Wills, Trusts, Guardianships, and Fiduciary Administration

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This Article describes selected cases and significant legislation from the period of June 1, 2007 through May 31, 2008 that pertain to Georgia fiduciary law and estate planning.

I. GEORGIA CASES

A. Undue Influence

In May 2008, the Georgia Supreme Court and the Georgia Court of Appeals each decided cases that clarified the burden of proof and the role of presumptions in an undue influence case.[1] In *Horton v. Hendrix*,[2] the daughter of the settlor of a trust asserted that the settlor's son had exercised undue influence over their mother. The daughter offered evidence that was sufficient to raise a rebuttable

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1. A testator or the settlor of a trust may be subjected to influence by a third party that is so undue that it overpowers the free will of the testator or settlor and substitutes the third party's wishes for those of the testator or settlor. *See* Smith v. Liney, 280 Ga. 600, 601, 631 S.E.2d 648, 649 (2006) (citing Curry v. Sutherland, 279 Ga. 489, 490, 614 S.E.2d 756, 757 (2005); Holland v. Holland, 277 Ga. 792, 793, 596 S.E.2d 123, 125 (2004)). For a detailed discussion of undue influence concepts and cases, see MARY F. RADFORD, REDFEARN: WILLS & ADMINISTRATION IN GEORGIA §§ 4-8, 6-17 (7th ed. 2008).

2. 291 Ga. App. 416, 662 S.E.2d 227 (2008).

presumption that the son had exercised this influence.[3] The daughter then objected when the court instructed the jury that she still maintained the ultimate burden of persuasion.[4] The court of appeals held that the jury was given a proper instruction.[5] The court of appeals pointed out that when the plaintiff offers evidence that is sufficient to raise a rebuttable presumption of undue influence, the burden of going forward with the evidence then shifts to the defendant.[6] However, the ultimate burden of persuasion always remains with the person who is asserting undue influence.[7]

In *Bean v. Wilson*,[8] the supreme court examined what happens when a person who challenges a will based on undue influence offers evidence sufficient to raise a presumption of undue influence and the presumption is then rebutted.[9] The supreme court affirmed that even though the presumption is rebutted, it does not "vanish" in the face of this contrary evidence.[10] The presumption alone may remain a sufficient ground for a jury to find that undue influence was exercised.[11] Thus, the fact that the presumption has been rebutted does not mean that the person accused of exercising the influence is entitled to a directed verdict.[12]

B. Probate Practice and Procedure

Two cases decided during the reporting period addressed issues that have arisen as a result of amendments to statutes that relate to practice and procedure in the probate courts.[13] The first case involved the right

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3. *Id.* at 417-18, 662 S.E.2d at 231. The daughter presented evidence that the mother, who had been in a weakened condition, had transferred assets to the son, who had been in a dominant position. *Id.* at 418, 662 S.E.2d at 231.

4. *Id.* at 418, 662 S.E.2d at 231.

5. *Id.* at 419, 662 S.E.2d at 231-32.

6. *Id.*, 662 S.E.2d at 231.

7. *Id.* at 418-19, 662 S.E.2d at 231.

8. 283 Ga. 511, 661 S.E.2d 518 (2008).

9. *See id.* In a will contest, the presumption of undue influence is raised when the person alleging the influence occurred shows that the person who benefits under the will was in a confidential relationship with the testator, was not a natural object of the testator's bounty, and took an active role in the preparation or execution of the will. *Id.* at 512, 661 S.E.2d at 519 (citing Bailey v. Edmonson, 280 Ga. 528, 529, 630 S.E.2d 396, 398 (2006)).

10. *Id.* at 513, 661 S.E.2d at 520 (quoting *Bailey*, 280 Ga. at 530, 630 S.E.2d at 399).

11. *Id.*, 661 S.E.2d at 519.

12. *Id.*, 661 S.E.2d at 520.

13. Both of these cases involved challenges to a surviving spouse's request for year's support. Year's support, which is the name given to the property that a surviving spouse and minor children may request from a decedent's estate, is discussed in detail in RADFORD, *supra* note 1, § 10.

to jury trials in appeals from probate courts and the second involved the right to open default judgments in the probate courts.[14]

The court of appeals opinion in *Montgomery v. Montgomery*[15] answered questions surrounding the right to a jury trial in an appeal from a probate court to a superior court.[16] The questions arose as a result of a 1998 amendment to section 5-3-30 of the Official Code of Georgia Annotated (O.C.G.A.).[17] Prior to the amendment, that code section provided that all appeals to the superior court or state court would be tried by a jury at the first term after the appeal unless the parties waived trial by jury by consent.[18] In 1998 the code section was amended to provide that any appeal from a *magistrate court* would be placed on the superior court's calendar for a nonjury trial unless either party filed a demand for a jury trial within thirty days of the filing of the appeal.[19] No mention of an appeal from a probate court was made in this new section. In *Montgomery* the child of the decedent argued that this amendment meant there was no longer a right to a trial by jury in an appeal from a probate court to a superior court.[20] The superior court disagreed. It found that the right to a trial by jury existed, but the surviving spouse in this case had waived her right by not filing her demand within thirty days of the appeal, as required by amended O.C.G.A. § 5-3-30.[21] The court of appeals, however, decided that amended O.C.G.A. § 5-3-30 simply did not apply to appeals from the probate court.[22] The court then went on to determine what rules do apply to the availability of a jury trial in superior court on appeal from a probate court.[23] The court determined that "in repealing former OCGA § 5-3-30 the legislature intended that appeals from the probate court to the superior court would continue without special limitations on the right to a jury trial."[24]

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14. *See* Montgomery v. Montgomery, 287 Ga. App. 77, 650 S.E.2d 754 (2007); *In re* Estate of Ehlers, 289 Ga. App. 14, 656 S.E.2d 169 (2007).

15. 287 Ga. App. 77, 650 S.E.2d 754 (2007).

16. *See id.* at 77-80, 650 S.E.2d at 755-57. Appeals from the decisions of most probate courts in Georgia lie in the superior courts. *See* O.C.G.A. § 5-3-2 (1995). For a discussion of appeals from probate courts, see *Radford*, *supra* note 1, § 6-3.

17. O.C.G.A. § 5-3-30 (Supp. 2008).

18. O.C.G.A. § 5-3-30 (1995), *amended by* O.C.G.A. § 5-3-30(a). The prior version of the statute is quoted by the court. *Montgomery*, 287 Ga. App. at 77, 650 S.E.2d at 755.

19. O.C.G.A. § 5-3-30.

20. *Montgomery*, 287 Ga. App. at 78, 650 S.E.2d at 756.

21. *Id.* at 77, 650 S.E.2d at 755.

22. *Id.* at 78, 650 S.E.2d at 755.

23. *Id.* at 80, 650 S.E.2d at 757.

24. *Id.*

In the case of *In re Estate of Ehlers*,[25] the court of appeals addressed whether O.C.G.A. § 9-11-55(a),[26] which allows parties who are in default to open the default as a matter of right within fifteen days,[27] applies to default judgments in the probate court.[28] In this case, a petition for year's support was filed pursuant to O.C.G.A. § 53-3-5,[29] and the court mailed a copy of the petition to the representative of the decedent's son.[30] The court received a signed return receipt from the son's representative, which was dated November 7, 2005, on November 9, 2005. From this return receipt, in accordance with O.C.G.A. § 53-11-10(a),[31] the probate court determined that any objection to the amended petition had to be filed no later than ten days from the receipt, thus by November 17, 2005. When no objection was filed by that date, the probate court determined that the proceeding was automatically in default.[32] The son's representative then sought to open the default, but the probate court refused to do so.[33] The court of appeals determined that the son's representative had the right to open the default, citing *Greene v. Woodard*,[34] a 1991 case in which it had reached this same conclusion.[35] The court noted that even though O.C.G.A. § 15-9-47,[36] which seems to grant to the probate judge the discretion to open a

25. 289 Ga. App. 14, 656 S.E.2d 169 (2007).

26. O.C.G.A. § 9-11-55(a) (2006).

27. *Id.*

28. *See In re* Estate of Ehlers, 289 Ga. App. at 16-17, 656 S.E.2d at 171-72.

29. O.C.G.A. § 53-3-5 (Supp. 2008).

30. *In re* Estate of Ehlers, 289 Ga. App. at 16, 656 S.E.2d at 171. The facts in this case were complicated by the deaths of the main parties during the course of the proceeding. The basic facts are that Ehlers died and his wife petitioned for year's support from his estate. The sole surviving son of Ehlers objected to the amount requested in the petition. The parties agreed to dismiss the petition and settle the dispute on their own. However, the settlement was not successful and while various related actions were pending, both the mother and the son died. The mother's executor filed an amended petition, and the son's executor (who is referred to in the text as the "son's representative") stepped into the son's shoes in the action. *Id.* at 14-15, 656 S.E.2d at 170-71.

31. O.C.G.A. § 53-11-10(a) (Supp. 2008) (governing proceedings in the probate court and providing that the date on which any objection to a petition must be filed shall not be less than ten days from the date of receipt that is shown on the return receipt that accompanied the petition).

32. *In re* Estate of Ehlers, 289 Ga. App. at 15-16, 656 S.E.2d at 171. Under O.C.G.A. § 53-3-7(a) (1997), if no objection is made to a year's support petition within the appropriate time limit, the court will award to the petitioner the property that is requested in the petition without a hearing. O.C.G.A. § 53-3-7(a).

33. *In re* Estate of Ehlers, 289 Ga. App. at 16, 656 S.E.2d at 171.

34. 198 Ga. App. 427, 401 S.E.2d 617 (1991).

35. *In re* Estate of Ehlers, 289 Ga. App. at 16-17, 656 S.E.2d at 171 (citing *Greene*, 198 Ga. App. at 428, 401 S.E.2d at 619).

36. O.C.G.A. § 15-9-47 (2008).

default judgment in probate court, had been enacted after the decision in *Greene*, nothing in the new statute conflicted with the right granted under O.C.G.A. § 9-11-55(a) to open a default judgment within fifteen days and upon the payment of costs.[37]

C. Compensation of Conservators and Personal Representatives

In Georgia, personal representatives and conservators[38] are entitled to compensation for their work in the administration of the estate or the management of the ward's assets.[39] Subject to some other agreement for determining compensation, the method of calculating the compensation of these fiduciaries is set out in the O.C.G.A.[40] A component of this statutory compensation is that the fiduciary is entitled to receive a "[t]wo and one-half percent commission on all sums of money" received by the fiduciary and a similar commission on sums paid out.[41]

In *In re Estate of Miraglia*,[42] an individual who was appointed conservator of an adult calculated his commission as two and one-half percent of the value of the stocks and bonds that he had managed.[43] In determining whether these items of property constituted "sums of money," as described in the conservatorship statute,[44] the court of appeals pointed out that the same wording, as it appeared in the statute relating to personal representatives,[45] had been strictly construed in *Walton v. Gairdner*.[46] In that case, the term "sums of money" did not include stocks and bonds.[47] The court of appeals also noted that it would reach the same conclusion even without *Walton* because the

37. *In re* Estate of Ehlers, 289 Ga. App. at 16-17, 656 S.E.2d at 171.

38. Personal representatives are those persons who manage the estate of a deceased individual. They include executors, administrators, and administrators with the will annexed. *See* O.C.G.A. § 53-1-2(12) (1997 & Supp. 2008). Conservators are the persons who handle the assets of a minor or an incapacitated adult. *See* O.C.G.A. § 29-3-21 (2007); O.C.G.A. § 29-5-21 (2007).

39. *See* O.C.G.A. § 53-6-60 (Supp. 2008) (personal representatives); O.C.G.A. § 29-3-50 (2007) (conservators of minors); O.C.G.A. § 29-5-50 (2007) (conservators of adults).

40. *See* O.C.G.A. § 53-6-60; O.C.G.A. § 29-3-50; O.C.G.A. § 29-5-50.

41. O.C.G.A. § 53-6-60(b)(1) (Supp. 2008); O.C.G.A. § 29-3-50(a)(1) (2007); O.C.G.A. § 29-5-50(a)(1) (2007).

42. 290 Ga. App. 28, 658 S.E.2d 777 (2008).

43. *Id.* at 28, 658 S.E.2d at 778.

44. O.C.G.A. § 29-2-42(a) (2007).

45. O.C.G.A. § 29-5-50.

46. *In re* Estate of Miraglia, 290 Ga. App. at 29, 658 S.E.2d at 778; Walton v. Gairdner, 111 Ga. 343, 36 S.E. 666 (1900).

47. *Walton*, 111 Ga. at 345, 36 S.E. at 666.

ordinary meaning of the term "money" did not include stocks and bonds.[48]

II. GEORGIA LEGISLATION IN 2008

A. Uniform Prudent Management of Institutional Funds Act

In 2008 the Georgia General Assembly enacted the Georgia Uniform Prudent Management of Institutional Funds Act (UPMIFA).[49] The act, which replaces the Georgia Uniform Management of Institutional Funds Act,[50] is modeled after, but does not replicate in its entirety, the uniform act that was promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 2006.[51] UPMIFA applies to trusts and other entities or institutions that operate solely for charitable purposes.[52] The act provides updated guidance for the management and investment of these institutional funds.[53]

UPMIFA strengthens the protection of donor intent by requiring the charity to follow the intent of the donor, whether expressed in the gift instrument itself or in an express written agreement between the donor and the charity.[54] UPMIFA adopts an investment standard that requires the person responsible for managing and investing the funds to "manage and invest such fund in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances, considering the purposes, terms, distribution requirements, and other circumstances of the institutional fund."[55] With regard to endowment spending, UPMIFA eliminates the concept of tying

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48. *In re* Estate of Miraglia, 290 Ga. App. at 29, 658 S.E.2d at 779. The court looked to the American Heritage Dictionary and Black's Law Dictionary as well as a definition that appeared in an unrelated section of the Georgia Code. *Id.* at 29-30, 658 S.E.2d at 779. The court also addressed the conservator's argument that because the stocks had been converted to "street name," they were easily converted to cash and the equivalent of cash. *See id.* at 30, 658 S.E.2d at 779. The court noted that the argument led to the opposite conclusion because the fact that the stocks had to be converted to street name indicated that they were not the essential equivalent of money. *Id.*

49. Ga. H.R. Bill 972, Reg. Sess. (2008).

50. O.C.G.A. §§ 44-15-1 to -9 (2002), *amended by* Uniform Prudent Management of Institutional Funds Act, O.C.G.A. § 44-15-1 to -8 (Supp. 2008).

51. *See* UNIF. MGMT. INST. FUNDS ACT §§ 1-11, 7A pt. III U.L.A. 1-9 (2006).

52. *See* O.C.G.A. §§ 44-15-2(4)-(5) (Supp. 2008).

53. The act is modeled after the Uniform Prudent Investor Act and the Revised Model Nonprofit Corporation Act. *See* UNIF. PRUDENT MGMT. INST. FUNDS ACT PREFATORY NOTE, 7A pt. III U.L.A. 4-6 (2006).

54. O.C.G.A. §§ 44-15-3(a), -4(a) (Supp. 2008). *See* UNIF. PRUDENT MGMT. INST. FUNDS ACT § 3, comment, 7A pt. III U.L.A. 14 (Supp. 2008).

55. O.C.G.A. § 44-15-3(b) (Supp. 2008).

endowment spending to "historic dollar value."[56] The former act permitted the expenditure of appreciation of an endowment fund to the extent of the fund's appreciation above its historic dollar value.[57] Historic dollar value was the value of the contribution at the time it was made.[58] The new act directs the institution to determine spending based on the total assets of the endowment fund, with a focus on the uses, benefits, purposes, and duration of the endowment fund.[59]

The Georgia version of UPMIFA contains a variation from the uniform act on the rule relating to diversification of trust funds.[60] The uniform act adopts this rule: "An institution shall diversify the investments of an institutional fund unless the institution reasonably determines that, because of special circumstances, the purposes of the fund are better served without diversification."[61]

The Georgia version of UPMIFA replaces that language with the following:

> An institution shall reasonably manage the risk of concentrated holdings of assets by diversifying the investments of the institutional fund or by using some other appropriate mechanism, except as provided in this paragraph, as follows:
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> (A) The duty imposed by this paragraph shall not apply if the institution reasonably determines that, because of special circumstances, or because of the specific purposes, terms, distribution requirements, and other circumstances of the institutional fund, the purposes of such fund are better served without complying with the duty. For purposes of this paragraph, special circumstances shall include an asset's special relationship or special value, if any, to the charitable purposes of the institution or to the donor;
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> (B) No person responsible for managing and investing an institutional fund shall be liable for failing to comply with the duty imposed by this paragraph to the extent that the terms of the gift instrument or express written agreement between the donor and the institution limits or waives the duty; and

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56. UNIF. PRUDENT MGMT. INST. FUNDS ACT § 4, comment, 7A pt. III U.L.A. 17 (Supp. 2008).

57. O.C.G.A § 44-15-3 (2002), *amended by* Uniform Prudent Management Institutional Funds Act, O.C.G.A. §§ 44-15-1 to -8.

58. O.C.G.A. § 44-15-2(4), *amended by* Uniform Prudent Management Institutional Funds Act, O.C.G.A. § 44-15-1 to -8.

59. O.C.G.A. § 44-15-4(a) (Supp. 2008).

60. *See* O.C.G.A. § 44-15-3(e)(4) (Supp. 2008).

61. UNIF. PRUDENT MGMT. INST. FUNDS ACT § 3(e)(4) (Supp. 2008).

> (C) The governing board of an institution may retain property contributed by a donor to an institutional fund for as long as the governing board deems advisable.[62]

B. Georgia Revised Uniform Anatomical Gift Act

Chapter 5 of Title 44 of the O.C.G.A.[63] was amended in 2008 to replace the Georgia Anatomical Gift Act[64] with the Georgia Revised Uniform Anatomical Gift Act (revised Georgia act).[65] The revised Georgia act is modeled after the Uniform Revised Anatomical Gift Act[66] (revised uniform act), which was promulgated by the NCCUSL in 2006 and has been adopted by twenty states in addition to the state of Georgia.[67] Like the previous versions of the act, the new uniform act applies only to post-mortem gifts of body parts and, thus, does not apply to donations made while the donor is still alive.[68]

The revised uniform act was promulgated to respond to the ever-growing problem of organ shortage.[69] The revised Georgia act expands the category of persons who can make an anatomical gift, both during the donor's life and at the donor's death.[70] The former Georgia act only permitted an individual over the age of eighteen to consent to a post-

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62. O.C.G.A. § 44-15-3(e)(4).

63. O.C.G.A. ch. 44-5 (1991 & Supp. 2008).

64. O.C.G.A. §§ 44-5-140 to -151 (1991), *amended by* Georgia Revised Uniform Anatomical Gift Act, O.C.G.A. §§ 44-5-140 to -159.4 (Supp. 2008).

65. Ga. S. Bill, § 1, Reg. Sess. (2008) (codified as amended at O.C.G.A. §§ 44-5-140 to -159.4).

66. UNIF. ANATOMICAL GIFT ACT REV. "TABLE OF JURISDICTIONS" 8A U.L.A. 27 (Supp. 2008).

67. *See id.* for a list of the states that have adopted the revised uniform act. The first Uniform Anatomical Gift Act was promulgated in 1968 and was adopted by all of the states. However, the first revision of the Act, which was promulgated in 1987, was only adopted by twenty-six states, which resulted in non-uniformity among the states. *See* UNIF. ANATOMICAL GIFT ACT REV. "HISTORY OF THE 1968 AND 1987 ACTS" 8 U.L.A. 29 (Supp. 2008). In 1992, Georgia became one of the states that enacted the 1987 revisions. *See* 1992 Ga. Laws 2946-63.

68. O.C.G.A. § 44-5-141(3) (Supp. 2008). The act defines "anatomical gift" as "a donation of all or part of a human body to take effect after the donor's death for the purpose of transplantation, therapy, research, or education." *Id*.

69. UNIF. ANATOMICAL GIFT ACT "PREFATORY NOTE" 8 U.L.A. 28 (Supp. 2008).

> As of January, 2006 there were over 92,000 individuals on the waiting list for organ transplantation, and the list keeps growing. It is estimated that approximately 5,000 individuals join the waiting list each year. Every hour another person in the United States dies because of the lack of an organ to provide a life saving organ transplant. The lack of organs results from the lack of organ donors.

Id. (internal citation omitted).

70. *See* O.C.G.A. § 44-5-143 (Supp. 2008).

mortem anatomical gift while that individual was alive.[71] Under the revised Georgia act, this consent may also be given by an emancipated minor or by a minor who is age sixteen or over and authorized to apply for a driver's license.[72] In addition, the consent may be given during the donor's life by the donor's agent under a health care power of attorney or advance directive,[73] the donor's parent if the donor is an unemancipated minor,[74] or the donor's guardian.[75] The donor may make the anatomical gift by authorizing a statement or symbol on the donor's driver's license or identification card, by will, by a communication made to two adult witnesses if the donor is terminally ill or injured, or by the grant of the power to make such a gift to the donor's agent under a power of attorney or advance health care directive.[76] The revised Georgia act states affirmatively that a person other than the donor cannot amend or revoke a donor's anatomical gift.[77] The revised Georgia act provides that an individual may refuse to make an anatomical gift by a signed and witnessed statement,[78] by will (regardless of whether the will is admitted to probate or invalidated after the individual dies), or by a communication made to two adult witnesses

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71. O.C.G.A. § 44-5-143(a) (1991), *repealed by* Georgia Revised Uniform Anatomical Gift Act, O.C.G.A. §§ 44-5-140 to -159.4.

72. O.C.G.A. § 44-5-142(1) (Supp. 2008).

73. O.C.G.A. § 44-5-142(2) (Supp. 2008). The agent may not make the gift if the health care advance directive or power of attorney prohibits the agent from doing so. *Id.*

74. O.C.G.A. § 44-5-142(3) (Supp. 2008).

75. O.C.G.A. § 44-5-142(4) (Supp. 2008).

76. O.C.G.A. § 44-5-143(a) (Supp. 2008).

77. O.C.G.A. § 44-5-146(a) (Supp. 2008). The purpose of this section, which replicates § 8 of the revised uniform act, is described as follows by the drafters of the revised uniform act:

> For many years, however, it was the practice, albeit now changing, for procurement organizations to seek permission from donor families before parts could be recovered from deceased donors. This practice, however, is inconsistent both with the 1987 Act and, more importantly, the respect due to donors who have made anatomical gifts during their lives. Furthermore, that practice could result in unnecessary delays in the recovery of organs.
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> Section 8 is designed to state firmly the rule that a donor's autonomous decision regarding the making of an anatomical gift is to be honored and implemented and is not subject to change by others. Section 8 not only continues the policy of making lifetime donations irrevocable but also is restated to take away from families the power, right, or authority to consent to, amend, or revoke donations made by donors during their lifetimes.

UNIF. ANATOMICAL GIFT ACT REV. § 8, comment, 8A U.L.A. 54 (Supp. 2008).

78. O.C.G.A. § 44-5-145(b) (Supp. 2008). According to O.C.G.A. § 44-5-145 (Supp. 2008), the statement must be signed and witnessed by two adult witnesses, one of whom is a disinterested witness, and the statement must state that it has been signed and witnessed in accordance with the requirements of this statute. *Id*.

during the individual's terminal illness or injury.[79] However, even though (as noted above) the gift itself may be made by the donor's agent, parent, or guardian, the refusal to make an anatomical gift can only be made by the would-be donor.[80]

The revised act also expands the category of persons who can consent to an anatomical gift of all or part of a donor's body after the donor has died.[81] Under the former act, these included (in order of priority) the donor's spouse, adult children, parents, adult siblings, guardian of the person, or anyone else who was obliged or authorized to dispose of the donor's body.[82] The revised Georgia act adds to this list the decedent's agent under an advance directive or health care power of attorney, adult grandchildren, grandparents (first, sixth, and seventh in priority respectively), and last in priority, a representative ad litem appointed by a court of competent jurisdiction.[83] The representative ad litem may consent to the gift only upon determining that the decedent had not communicated a contrary intent and that there is no one available in a higher priority who objects to the gift.[84] This code section also provides that "[a] person may not make an anatomical gift if, at the time of the decedent's death, a person in a prior class . . . is reasonably available to make or to object to the making of an anatomical gift."[85]

The revised Georgia act amends the separate provisions of Georgia law relating to eye donations to bring these donations under the umbrella of the revised Georgia act.[86]

The revised Georgia act interacts with the new Georgia Advance Directive for Health Care Act[87] in two important ways. The first

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79. *Id.* § 44-5-145(a).

80. *Id.* § 44-5-145(d).

81. *See* O.C.G.A. § 44-5-147 (Supp. 2008).

82. O.C.G.A. § 44-5-143(b) (1991), *repealed by* Georgia Revised Uniform Anatomical Gift Act, O.C.G.A. §§ 44-5-140 to -159.4.

83. O.C.G.A. § 44-5-147. The revised uniform act does not include a representative ad litem but does include "an adult who exhibited special care or concern for the decedent." UNIF. ANATOMICAL GIFT ACT REV. § 9(a)(8), 8A U.L.A. 56 (Supp. 2008).

84. O.C.G.A. § 44-5-147(b).

85. *Id.* § 44-5-147(c).

86. Ga. S. Bill 405 § 4 (codified at O.C.G.A. § 40-5-6 (Supp. 2008) and scattered sections of O.C.G.A. tit. 31 (Supp. 2008)). The provisions relating to eye donations appear at Chapter 23 of Title 31 of the Georgia Code. *See* O.C.G.A. ch. 31-23 (2006 & Supp. 2008).

87. Ga. H.R. Bill 24 § 2, Reg. Sess. (2007) (codified at O.C.G.A. §§ 31-32-1 to -14 (Supp. 2008)). The Georgia Advance Directive for Health Care Act became effective in 2007. This Act authorizes the use of an advance directive for health care that combines the two documents that were traditionally referred to as a living will and a power of attorney for health care. O.C.G.A. §§ 31-32-1 to -14; *see* Mary F. Radford, *Wills, Trusts, Guardianships, and Fiduciary Administration*, 59 MERCER L. REV. 447, 459-62 (2007).

interaction revolves around the power of an agent to effect a limited or unqualified refusal to make an anatomical gift on behalf of the declarant.[88] Under the statutory form for the Georgia Advance Directives for Health Care, the declarant authorizes his or her health care agent to "make a disposition of any part or all of [the declarant's] body for medical purposes pursuant to the Georgia Revised Uniform Anatomical Gift Act" unless the declarant limits that authority.[89] The declarant is then given the choice to limit the agent's authority so that the agent will not have the power to dispose of the declarant's body or will not have the power to dispose of any of the declarant's organs.[90] Thus, for example, the Advance Directive for Health Care allows the declarant to authorize the agent to donate separate organs but at the same time prohibit the agent from donating the declarant's entire body.[91] Also, the declarant may mark both of the choices set out in the statute and thus prohibit the agent from making any anatomical gifts on behalf of the declarant.[92] Presumably a declarant who does not want to gift his or her body or organs would initial this portion of the form.

The revised Georgia Anatomical Gift Act differs from this section in two ways. First, when the revised Georgia act refers to an agent's power to authorize gifts, it makes no clear distinction between a gift of the entire body and a gift of separate organs.[93] However, as noted above, the revised Georgia act does limit those agents who can consent to gifts to agents who are not prohibited from doing so under the advance directive or power of attorney, so presumably a limitation in the advance directive would be respected.[94] Second, and more importantly, the revised Georgia act only allows a would-be donor to refuse to make an anatomical gift.[95] Does this mean that an agent under an advance directive or health care power of attorney may not object on behalf of the declarant to an anatomical gift of the declarant's body or organs? Probably not, although the revised Georgia act is not exactly clear on

88. *See* O.C.G.A. §§ 31-32-1 to -14.
89. O.C.G.A. § 31-32-4 Part One(5)(b) (Supp. 2008).
90. *Id.*
91. *See id.*
92. *See id.*
93. *See* O.C.G.A. §§ 31-32-1 to -14; O.C.G.A. ch. 44-5. At the end of the comment to the section of the uniform revised act that deals with the right of refusal, the drafters do indicate that an individual may sign a refusal that refers only to specific organs. *See* UNIF. ANATOMICAL GIFT ACT REV. § 7, comment, 8A U.L.A. 53 (Supp. 2008).
94. *See* O.C.G.A. § 44-5-147.
95. O.C.G.A. § 44-5-145.

this issue.[96] The revised Georgia act does indicate that individuals who may give consents are entitled to do so in an order of priority, and it states obliquely that an individual in a lower order of priority may not make a gift if there is someone in one of the higher orders who "is reasonably available to make or object to the making of an anatomical gift."[97] This seems to indicate that an agent, who is in the highest order of priority other than the individual donor, can object to the making of a gift. However, until this issue is clarified, individuals who want to refuse to make anatomical gifts should not count on their agents under an advance health care directive alone but rather should consider signing a separate witnessed statement in accordance with the requirements set forth in the revised Georgia act.[98]

The second important way in which the revised Georgia act interacts with the Georgia Advance Directive for Health Care revolves around the use of support systems to sustain a donor's body or organs so that an effective donation can occur.[99] The revised Georgia act contains this provision:

> If a prospective donor has an advance directive for health care in accordance with Chapter 32 of Title 31 or a declaration signed by a prospective donor, unless it expressly provides to the contrary, measures necessary to ensure the medical suitability of an organ for transplantation or therapy may not be withheld or withdrawn from the prospective donor.[100]

The Georgia Advance Directive for Health Care allows an individual to direct that no unnecessary procedures be used to prolong his or her life if the individual is terminally ill or in a state of permanent unconsciousness.[101] However, the revised Georgia act presumes that regardless of a direction in an advance directive that life support systems be discontinued, a donor has consented to whatever life support procedures are needed to preserve the donated organs for transplantation.[102] The drafters of the revised uniform act describe this problem as follows:

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96. *See id.*
97. O.C.G.A. § 44-5-147(c).
98. O.C.G.A. § 44-5-145(b). As noted above, the statement must be signed and witnessed by two adult witnesses (one of whom is a disinterested witness) and must state that it has been signed and witnessed in accordance with the requirements of this statute. *Id.*
99. *See* O.C.G.A. § 44-5-159 (Supp. 2008).
100. *Id.* This provision did not appear in the former act.
101. O.C.G.A. § 31-32-4, pt. Two(7) (Supp. 2008).
102. *See* O.C.G.A. § 31-32-4, pt. Two (Supp. 2008).

> The purpose of this section is to recognize a potential tension between the intent to make an anatomical gift and the intent to not have life support systems administered merely to prolong a life. The section presumes that for prospective donors the desire to save lives by making an anatomical gift trumps the desire to have life support systems withheld or withdrawn. Such measures are necessary for only a brief period of time. Individuals who desire to overcome this presumption can do so by express language in their advance health-care directive or declaration.[103]

C. Voluntary Legitimation

The Georgia General Assembly added a provision in 2005 that allows the parents of a child born out of wedlock to engage in a "voluntary legitimation" of the relationship between the father and the child.[104] Under O.C.G.A. § 19–7–22(g)(2),[105] the mother and father of a child born out of wedlock can legitimate the father-child relationship if both parents sign a voluntary acknowledgement of paternity that also includes an acknowledgement of legitimation.[106] In 2008 the Georgia legislature added O.C.G.A. § 19-7-21.1,[107] which describes in detail the effect of this "acknowledgement of legitimation."[108] According to the statute, the acknowledgment must be signed prior to the child's first birthday and may not be made if the child already has a "legal father" (for example husband of the mother, adoptive father, and so forth).[109] The acknowledgment is recorded in the putative fathers registry.[110] The acknowledgment does not give the father custody or visitation rights; those must be determined by a separate judicial proceeding.[111]

Even after the 2008 amendments, it remains unclear whether this method of legitimation is sufficient to establish inheritance rights between a father and child. The portion of O.C.G.A. § 19–7–22[112] that deals with a formal court order of legitimation specifically states that the

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103. UNIF. ANATOMICAL GIFT ACT REV. § 21, comment, 8 U.L.A. 74 (Supp. 2008).
104. O.C.G.A. § 19-7-22(g)(2) (Supp. 2008). This new provision was discussed in Mary F. Radford, *Wills, Trusts, Guardianships, and Fiduciary Administration*, 57 MERCER L. REV. 403, 417-18 (2005).
105. O.C.G.A. § 19-7-22(g)(2) (Supp. 2008).
106. *Id.*
107. O.C.G.A. § 19-7-21.1 (Supp. 2008).
108. *Id.*
109. *Id.*
110. *See* O.C.G.A. § 19-11-9 (2004).
111. *See* O.C.G.A. § 19-7-22(f)(1) (Supp. 2008).
112. O.C.G.A. § 19–7–22 (2004 & Supp. 2008).

order will result in inheritance rights between the father and the child,[113] but subsection (g)(2) of this Code section does not reference inheritance rights and does not contemplate a court order.[114] Also, if the voluntary acknowledgment is not a sworn statement, it does not meet the requirements of O.C.G.A. §§ 53–2–3[115] and 53–2–4,[116] which are the provisions of the Georgia Probate Code that deal with the inheritance rights of children born out of wedlock.[117]

D. Miscellaneous Legislation

The Georgia General Assembly enacted senate bill 508,[118] which contains a variety of provisions that relate to practice in the probate courts.[119] Important substantive amendments made by this bill include the following:

1) O.C.G.A. § 15-9-127,[120] which contains the list of matters over which certain probate courts have concurrent jurisdiction with superior courts, is expanded to add the "[a]djudication of petitions for direction or construction of a will pursuant to Code Section 23-2-92."[121]

2) Subsection (h) of O.C.G.A. § 29-3-3,[122] relating to the circumstances under which a natural guardian or conservator of a minor may compromise a claim without receiving consideration in a lump sum, is amended to clarify which court must approve such a compromise.[123] The amendment adds that the order approving such a compromise may be obtained from the court in which the action is pending instead of from the probate court, unless the total distribution that will be made to the minor before reaching the age of eighteen exceeds $15,000.[124]

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113. *Id.* § 19-7-22(c).
114. *See id.* § 19-7-22(g)(2).
115. O.C.G.A. § 53-2-3 (Supp. 2008).
116. O.C.G.A. § 53-2-4 (Supp. 2008).
117. *See id.*; O.C.G.A. § 53-2-3.
118. Ga. S. Bill 508, Reg. Sess. (2008).
119. *See id.*
120. O.C.G.A. § 15-9-127 (2008).
121. *Id.* § 15-9-127(9). The concurrent jurisdiction of certain probate courts and the superior courts is explained in RADFORD, *supra* note 1, § 6-1.
122. O.C.G.A. § 29-3-3(h) (Supp. 2008).
123. *Id.*
124. *Id.* Under O.C.G.A. § 29-3-1 (2007), a parent must qualify formally to serve as the conservator (or guardian of the property) of that parent's minor child if the amount of personal property owned by the minor exceeds $15,000. *Id.* For a discussion of the conservatorship of minors, see MARY F. RADFORD, GUARDIANSHIPS & CONSERVATORSHIPS IN GEORGIA ch. 3 (2005).

3) O.C.G.A. § 29-9-18,[125] relating to the sealing of records of conservatorships and guardianships, is amended to add the minor, the minor's parents, and the minor's legal counsel to the list of people who may examine the sealed records.[126] The amendment allows the judge to shorten the thirty-day period for giving notice to the ward, conservator, or guardian that someone is seeking to examine the records and allows the judge to grant the petition without notice.[127] The amendment also authorizes the judge to limit the portion of the file to which access is granted to that required to meet the legitimate needs of the petitioner.[128]

4) O.C.G.A. § 53-2-40,[129] relating to "no administration necessary," is amended to require that if the estate has an interest in real property, the probate court must file a copy of the order granting the petition in the deed records of the county in which the property is located.[130]

5) O.C.G.A. § 53-5-3,[131] which prescribes the time limit after which a will may not be offered for probate, is amended to delete the reference to an order granting year's support.[132] In other words, an order granting year's support will no longer cause the five-year statute of limitations to begin to run.[133]

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125. O.C.G.A. § 29-9-18 (Supp. 2008).
126. *Id.*
127. *Id.*
128. *Id.*
129. O.C.G.A. § 53-2-40 (1997 & Supp. 2008)).
130. *Id.* For a discussion of "no administration necessary" orders, see RADFORD, *supra* note 1, § 11-18.
131. O.C.G.A. § 53-5-3 (1997 & Supp. 2008).
132. *Id.*
133. For a discussion of the time limit for probating wills, see RADFORD, *supra* note 1, § 6-7.