 269 Ga. 180, 496 S.E.2d 711 (1998), the will comprised two pages, which ended with lines for the testator's and witnesses' signatures. A self-proving affidavit was attached (in the same type style), with signature lines for the testator, two witnesses, and the notary. However, the witnesses had signed only once, on page two, on the appropriate lines; the notary public had signed on page two on the line marked "Testator"; and the testator had signed on the affidavit on the line marked "Testator." *Id.* at 180, 496 S.E.2d at 712. The superior court granted summary judgement for the caveators of the will. *Id.*, 496 S.E.2d at 711. The supreme court, however, reversed, finding it was clear that the testator had testamentary intent and that "it was merely by oversight that the signature of the testator appears on the wrong page." *Id.* at 181, 496 S.E.2d at 712.

56. *Miles*, 277 Ga. at 365, 589 S.E.2d at 88.

57. O.C.G.A. § 53-4-12 (1997).

58. *See* Andrews v. Rentz, 266 Ga. 782, 470 S.E.2d 669 (1996); Bryan v. Norton, 245 Ga. 347, 265 S.E.2d 282 (1980).

59. A relationship

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

O.C.G.A. § 23-2-58 (1997). O.C.G.A. section 23-2-59 also provides as follows:

> Where, by the act or consent of parties or the act of a third person or of the law, one person is placed in such relation to another that he becomes interested for him or with him in any subject or property, he is prohibited from acquiring rights in that subject or property, . . . which are antagonistic to the person with whose interest he has become associated.

O.C.G.A. § 23-2-59 (1997).

60. *See, e.g.*, Trustees of Jesse Parker Williams Hosp. v. Nisbet, 191 Ga. 821, 14 S.E.2d 64 (1941); Parker v. Spurlin, 227 Ga. 183, 179 S.E.2d 251 (1971); Tingle v. Harvill, 228 Ga. 332, 185 S.E.2d 539 (1971); Myers v. Myers, 195 Ga. App. 529, 394 S.E.2d 394 (1990);

contest cases consistently required not only that the confidential relationship be proved, but also that the individual be shown to have participated actively in the procurement of the will.[61] Active procurement, on the other hand, was not a requirement for the cancellation of deeds or for the invalidation of gifts.[62]

In 2002 the Georgia Supreme Court added new confusion to this area in *White v. Regions Bank*[63] when it consolidated a will contest case with an action to invalidate a deed. In deciding whether a presumption of undue influence arose, the court applied the single-element test used in deed cases, requiring only a confidential relationship, rather than the double-pronged test used in will contest cases, requiring a confidential relationship plus active procurement.[64]

In *Holland v. Holland*,[65] a 2004 case, the Georgia Supreme Court had the opportunity to clarify this confusion but failed to do so. Instead, the court introduced a new method of evaluating undue influence and confidential relationship will contests. The court focused on the nature of the relationship between the parties rather than on the circumstances under which the will was procured, even though the facts of the case easily lent themselves to a discussion of whether active participation is required to raise the presumption of undue influence.[66]

The caveators[67] relied upon the following facts: the propounder's

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Matthis v. Hammond, 268 Ga. 158, 486 S.E.2d 356 (1970).

O.C.G.A. § 44-5-86 provides as follows:

> A gift by a person who is just over the age of majority or who is particularly susceptible to be unduly influenced by his parent, guardian, trustee, attorney, or other person standing in a similar confidential relationship to one of such persons shall be closely scrutinized. Upon the slightest evidence of persuasion or influence, such gift shall be declared void at the instance of the donor or his legal representative and at any time within five years after the making of such gift.

O.C.G.A. § 44-5-96 (2004).

61. Andrews v. Rentz, 266 Ga. 782, 470 S.E.2d 669 (1996); Bryan v. Norton, 245 Ga. 347, 265 S.E.2d 282 (1980).

62. For a discussion of these competing theories, see RADFORD, *supra* note 1, at § 4-8.

63. 275 Ga. 38, 561 S.E.2d 806 (2002).

64. *Id.* at 39, 561 S.E.2d at 808.

65. 277 Ga. 792, 596 S.E.2d 123 (2004). This estate was also the subject of a year's support controversy. *See* Holland v. Holland, 267 Ga. App. 251, 599 S.E.2d 242 (2004), discussed *supra* at text accompanying notes 5-8.

66. *Holland*, 277 Ga. at 794, 596 S.E.2d at 126.

67. In *Holland* the testator's son, Arnold, was the propounder of his father's will. The testator's widow and other son filed a caveat. They asserted that the will was the product of a mistake of fact and undue influence. The jury agreed with them and the propounder moved for JNOV. *Holland*, 277 Ga. at 792, 596 S.E.2d at 125. The trial court denied the propounder's motion. *Id.* On appeal the supreme court reversed, holding that there was no evidence to support the jury's finding of undue influence, fraud, or mistake of fact. *Id.*

lawyer wrote the will after the propounder suggested to his father that his existing will was "a mess" and needed to be redone;[68] the propounder was present in the lawyer's office during discussions with the testator; the propounder admitted to having "input into getting the will made";[69] the new will conflicted with the testator's previous declarations as to how his property was to be distributed; and the propounder received a larger share than his brother or the children of a deceased brother. The caveators asserted that the testator and the propounder were in a confidential relationship and that relationship was sufficient to raise a presumption of undue influence.[70]

The supreme court discussed the elements of an undue influence charge and the effect of a confidential relationship.[71] The court noted that the propounder clearly had the opportunity to exert influence and that he had received a substantial benefit under the will; however, that was not enough to establish undue influence.[72] Furthermore, the court stated that the evidence did not show the type of confidential relationship that would give rise to a presumption of undue influence.[73] Such a relationship must be one in which the "'primary beneficiary was capable of exerting the power of leadership over the submissive testator.'"[74] The court stated that the evidence showed that the testator was "a strong individual who followed his own judgment."[75] The court also noted that there was evidence that the testator wanted to change his will "in order to prevent one of his sons from influencing his mother to 'fritter away' the estate."[76] In upholding the will, the court concluded that "'[t]o set aside a will and thus deprive a person of the valuable right to make a will, a stringent standard must be met.'"[77]

3. Contract to Make a Will. In *Abrams v. Massell,*[78] the court of appeals upheld an unmarried couple's contract to make, and keep in

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at 795, 596 S.E.2d at 127.

68. *Id.* at 793, 596 S.E.2d at 126.

69. *Id.* at 794, 596 S.E.2d at 126.

70. *Id.* at 795, 596 S.E.2d at 126.

71. *Id.* at 792-93, 596 S.E.2d at 125.

72. *Id.* at 793, 596 S.E.2d at 125.

73. *Id.*, 596 S.E.2d at 126.

74. *Id.* at 794, 596 S.E.2d at 126.

75. *Id.*

76. *Id.*

77. *Id.* at 795, 596 S.E.2d at 127 (quoting Kendrick-Owens v. Clanton, 271 Ga. 731, 732, 524 S.E.2d 237, 237 (1999)).

78. 262 Ga. App. 761, 586 S.E.2d 435 (2003), *cert. granted* (Ga. March 8, 2004) (No. A03A1434).

effect, wills that mutually benefitted each other.[79] The contract, which was prepared by a lawyer, was entered into after the couple had lived together for several years. The contract described the codicils that each party had previously executed in which each devised a significant amount of property to the other. In the contract the parties agreed that neither would change his or her will or codicil without the consent of the other.[80] As consideration the parties recited that they would provide each other

> "a comfortable home life with shared expenses," settl[e] "any claims either may have against each other, or their estates, by reason of their friendship and support during life," releas[e] "any right which she or he may have otherwise in the property of the other," and giv[e] "[t]en . . . [d]ollars and other good and valuable consideration."[81]

Abrams changed his will after moving out of their mutual home, and Massell sued his estate for breach of contract.[82] The executors of his estate asserted that the contract was unenforceable because it was "in furtherance of an immoral relationship which renders the contract void ab initio."[83] The executors cited O.C.G.A. section 13-8-1,[84] which provides, in part, that "[a] contract to do an immoral or illegal thing is void."[85] They also cited *Rehak v. Mathis,*[86] a 1977 case in which the Georgia Supreme Court refused to enforce a cohabitation agreement because it was based on immoral consideration.[87] In *Abrams* the executors claimed that the consideration for the couple's contract to make a will was a "meretricious relationship."[88]

In response the court of appeals determined that the Georgia statute outlawing "fornication"[89] was deemed unconstitutional in 2003.[90] However, the court noted that binding supreme court precedent still

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79. *Id.* at 768, 586 S.E.2d at 442.
80. *Id.* at 765, 586 S.E.2d at 440.
81. *Id.*
82. *Id.* at 766, 586 S.E.2d at 441.
83. *Id.*
84. O.C.G.A. § 13-8-1 (1982).
85. *Id.*
86. 239 Ga. 541, 238 S.E.2d 81 (1977).
87. *Id.* at 543, 238 S.E.2d at 82.
88. *Abrams,* 262 Ga. App. at 766, 586 S.E.2d at 440.
89. O.C.G.A. § 16-6-18 (1968).
90. *Abrams*, 262 Ga. App. at 767, 586 S.E.2d at 441. The court cited *In re J.M.*, 276 Ga. 88, 575 S.E.2d 441 (2003), which held O.C.G.A. § 16-6-18 unconstitutional. That statute provides as follows: "An unmarried person commits the offense of fornication when he voluntarily has sexual intercourse with another person and, upon conviction thereof, shall be punished as for a misdemeanor." O.C.G.A. § 16-6-18.

requires that contracts based upon sexual relationships between unmarried adults be set aside.[91] Consequently, the court of appeals felt it incumbent to determine whether the contract at issue was founded on such immoral consideration.[92] The court concluded that it was not.[93] The contract did not refer to the couple as husband and wife and did not require that they share a bedroom or engage in a sexual relationship, but rather, described them as "friends," who would offer each other a "comfortable home" and "support."[94] The court noted that in *Crooke v. Gilden,*[95] a cohabitation contract with similar terms had been upheld by the supreme court.[96]

In March 2004 the Georgia Supreme Court granted the writ of certiorari in *Abrams*.[97] In doing so the court stated that it was "particularly concerned with Division 5 of the opinion of the Court of Appeals and its holding that, as a matter of law, enforcement of the contract at issue does not contravene [O.C.G.A. section] 13-8-1."[98]

D. Personal Representatives

In two cases during the reporting period, the court of appeals examined questions of an executor's conflict of interest.[99] In *In re Estate of Moriarty,*[100] the testator's daughter sought to have the testator's wife disqualified from serving as executor of his estate.[101]

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91. 262 Ga. App. at 767, 586 S.E.2d at 441. The court cited *Rehak v. Mathis*, 239 Ga. 541, 238 S.E.2d 81 (1977) and *Liles v. Still*, 176 Ga. App. 65, 335 S.E.2d 168 (1985).

92. *Abrams,* 262 Ga. App. at 767, 586 S.E.2d at 440.

93. *Id.*

94. *Id.*, 586 S.E.2d at 441.

95. 262 Ga. 122, 414 S.E.2d 645 (1992).

96. *Abrams*, 262 Ga. App. at 767, 586 S.E.2d at 441 (citing Crooke v. Gilden, 262 Ga. 122, 414 S.E.2d 645 (1992)).

97. Abrams v. Massell, No. S04C0024 (Ga. Mar. 8, 2004).

98. *Id.* at *1.

99. *See In re* Estate of Moriarty, 262 Ga. App. 241, 585 S.E.2d 182 (2003); Walters v. Stewart, 263 Ga. App. 475, 585 S.E.2d 248 (2003).

100. 262 Ga. App. 241, 585 S.E.2d 182 (2003).

101. The wife submitted the will for probate in common form. The daughter filed a caveat in which she challenged the wife's ability to serve as executor in an unbiased manner. The wife claimed that the probate court lacked jurisdiction to disqualify her because the will was submitted for probate in common form, and earlier cases had made it clear that there is no caveat allowed if the will is submitted for probate in common form because the proper method of caveating the will in these circumstances is to petition for probate in solemn form. *Id.* at 241-42, 585 S.E.2d at 183. These cases are discussed in Mary F. Radford, *Wills, Trusts, Guardianships, and Fiduciary Administration*, 55 MERCER L. REV. 459, 461-62 (2003). The court of appeals in *In re Estate of Moriarty* stated that despite being labeled a caveat, the petition was not one that challenged the validity of the will. 262 Ga. App. at 241, 585 S.E.2d at 183. Instead, it was a petition that challenged

The will left the testator's entire estate in a trust with the daughter as the primary beneficiary. The daughter's concern about the wife's impartiality in administering the estate revolved around a joint account that had apparently been maintained by the testator and his wife. The wife planned to claim the account under her right of survivorship.[102] The probate court found, and the court of appeals agreed, that the claim against the estate presented a conflict of interest for the would-be executor.[103] The wife argued that she should not be disqualified from serving as executor due to the "mere fact" that she and the testator had maintained a joint account.[104] However, the court of appeals determined that she was disqualified not "merely because she maintained a joint account with her husband," but also "because she claim[ed] entitlement to funds in that account, which may belong to the estate."[105]

In *Walters v. Stewart*,[106] the court of appeals examined whether an executor, who may have received an advancement from the testator during the testator's life, is obliged to acknowledge that advancement by virtue of his status as a fiduciary.[107] An advancement is a transfer made by an individual, during life, which is intended to be an advance payment to the transferee of amounts the transferee is due to take from the transferor's estate.[108] The amount of any advancement received by a transferee is set off against the amount that the transferee receives from the transferor's estate.[109] In *Walters* the testator's will was executed in 1972. In 1995 the testator transferred $50,000 to his son. Friends and family members testified that the money was meant to be an advance payment of the son's share of his father's estate.[110]

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the wife's right to serve as executor. *Id.*

102. *In re Estate of Moriarty*, 262 Ga. App. at 242-43, 585 S.E.2d at 183-84. Typically, the survivor of the parties named on a joint account is the owner of the account assets "unless there is clear and convincing evidence of a different intention at the time the account is created . . . ." O.C.G.A. § 7-1-813 (2004). The question of who owns the assets in a joint bank account frequently gives rise to litigation. For a discussion of these cases, see RADFORD, *supra* note 1, at § 2-7.

103. *In re Estate of Moriarty*, 262 Ga. App. at 242, 585 S.E.2d at 183.

104. *Id.*

105. *Id.* at 243, 585 S.E.2d at 183.

106. 263 Ga. App. 475, 588 S.E.2d 248 (2003), *cert. granted*.

107. *Id.* at 477, 588 S.E.2d at 250.

108. O.C.G.A. § 53-1-10(b) (1997). For a general discussion of advancements, see RADFORD, *supra* note 1, at § 2-4.

109. O.C.G.A. § 53-1-12 (1997).

110. *Walters,* 263 Ga. App. at 475, 588 S.E.2d at 248.

At the time of the transfer, former O.C.G.A. section 53-4-50[111] provided that an *inter vivos* payment from a parent to a child would be treated as an advancement unless it was intended to be a "donation from affection."[112] This section was replaced in 1998 with O.C.G.A. section 53-1-10,[113] which provides that a transfer will be treated as an advancement only "if the will provides for the deduction of the lifetime transfer or its value or if the satisfaction or advancement is declared in a writing signed by the transferor within 30 days of making the transfer or acknowledged in a writing signed by the recipient at any time."[114] The father left no written acknowledgment of the advancement. The son, who was appointed executor of his father's estate when his father died in 2001, refused to acknowledge that the transfer was an advancement. The decedent's daughter sought a declaratory judgment that the transfer was an advancement.[115]

The trial court granted summary judgment for the son after determining that the transfer was not an advancement because no writing existed acknowledging it as such.[116] The court of appeals reversed the grant of summary judgment.[117] It concluded that the law allowed the son to acknowledge the transfer as an advancement "at any time" even though his father had not done so in the thirty days following the transfer.[118] The court stated that the son "has the authority under the statute and the sacred duty as executor to acknowledge the transfer as an advancement, if that was in fact his father's intention."[119] Consequently, a genuine issue of material fact existed and summary judgment was improper.[120]

In February 2004 the Georgia Supreme Court granted the writ of certiorari.[121] In doing so, the court stated that it was "particularly concerned with the following issue . . . : Whether the executor of an estate who is also a beneficiary of the estate and who received funds

111. O.C.G.A. § 53-4-50 (1997) (current version at O.C.G.A. § 53-1-10 (1998)).
112. *Id.*
113. O.C.G.A. § 53-1-10 (1998).
114. *Id.* § 53-1-10(c). The court of appeals decided that the new law should apply to this transfer. *Walters,* 263 Ga. App. at 475-76, 588 S.E.2d at 249-50.
115. *Walters*, 263 Ga. App. at 475, 588 S.E.2d at 248.
116. *Id.* at 476, 588 S.E.2d at 249. The trial court apparently agreed with the daughter that the money was intended to be an advancement and said that its ruling created "an unintended windfall" for the son. *Id.* at 476 n.6, 588 S.E.2d at 249 n.6.
117. *Id.* at 477, 588 S.E.2d at 250.
118. *Id.*
119. *Id.*
120. *Id.*
121. Stewart v. Walters, No. S04G0291 (Ga. Feb. 19, 2004).

from the testator during the testator's life is required in the exercise of the executor's fiduciary duty to acknowledge the receipt of funds in writing."[122]

E. Trusts and Trustees

In *Wachovia Bank of Georgia v. Namik*,[123] the court of appeals faced a suit in which the bank, as trustee, was sued for breach of fiduciary duty. General Ali, an Iraqi citizen, visited his son, Namik, in Atlanta, Georgia in 1989. While there, he and his son made three trips to the bank. On the first trip, after transferring money from a Swiss bank account, Ali purchased a certificate of deposit ("CD") for $350,000. On the second trip, he purchased another $350,000 CD and a $2,650,000 CD, referred to as the "Jumbo CD," which would mature in six months. The next day, Ali conferred with a bank officer. At the meeting and after going over its terms with the officer, Ali signed the bank's Revocable Living Trust Agreement, but no funds were transferred to the trust. Six months later a memorandum from the same officer indicated that Ali wanted to fund the trust with the money from the matured Jumbo CD.[124] The memo also indicated that Ali had orally mentioned to the officer that he wanted "no market risks," and that he would like to have the funds invested "only in U.S. Government issues."[125] Neither of these instructions were embodied in the written trust agreement, which authorized the trustee to "hold, manage, invest, and reinvest said property in its discretion."[126]

When the trust was established in September 1989, another bank officer attempted to contact Ali at the addresses he left with the bank and through his son. The officer wished to discuss the investment of the trust assets, but the attempts to contact Ali were unsuccessful. Over a year later, Namik told the bank that his father had been imprisoned, and in 1994 Namik informed the bank that his father was executed in May 1990.[127] Before learning of General Ali's death, the bank officers invested the trust funds in a tax-free money-market fund "to maintain liquidity and protect the principal . . . ."[128] When it was discovered that Ali was deceased, the funds were paid over to the bank as

122. *Id.* at *1.

123. 265 Ga. App. 80, 593 S.E.2d 35 (2003), *cert. granted*. The Author of this Article appeared as an expert witness in the trial of this case.

124. *Id.* at 81, 593 S.E.2d at 37.

125. *Id.*

126. *Id.* at 83, 593 S.E.2d at 38.

127. *Id.* at 81, 593 S.E.2d at 37.

128. *Id.*

administrator of Ali's estate. The estate tax law and regulations in effect at the time of Ali's death caused the entire value of the trust fund to be included in his estate as U.S. situs property, and the estate paid tax in the amount of $933,248.49. Namik and the rest of Ali's family sued, claiming that the bank was responsible for the estate being subject to the taxes.[129]

First, Namik argued that the bank, as part of its fiduciary duty to Ali, should have engaged in estate planning for Ali. It should have invested the trust funds in assets that would not have been included in his gross estate for U.S. estate tax purposes.[130] The Internal Revenue Code lists certain types of property that are not considered to be "situated in the United States"[131] when calculating the estates of non-resident aliens. These include proceeds of life insurance policies, certain bank deposits, and other debt obligations, including U.S. debt obligations.[132] However, as noted by the court of appeals, prior to the 1997 amendment, the law was "obscure . . . 'not perspicuous, not clearly expressed, vague, hard to understand.'"[133] The obscure rule in effect in 1990 would have only excluded issues with a maturity of over 183 days from Ali's gross estate investments in U.S. government issues.[134]

The bank's argument, with which the court of appeals agreed, was that the trustee of a revocable living trust was under no obligation to engage in estate planning for the settlor or beneficiary, or to consider the estate tax consequences of the investments it makes.[135] The court stated that while a trustee may invest in accordance with the terms of the trust agreement, according to O.C.G.A. § 53-12-287,[136] the trustee is also bound to exercise the standard of care set forth in the statute.[137] This section focuses on the knowledge the trustee has, or should have had, at the time the investments were made.[138] The court said: "The test is not whether, in hindsight, a more lucrative investment could have been made measured from the standpoint of safety, value, income, or tax consequences."[139] Furthermore, the bank was acting as

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129. *Id.* at 80, 593 S.E.2d at 36.
130. *Id.* at 81, 593 S.E.2d at 36.
131. I.R.C. § 2106 (2000).
132. I.R.C. §§ 2105 to 2106 (2000).
133. *Wachovia Bank*, 265 Ga. App. at 84, 593 S.E.2d at 39 (quoting BLACK'S LAW DICTIONARY 971 (5th ed. 1979)).
134. *Id.*, 593 S.E.2d at 38-39.
135. *Id.*, 593 S.E.2d at 39.
136. O.C.G.A. § 53-12-287 (1998).
137. *Wachovia Bank*, 265 Ga. App. at 82, 593 S.E.2d at 37-38.
138. *Id.*
139. *Id.*, 593 S.E.2d at 38.

trustee under a revocable living trust, and these "trusts are vehicles for investment purposes; they are not vehicles for estate-planning purposes and generally, as in this case, have no testamentary provisions."[140] The court realized that O.C.G.A. section 53-12-287 indicates that a trustee, in making investment decisions, "*may* consider [among other things] the anticipated tax consequences of the investments," but the statute does not mandate that a trustee look into potential estate tax consequences.[141] The court stated: "No Georgia law requires a trustee of a revocable living trust to consider estate tax consequences of investments or to invest trust funds to minimize estate taxes."[142] Finally, the court noted that the Georgia Supreme Court has held that there is no duty on the part of a fiduciary "to inform itself and advise [its] beneficiaries of obscure tax laws."[143]

Second, Namik claimed that the bank breached its fiduciary and contractual duty by not following Ali's oral instructions to invest the trust funds in U.S. government issues.[144] The court of appeals noted that even if the bank had invested in U.S. government securities, there was still no evidence that the bank would have chosen to invest in securities with a maturity of over 183 days.[145] The court discussed the "cardinal rule . . . that the trustor-settlor's intention be followed."[146] Intent is to be found in the language of the trust agreement, and oral evidence will be resorted to only if the agreement is ambiguous.[147] The court determined there was no ambiguity in the investment directions in Ali's trust agreement.[148] Additionally, the court noted that Ali could have easily inserted his own investment directives if he had desired to do so.[149] The court held that the interoffice memorandum "should not have been admitted to vary the terms of the Trust Agreement because it constitutes parol evidence inadmissible under Georgia law."[150] The memo did not explain any ambiguities in the agreement and, instead,

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140. *Id.* at 83, 593 S.E.2d at 38.
141. *Id.* (emphasis in original).
142. *Id.*
143. *Id.* (citing Robbins v. Nat'l Bank of Georgia, 241 Ga. 538, 543, 246 S.E.2d 660, 664 (1978)).
144. *Id.* at 84, 593 S.E.2d at 39.
145. *Id.*
146. *Id.* (quoting Griffith v. First Nat'l Bank, 249 Ga. 143, 146, 287 S.E.2d 526, 529 (1982)).
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 84-85, 593 S.E.2d at 39 (citing O.C.G.A. § 13-2-2 (Supp. 1994); O.C.G.A. § 24-6-1 (1995)).

"would completely change the discretion provided in the Trust Agreement."[151] The court further held that the memorandum did not constitute a contract between Ali and the bank.[152]

Finally, Namik claimed that the actions of the bank gave rise to a tort action based on its failure to follow Ali's instructions.[153] The court of appeals agreed with the trial court holding that the case cited by Namik did not create a new tort action in Georgia.[154]

The Georgia Supreme Court granted the writ of certiorari and oral arguments were scheduled for September 2004.[155] The question for the court was simply: "Did the [Georgia] Court of Appeals err by reversing the trial court's judgment?"[156]

F. Tortious Interference with Inheritance

The Restatement (Second) of Torts describes a cause of action against an individual who "by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received."[157] In *Copelan v. Copelan*,[158] decided in 2003, the Georgia Court of Appeals addressed whether a claimant can pursue such a cause of action while the individual from whom the claimant hopes to inherit is still alive.[159] In

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151. *Id.* at 85, 593 S.E.2d at 39.

152. *Id.*, 593 S.E.2d at 40.

153. *Id.* at 86-87, 593 S.E.2d at 41. Namik cited *Wachovia Bank of Georgia v. Reynolds*, 244 Ga. App. 1, 533 S.E.2d 743 (2000).

154. *Wachovia Bank*, 265 Ga. App. at 87, 593 S.E.2d at 41.

155. Namik v. Wachovia Bank of Georgia, No. S04G0857 (Ga. May 24, 2004).

156. *Id.* at *1. Namik also appealed in this case, claiming that the trial court had awarded insufficient damages. The trial court calculated damages by (1) assuming that the trust fund, if properly invested, should have been invested fifty percent in estate taxable investments and fifty percent in estate tax exempt investments; (2) holding Namik to a duty to mitigate damages once he knew of his father's death; (3) having each party pay its own attorney fees; and (4) having the Bank disgorge half of the fees it had charged. *Namik*, 265 Ga. App. at 86, 593 S.E.2d at 40. The court of appeals, after finding no liability on the part of the Bank, found the issues raised by Namik to be moot. *Id.* It is unclear whether the Georgia Supreme Court will address the damages issue.

157. *See* RESTATEMENT (SECOND) OF TORTS § 774B (1979).

158. 261 Ga. App. 726, 583 S.E.2d 562 (2003).

159. *Id.* at 727, 583 S.E.2d at 563-64. No Georgia appellate court has addressed directly whether this tort is recognized in Georgia. In an old case, *Mitchell v. Langley*, 143 Ga. 827, 85 S.E.2d 1050 (1915), the Georgia Supreme Court alluded to the possibility that such a cause of action is valid. The court said:

> Is it possible that where a will has been made, leaving a devise, a third person can fraudulently and maliciously cause the testator to revoke the devise, and thus cause a loss to the devisee, without any redress on the part of the latter? . . . . [W]here an intending donor, or testator, or member of a benefit society, has

this case the Copelan siblings were in dispute over the management and disposition of their mother's property. Thomas and John sued Uyvonna and Willie David, asking for restoration into their mother's name of properties that the mother deeded to Uyvonna and Willie David. Thomas and John partially grounded their suit on the fact that they expected all siblings to be equal heirs to their mother's estate, and that Uyvonna and Willie David had tortiously interfered with their expectation of inheritance.[160] The trial court granted summary judgment in favor of Uyvonna and Willie David ruling that Thomas and John had no standing and no claim for tortious interference with their expected inheritance.[161] The court of appeals agreed, stating that "plaintiffs claim a basis for recovery that simply does not exist under Georgia law."[162]

The court's theory was that an expectancy is not a property interest, and thus, the status as "expected heirs" did not give plaintiffs standing to bring suit for the cancellation of their mother's deeds.[163] The court cited Georgia case law to bolster the well-known maxim that no one can be the heir of an individual who is still alive.[164] According to the court, as long as the mother was alive, the children were not heirs and had no property interest in her estate.[165] It is important to note that while a superficial reading of *Copelan* would indicate that the court of appeals chose not to recognize the tortious interference cause of action in Georgia, the actual holding does not go that far.[166] The court simply stated that one cannot pursue such a claim so long as the individual

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> actually taken steps toward perfecting the gift, or devise, or benefit, so that if let alone the right of the donee, devisee, or beneficiary will cease to be inchoate and become perfect, we are of the opinion that there is such a status that an action will lie, if it is maliciously and fraudulently destroyed, and the benefit diverted to the person so acting, thus occasioning loss to the person who would have received it.

Id. at 835, 85 S.E.2d at 1053. In 1986 in *Morgan v. Morgan*, 256 Ga. 250, 347 S.E.2d 595 (1986), the supreme court did not allow two sons of a testator to pursue such a cause of action in superior court because their caveat in the probate court of their father's will was still in progress. *Id.* at 251-52, 347 S.E.2d at 596. Again, while not directly recognizing such a cause of action, the court did say that, should the will caveat be successful, the sons would then "have standing, as beneficiaries of the estate, to pursue such a claim on behalf of the estate." *Id.* at 251, 347 S.E.2d at 596.

160. *Copelan*, 261 Ga. App. at 726, 583 S.E.2d at 563.

161. *Id.*

162. *Id.* at 727, 583 S.E.2d at 563.

163. *Id.*

164. *Id.*, 583 S.E.2d at 563-64 (citing Frady v. Irvin, 245 Ga. 307, 264 S.E.2d 866 (1980)).

165. *Id.*, 583 S.E.2d at 564.

166. *Id.*

from whom the claimant expects to inherit is still alive.[167] This is a rational conclusion because until that individual dies, no irreparable damage has been done; no expectation has been lost.[168]

II. LEGISLATION

In 2004 the Georgia General Assembly adopted a comprehensive revision of Title 29 of the O.C.G.A.[169] Title 29 covers the guardianships of the persons and property of minors and incapacitated adults. The new guardianship code is the culmination of a five-year study and drafting process by the Guardianship Code Revision Committee of the Fiduciary Law Section of the State Bar of Georgia.[170] The effective date of the new guardianship code is July 1, 2005.[171]

The new code is a reorganization, modernization, and clarification of the Georgia laws that relate to the guardianship of the person and property of minors and incapacitated adults. The revision reorganizes the current Title 29 by separating into distinct chapters the provisions that relate to minors, to adults, and to guardianship of the person ("guardianship") and guardianship of the property ("conservatorship").[172]

The proposed revision modernizes Georgia's guardianship code by adopting the terminology that is used in the majority of states. For example, the revision replaces the term "guardian of the person" with "guardian" and the term "guardian of the property" with "conservator."[173] The revision incorporates recent legislative amendments to Title 29, clarifies the current law by reflecting recent decisions of the Georgia appellate courts on guardianship issues, and updates the chapter governing Veteran's Administration guardianships so that it complies with the most recent version of the Uniform Veterans' Guardianship Act.[174] The revision adopts statutes prepared by the

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167. *Id.*
168. *Id.*
169. 2004 Ga. Laws 460.
170. The committee was composed of lawyers from across the state who were experienced in estate planning and guardianship matters. The Honorable W. Marion Guess, Probate Judge of Dekalb County, served as the Probate Judges' liaison to the committee. The Chair of the Committee was William Linkous, Jr., and the Author of this Article served as the Reporter. Other Committee members included: Julian Friedman, Gregory Fullerton, John Graham, Thomas Jones, Larry V. McLeod, Faryl S. Moss, Albert Reichert, Jr., E. Lowry Reid, Ann D. Salo, John Spears, and Rees Sumerford.
171. 2004 Ga. Laws 460.
172. O.C.G.A. § 29-5-3 (Supp. 2004).
173. *Id.*
174. UNIF. VETERANS' GUARDIANSHIP ACT, 86 U.L.A. 287 (2001).

National College of Probate Judges to facilitate the transfer of guardianships or conservatorships from one state to another.[175] And finally, the revision makes guardianships and conservatorships more flexible and manageable by allowing these fiduciaries to petition the court for powers that are more expansive than those to which guardians and conservators are restricted under the current code.[176]

175. O.C.G.A. § 29-5-3.

176. For example, current O.C.G.A. section 29-2-13 (Supp. 2004) restricts a guardian of the property to investing in a "legal list" of state and federal bonds and securities. In the revised Code, new section 29-5-23 allows the conservator to petition for permission to make other types of investments.