

Wills, Trusts, Guardianships, and Fiduciary Administration

by Mary F. Radford*

This Article describes selected cases and significant legislation from the period of June 1, 2010 through May 31, 2011 that pertain to Georgia fiduciary law and estate planning.¹

I. GEORGIA CASES

A. *What Constitutes a Will*

The question in *Swain v. Lee*² was whether the documents at issue could possibly constitute a valid will.³ The testator, Ms. Collins, wrote a letter in 1999 “in which she stated . . . that Swain was to have ‘everything that’s in my name.’”⁴ The letter was not witnessed. In 2005, Collins took a blank will form and wrote in language that named Swain as the executor of her estate. She wrote nothing else on this form. Collins signed the form, and it was witnessed by three witnesses. Collins kept both of these documents together in an envelope and

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1. For an analysis of Georgia fiduciary law and estate planning during the prior survey period, see Mary F. Radford, *Wills, Trusts, Guardianships, and Fiduciary Administration*, *Annual Survey of Georgia Law*, 62 *MERCER L. REV.* 365 (2010).

2. 287 Ga. 825, 700 S.E.2d 541 (2010).

3. *Id.* at 825-26, 700 S.E.2d at 542.

4. *Id.* at 826, 700 S.E.2d at 542.

showed both documents to the witnesses when she signed the form.⁵ When Collins died, Swain attempted to probate the two documents as Collins's will. The temporary administrator of her estate filed a caveat. The Probate Court of Glynn County, Georgia, found that the documents did not constitute a valid will, so Swain appealed to the Superior Court of Glynn County, Georgia. The administrator filed a motion for judgment on the pleadings, which was granted.⁶ The Georgia Supreme Court reversed the order and remanded the case for trial, holding that an issue of fact existed as to whether the documents could be read together to create a valid will.⁷ The supreme court emphasized that the intention of the maker, gathered from the whole instrument and the surrounding circumstances, is determinative.⁸ The court noted that there is no required form for a will; nor must a will be written on one continuous sheet of paper or on sheets that are attached together.⁹ The court pointed out that Swain argued the letter and the will form were presented to the witnesses as an integrated document.¹⁰ This alone created an issue of fact as to the validity of the will.¹¹

B. *Proper Execution of a Will*

In *Auito v. Auito*,¹² the testator's will included a self-proving affidavit that complied substantially with the statutory form.¹³ In the body of the affidavit, the lines that were meant to contain the witnesses' names were blank. However, the witnesses did sign the affidavit on the appropriate signature lines. The caveator's only ground for attack of the will was that the self-proving affidavit was improper.¹⁴ The supreme court agreed with the probate court that the self-proving affidavit was adequate.¹⁵ The court noted that the three essential elements of a complete affidavit were met: "(a) a written oath . . .; (b) the signature of

5. *Id.* at 826, 700 S.E.2d at 542-43.

6. *Id.* at 825-26, 700 S.E.2d at 542.

7. *Id.* at 827-28, 700 S.E.2d at 543.

8. *Id.* at 827, 700 S.E.2d at 543; *see also* O.C.G.A. § 53-4-3 (2011).

9. *Swain*, 287 Ga. at 827, 700 S.E.2d at 543 (quoting *Jones v. Habersham*, 63 Ga. 146, 147 (1879)).

10. *Id.* at 826, 700 S.E.2d at 542-43.

11. *Id.* at 827, 700 S.E.2d at 543.

12. 288 Ga. 443, 704 S.E.2d 789 (2011).

13. *Id.* at 443, 704 S.E.2d at 789-90. This form appears at O.C.G.A. § 53-4-24(b) (2011). A will that is self-proved may be probated without the testimony of the witnesses. O.C.G.A. § 53-4-24(a) (2011). *See also* MARY F. RADFORD, *WILLS AND ADMINISTRATION IN GEORGIA* § 5:8 (7th ed. 2008).

14. *Auito*, 288 Ga. at 444, 704 S.E.2d at 790.

15. *Id.* at 444, 704 S.E.2d at 790-91.

the affiant; and (c) the attestation by an officer authorized to administer the oath that the affidavit was actually sworn by the affiant before the officer.”¹⁶ The court held that identification by name of the witnesses in the body of the affidavit is not essential.¹⁷

C. *Testamentary Capacity, Undue Influence, Ademption*

The most recent opinion in *Melican v. Parker (Melican III)*¹⁸ marks the third time the Georgia Supreme Court has issued an opinion relating to the final disposition of the estate of Mr. Harvey Strother. The 2008 case (*Melican I*)¹⁹ dealt primarily with standing to caveat the will.²⁰ The 2009 case (*Melican II*)²¹ addressed and found invalid the first and third codicils of Strother’s will.²² In *Melican III*, the court upheld the second codicil.²³

In the ten years prior to his death the testator Harvey Strother, a married man, executed three codicils to his will that favored his lover, Anne Melican, and her son.²⁴ These three codicils left a significant amount of money and property to Melican and her son. The first codicil left Melican a \$7900 monthly payment for life. The second codicil gave her a Florida condominium, provided the testator still owned it at his death. The third codicil—executed within weeks of Strother’s death—directed the payoff of a mortgage on a Cape Cod home shared by Melican and Strother and gave Melican’s son the Florida property on which his business was located.²⁵

The record establishes that “[t]he will named Sydney Parker as executor and as trustee of a testamentary trust created for [the] Testator’s wife.”²⁶ Acting in both capacities, Parker filed caveats to the codicils, in which he was joined by a grandson of the testator. The caveators claimed lack of testamentary capacity and undue influence.²⁷ In *Melican I*, the Georgia Supreme Court granted an interlocutory review of both the probate court’s denial of the propounders’ motion to

16. *Id.* at 443, 704 S.E.2d at 790 (quoting *Roberson v. Ocwen Fed. Bank*, 250 Ga. App. 350, 352, 553 S.E.2d 162, 165 (2001)).

17. *Id.* at 444, 704 S.E.2d at 790.

18. 289 Ga. 420, 711 S.E.2d 628 (2011).

19. *Melican v. Parker*, 283 Ga. 253, 657 S.E.2d 234 (2008).

20. *Id.* at 254-57, 657 S.E.2d at 236-38.

21. *Parker v. Melican*, 286 Ga. 185, 684 S.E.2d 654 (2009).

22. *Id.* at 185, 684 S.E.2d at 656.

23. *See Melican III*, 289 Ga. 421, 711 S.E.2d at 629-30.

24. *Melican I*, 283 Ga. at 253, 657 S.E.2d at 235.

25. *Melican II*, 286 Ga. at 185, 684 S.E.2d at 656.

26. *Melican I*, 283 Ga. at 253, 657 S.E.2d at 235.

27. *Id.* at 253, 657 S.E.2d at 235-36.

have the caveat dismissed and the denial of the motion for summary judgment.²⁸

First, the supreme court examined whether Parker, in his capacities as executor and testamentary trustee, had standing to file a caveat.²⁹ The supreme court noted that there has been a “healthy trend” to expand the category of interested persons who have standing to caveat a will.³⁰ The court examined decisions from other jurisdictions.³¹ The court did not resolve whether Parker as executor had standing to file a caveat, but it did conclude that Parker, as testamentary trustee, had a substantial interest in the estate.³²

The court distinguished this case from those in which a later codicil may affect the trustee by shifting control of the corpus or the payment of the fees from the trustee to someone else.³³ In such a case, the trustee would not have standing.³⁴ However, in the instant case the codicil changed the beneficiaries of the estate and caused an adverse effect on what the beneficiary of the trust would receive.³⁵ Thus, the court held that the probate court correctly denied the motion to dismiss the caveat for lack of standing.³⁶

Second, on the question of testamentary capacity, the caveators offered evidence of the testator’s extensive alcohol abuse and dependency. The testator usually drank up to one and a half gallons of wine per day, causing his blood alcohol level to be near 0.40 grams.³⁷ The caveators showed that he had been heavily intoxicated on the day after he signed the second codicil and earlier in the month when he signed the third codicil.³⁸ Other evidence showed that in the last months of his life, the testator suffered memory loss and was unable to make business decisions.³⁹

The supreme court held that the denial of the motion for summary judgment was improper as to the testator’s testamentary capacity because there remained a genuine issue of material fact when the

28. *Id.* at 253, 657 S.E.2d at 236.

29. *Id.* at 254-55, 657 S.E.2d at 236-37.

30. *Id.* at 254, 657 S.E.2d at 236 (quoting *State v. Haddock*, 140 So. 2d 631, 636 (Fla. Dist. Ct. App. 1962), *rev’d on other grounds*, 149 So. 2d 552 (Fla. 1963)).

31. *See id.* at 255, 657 S.E.2d at 236.

32. *Id.* at 255, 657 S.E.2d at 236-37.

33. *Id.* at 256, 657 S.E.2d at 237.

34. *Id.*

35. *Id.*

36. *Id.* at 257, 657 S.E.2d at 238.

37. *Id.*

38. *Id.* at 257-58, 657 S.E.2d at 238.

39. *Id.* at 258, 657 S.E.2d at 238-39.

evidence was construed most favorably for the caveators.⁴⁰ The court also determined that the denial of the propounders' motion for summary judgment on the undue influence issue was proper.⁴¹ The evidence showed that the seventy-nine-year-old testator was dependent on alcohol and suffered from numerous physical ailments.⁴² When he signed the second and third codicils, he was "in an incapacitated state, vulnerable, and easily manipulated."⁴³ When he stayed in Florida, he was entirely dependent upon Melican.⁴⁴ Melican took the testator to her own attorney, and she and her son sat in the office on either side of the testator when he signed the third codicil.⁴⁵ The court held that a genuine issue of material fact remained on the undue influence issue and remanded the case.⁴⁶

The case was tried in 2008 in the Probate Court of Cobb County, Georgia.⁴⁷ The jury found in favor of Melican on the first two codicils but found that the third codicil was invalid and both parties appealed.⁴⁸ In October 2009, the supreme court held in *Melican II* that the first codicil was invalid because it was not properly executed—thereby reversing the jury's finding in favor of the validity of the first codicil—and affirmed the jury verdict that the third codicil was invalid.⁴⁹ The court did not rule on the second codicil because it determined that the caveator's challenge with regard to the property listed in that codicil had not been ruled on by the trial court.⁵⁰

1. First and Third Codicils (*Melican II*). The two witnesses to the first codicil were healthcare workers who worked full-time for the testator beginning in September 2000.⁵¹ The first codicil was dated July 20, 2000.⁵² The first witness claimed that Strother asked her to sign a document, but he did not explain to her what it was. She testified that his signature was not on the document when she signed it. The second witness testified to the same facts, although there was conflicting

40. *Id.* at 258, 657 S.E.2d at 238.

41. *Id.* at 258, 657 S.E.2d at 239.

42. *Id.* at 258, 657 S.E.2d at 238.

43. *Id.*

44. *Id.* at 258, 657 S.E.2d at 239.

45. *Id.*

46. *Id.*

47. *Melican III*, 289 Ga. at 420 n.2, 711 S.E.2d at 629 n.2.

48. *Melican II*, 286 Ga. at 185, 684 S.E.2d at 656.

49. *Id.*

50. *Id.*

51. *Id.* at 185-86, 684 S.E.2d at 656.

52. *Id.* at 186 n.1, 684 S.E.2d at 657 n.1.

testimony in her earlier deposition.⁵³ The supreme court noted that section 53-4-20(b) of the Official Code of Georgia Annotated (O.C.G.A.)⁵⁴ requires a testator sign or acknowledge the signature on his or her will in the presence of two witnesses.⁵⁵ The supreme court stated the evidence showed that “it is clear [the] testator failed to sign or acknowledge his signature on the first codicil in the presence of at least one, and possibly both, subscribing witnesses.”⁵⁶ The propounders of the will alleged that, since the witnesses’ memories as to the circumstances surrounding their attestation were unclear, they should be treated as “unavailable” for testifying, thereby authorizing the jury to consider other testimony as to the validity of the codicil.⁵⁷ O.C.G.A. § 53-5-24⁵⁸ allows the consideration of other credible, disinterested persons’ testimony if “one or more of the subscribing witnesses to the will is dead or mentally or physically incapable of testifying or otherwise inaccessible.”⁵⁹ The court refused to entertain this argument and found that the testimony of at least one of the witnesses was “unequivocal.”⁶⁰ The court also refused to consider a clause in the codicil stating that the codicil was signed on the specified date as an attestation clause because the clause did not mention whether the testator signed or acknowledged his signature in the presence of the witnesses.⁶¹ The court went on to point out that an attestation clause only provides a presumption of due execution, and such a presumption was “rebutted by clear proof that the codicil was not properly executed.”⁶²

The propounders’ appeal of the jury verdict against the third codicil was based on the argument that the trial court improperly charged the jury with instructions that the caveators did not have the burden of proving the grounds of their caveat.⁶³ The supreme court pointed out that the propounders of a will have the burden of proving all elements of its validity, including the testamentary capacity of the testator and the free and voluntary execution of the will.⁶⁴ At trial, the caveators merely denied the propounders’ assertions that Strother had the

53. *Id.* at 186, 684 S.E.2d at 656.

54. O.C.G.A. § 53-4-20(b) (2011).

55. *Melican II*, 286 Ga. at 185, 684 S.E.2d at 656; *see also* O.C.G.A. § 53-4-20(b).

56. *Melican II*, 286 Ga. at 186, 684 S.E.2d at 656.

57. *Id.*

58. O.C.G.A. § 53-5-24 (2011).

59. *Id.*

60. *Melican II*, 286 Ga. at 186, 684 S.E.2d at 656.

61. *Id.* at 186, 684 S.E.2d at 656-57.

62. *Id.* at 186, 684 S.E.2d at 657.

63. *Id.* at 187, 684 S.E.2d at 657.

64. *Id.*

appropriate capacity and that the will was not the product of undue influence.⁶⁵ According to the court, since the caveators raised no affirmative defense, they did not assume the burden of proof and were merely required to rebut the propounders' prima facie case.⁶⁶

2. Second Codicil (*Melican III*). The second codicil to Strother's will dealt with a condominium located in Florida, so the Georgia Supreme Court applied Florida law.⁶⁷ The second codicil stated: "If I am still the owner of the Cozumel Condominium, Unit # 806, located in Marco Island, Florida at the time of my death, notwithstanding any provision in my [w]ill to the contrary, that property shall pass to Anne Melican."⁶⁸ Strother entered into a contract to sell the condominium before he died, but the closing did not occur until after his death. The executor claimed that the property had been adeemed and that Melican was not entitled to receive the proceeds of the sale.⁶⁹ Under the traditional ademption rule, if property that is devised in a will is not owned by the testator at death for any reason, the beneficiary to whom the property was devised receives no substitute for the property.⁷⁰ Melican claimed that Florida's "nonademption statute," section 732.606 of the Florida Statutes,⁷¹ applied.⁷² This statute provides, in pertinent part, that "[a] specific devisee has the right to the remaining specifically devised property and . . . [a]ny balance of the purchase price owing from a purchaser to the testator at death because of sale of the property"⁷³ This statute, according to the Georgia Supreme Court, overrode any previous Florida case law relating to the sale of a house prior to a decedent's death.⁷⁴ This case brings into play a doctrine accepted in both Georgia and Florida that is referred to as "equitable conversion."⁷⁵ The equitable conversion doctrine, as defined in the Florida case of *In re Estate of Sweet v. First National Bank of Clearwater*,⁷⁶ provides as follows:

65. *Id.*

66. *Id.*

67. *Melican III*, 289 Ga. at 421, 711 S.E.2d at 629.

68. *Id.* at 426, 711 S.E.2d at 632 (Carley, J., dissenting).

69. *Id.* at 420-21, 711 S.E.2d at 629 (majority opinion).

70. See RADFORD, *supra* note 13, § 8:4.

71. FLA. STAT. § 732.606 (2011), available at <http://www.leg.state.fl.us/statutes/>.

72. *Melican III*, 289 Ga. at 421, 711 S.E.2d 629-30 (internal quotation marks omitted).

73. FLA. STAT. § 732.606(a)(2).

74. *Melican III*, 289 Ga. at 422, 711 S.E.2d at 630.

75. See *id.*

76. 254 So. 2d 562 (Fla. Dist. Ct. App. 1971).

[W]hen an owner makes a specifically enforceable contract to sell his real property, the vendee becomes the beneficial owner and the vendor retains only naked legal title in trust for the vendee and as security for the vendee's performance Under this doctrine the vendor's interest is considered personalty and passes accordingly upon the vendor's death⁷⁷

Under this theory, when the contract between Strother and the purchaser was signed, Strother no longer owned the property.⁷⁸ However, the Georgia Supreme Court stated that the Florida statute prevailed; thus, Melican, under the statute, was entitled to receive any "balance of the purchase price" owed to Strother.⁷⁹ As none of the purchase price in this case had been paid at the time of Strother's death, Melican was entitled to the entire proceeds.⁸⁰ The Georgia court cited Florida case law that stated—in a somewhat different context—that the Florida nonademption statute would control.⁸¹

In the dissent, Justice Carley, joined by Justices Benham and Thompson, approached this case as a matter of fulfilling the clear intention of the testator, rather than as a matter that would be controlled by the nonademption statute.⁸² Justice Carley pointed out that a statute appearing at the beginning of the chapter in which the Florida nonademption statute appears provides that "[t]he intention of the testator as expressed in the will controls the legal effect of the testator's dispositions. The rules of construction[, including § 732.606] . . . shall apply *unless a contrary intention is indicated by the will.*"⁸³ Justice Carley noted a clear contrary intention apparent in the testator's words "[i]f I am still the owner"⁸⁴ The devise created a "conditional specific devise," the condition of which had not been met.⁸⁵

Justice Carley argued that the relevance of the equitable conversion doctrine was two-fold: first, the application of the doctrine caused Strother to no longer be the owner of the condominium; second, the application of the doctrine of equitable conversion would have caused Strother's interest in the condominium to be converted into personal

77. *Id.* at 563.

78. *Melican III*, 289 Ga. at 421, 711 S.E.2d at 630.

79. *Id.* at 421, 711 S.E.2d at 629-30; FLA. STAT. § 732.606(a)(2).

80. *Melican III*, 289 Ga. at 421, 711 S.E.2d at 630.

81. *Id.* at 421-22, 711 S.E.2d at 629-30.

82. *Id.* at 425, 711 S.E.2d at 632 (Carley, J., dissenting).

83. *Id.* at 427, 711 S.E.2d at 633 (alterations in original); FLA. STAT. § 733.6005(1) (2011), available at <http://www.leg.state.fl.us/statutes/>.

84. *Melican III*, 289 Ga. at 426, 711 S.E.2d at 632.

85. *Id.*

property when he signed the contract.⁸⁶ Thus, the dissent argued that Georgia law rather than Florida law should apply.⁸⁷

The Georgia Probate Code⁸⁸ also contains a nonademption statute that is not as broad as the Florida statute.⁸⁹ O.C.G.A. § 53-4-67⁹⁰ does not apply to the situation in which property that is the subject of a specific bequest is sold.⁹¹ Rather, the statute applies to circumstances that are beyond the control of the testator.⁹² Under the Georgia statute, if property is stolen, lost, destroyed, or condemned within six months of the decedent's death, the beneficiary of the specific testamentary gift is entitled to the insurance or condemnation proceeds.⁹³ O.C.G.A. § 53-4-55,⁹⁴ the first statute in the article that covers the construction of wills, directs the court to seek diligently the intent of the testator and to give effect to that intention.⁹⁵

D. Trustee's Discretion

*McPherson v. McPherson*⁹⁶ is the first trust case decided by a Georgia appellate court since the enactment of the Revised Georgia Trust Code of 2010 (the Revised Trust Code).⁹⁷ Although the Georgia Court of Appeals referenced the Revised Trust Code in its opinion, it ultimately determined that only a few of its provisions applied in this case.⁹⁸ Howard McPherson set up an irrevocable trust in 1990, at which time he had four children.⁹⁹ The trust gave the trustee discretion to pay out the income and principal of the trust in “equal or unequal” amounts to Howard's children, “as may be needed for their support [and] maintenance . . . taking into consideration any other means of support they or any of them may have to the knowledge of the Trustee.”¹⁰⁰ Howard reserved the right to remove a trustee “for reasonable cause” and replace

86. *Id.* at 427-28, 711 S.E.2d at 633-34.

87. *Id.* at 428, 711 S.E.2d at 634.

88. O.C.G.A. tit. 53, chs. 1-11 (2011).

89. See RADFORD, *supra* note 13, § 8:4.

90. O.C.G.A. § 53-4-67 (2011).

91. *See id.*

92. *See id.*

93. *Id.* § 53-4-67(b).

94. O.C.G.A. § 53-4-55 (2011).

95. *Id.*

96. 307 Ga. App. 548, 705 S.E.2d 314 (2011).

97. Ga. S. Bill 131, Reg. Sess., 2010 Ga. Laws 506 (codified at O.C.G.A. tit. 53, ch. 12 (2011)).

98. *McPherson*, 307 Ga. App. at 550-51, 705 S.E.2d at 317-18.

99. *Id.* at 548, 705 S.E.2d at 316.

100. *Id.*

that trustee with anyone but himself.¹⁰¹ In 1992, the four McPherson children served as trustees of the trust. The trustees distributed trust property in equal shares among the children from 1992 to 2005. In 2004, Howard told one son, Eric, that he was considering removing him as trustee for a number of reasons: Eric refused to sign certain documents, he put his girlfriend on the company payroll, and he threatened to sue his siblings. When Eric in fact sued his siblings a few months later, in March of 2005, Howard removed Eric as a trustee.¹⁰²

In July 2005, the trustees decided to distribute \$300,000 to each of the McPherson children. However, Eric's share was reduced to \$250,000 after he submitted a false affidavit in an attempt to have his child support payments reduced; the remaining \$50,000 was placed in a subtrust for his children. The trustees also decided to deduct from his share \$157,000 to cover the expenses of defending the lawsuit. Over the next three years, the children received \$2,240,000 each from the trust. Eric sued again in 2006, this time claiming that the trustees had abused their discretion and fiduciary duties by withholding the \$157,000 and by not taking into account the children's other resources. He also sought an injunction against his father for removing him as co-trustee.¹⁰³ The trustees sought and received summary judgment in their favor, and the court of appeals affirmed.¹⁰⁴

The court of appeals cited the Revised Trust Code, common law, and the Second and Third Restatements of Trusts¹⁰⁵ in its opinion.¹⁰⁶ The court noted that the Revised Trust Code does not require the trustee to consider other resources a beneficiary may have before distribution,¹⁰⁷ but that Howard included that direction in his trust.¹⁰⁸ The court also noted that the Revised Trust Code requires a trustee to exercise discretionary powers "in good faith."¹⁰⁹ The court held that

101. *Id.* at 548-49, 705 S.E.2d at 316.

102. *Id.* at 549, 705 S.E.2d at 316.

103. *Id.* at 549, 705 S.E.2d at 316-17.

104. *Id.* at 549-50, 553, 705 S.E.2d at 317, 319.

105. See RESTATEMENT (THIRD) OF TRUSTS (2003); RESTATEMENT (SECOND) OF TRUSTS (1987).

106. *McPherson*, 307 Ga. App. at 551, 705 S.E.2d at 318.

107. *Id.* at 550, 705 S.E.2d at 317; see O.C.G.A. § 53-12-245 (2011).

108. *McPherson*, 307 Ga. App. at 550, 705 S.E.2d at 317. Under O.C.G.A. § 53-12-7, the settlor of a trust is allowed to vary any of the terms of the Revised Trust Code, except those listed in that Code section. O.C.G.A. § 53-12-7 (2011). O.C.G.A. § 53-12-245 does not appear on this list. See O.C.G.A. § 53-12-7.

109. *McPherson*, 307 Ga. App. at 550, 705 S.E.2d at 317 (internal quotation marks omitted); see O.C.G.A. § 53-12-260 (2011). This requirement appears on the list in O.C.G.A. § 53-12-7(a)(4) and, thus, may not be varied by the settlor. See O.C.G.A. § 53-12-7.

judicial intervention was not appropriate absent a finding of bad faith.¹¹⁰ The court cited the Third Restatement of Trusts for the concept that a court may intervene only when trustees abuse their discretionary powers.¹¹¹ The court also pointed out that the Restatement's commentary advises that when there are multiple beneficiaries, a per stirpes distribution¹¹² is the presumed form of distribution.¹¹³ The court stated that Eric did not prove whether the trustees failed to take the beneficiaries' other resources into account, but even if they had failed to do so, the trust instrument allowed them to make distributions in unequal amounts.¹¹⁴ The court also articulated the "cardinal rule" that the settlor's intent should control.¹¹⁵ As to the reduction of Eric's share to pay for the costs of litigation, the court noted that Eric's first suit was unsuccessful and that the reduction was made on a "principled basis."¹¹⁶ Finally, the court determined that Eric's actions constituted "reasonable cause" for his removal.¹¹⁷

E. Guardians of Minors

Two cases decided during the reporting period confirm that parents have virtually unquestioned power to choose who will serve as guardians of their minor children. The case of *Zinkhan v. Bruce*¹¹⁸ began with the tragic incident of a college professor who shot and killed his wife and then killed himself. The couple had two minor children. In their wills, both nominated the husband's brother, Zinkhan, as the children's testamentary guardian.¹¹⁹ Immediately after the wife's death and

110. *McPherson*, 307 Ga. App. at 552, 705 S.E.2d at 318-19.

111. *Id.* at 551, 705 S.E.2d at 318; *see also* RESTATEMENT (THIRD) OF TRUSTS § 50.

112. For a discussion of the meaning of the term "per stirpes," *see* RADFORD, *supra* note 13, § 9:2.

113. *McPherson*, 307 Ga. App. at 552, 705 S.E.2d at 318; *see also* RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. f.

114. *McPherson*, 307 Ga. App. at 552, 705 S.E.2d at 318.

115. *Id.* (quoting *Griffith v. First Nat'l Bank & Trust Co.*, 249 Ga. 143, 146, 287 S.E.2d 526, 529 (1982)) (internal quotation marks omitted).

116. *Id.* at 553, 705 S.E.2d at 319; *see also* RESTATEMENT (THIRD) OF TRUSTS § 50 cmt. f.

117. *McPherson*, 307 Ga. App. at 553, 705 S.E.2d at 319. O.C.G.A. § 53-12-221 allows a trustee to be removed in accordance with the provisions of the trust instrument or for good cause. *See* O.C.G.A. § 53-12-221 (2011).

118. 305 Ga. App. 510, 699 S.E.2d 833 (2010).

119. *Id.* at 510, 699 S.E.2d at 834. O.C.G.A. § 29-2-4 allows a parent to nominate in the parent's will who will serve as testamentary guardian for the parent's minor children when the parent dies. O.C.G.A. § 29-2-4(a) (2007). O.C.G.A. § 29-2-4(b) requires the probate judge to issue letters of guardianship to the nominee "without notice or hearing provided that the individual is willing to serve." O.C.G.A. § 29-2-4(b) (2007). *See also*

before the husband was found, the wife's brother and sister-in-law (the Bruces) filed a petition for temporary guardianship of the children in McDuffie County, where the Bruces resided. The temporary guardianship was granted.¹²⁰ After the husband's body was found, Zinkhan filed to probate his brother's will in common form and for letters of testamentary guardianship over the children. Zinkhan filed in Athens-Clarke County, where the parents resided.¹²¹

The Athens-Clarke County Probate Judge admitted the will to probate but, at that point, declined to terminate the temporary guardianship by issuing letters of testamentary guardianship to Zinkhan.¹²² The Bruces filed petitions for permanent guardianship and conservatorship in McDuffie County; however, the McDuffie County Probate Court transferred the petitions to the Athens-Clarke County Probate Court. The Athens-Clarke County Probate Judge set a date for trial. On the trial date, the Bruces objected to the appointment of Zinkhan and requested an evidentiary hearing so that the best interests of the children could be determined. Both the Bruces and Zinkhan filed petitions to have the will admitted to probate in solemn form. The Athens-Clarke County Probate Judge granted Zinkhan's petition and, without a hearing, issued letters of testamentary guardianship to him.¹²³

A few months later, pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA),¹²⁴ the Bruces filed a petition for custody of the children.¹²⁵ Zinkhan's motion to dismiss the petition for lack of jurisdiction was denied. The McDuffie County Superior Court granted joint legal custody of the children to Zinkhan and the Bruces and temporary physical custody to the Bruces. Zinkhan appealed the custody order and the Bruces appealed the testamentary guardianship order. In particular, the Bruces stated that the probate court had

MARY F. RADFORD, *GUARDIANSHIPS & CONSERVATORSHIPS IN GEORGIA* § 2-3 (1st ed. 2005).

120. *Zinkhan*, 305 Ga. App. at 511, 699 S.E.2d at 835. The probate court may appoint a temporary guardian for a child upon the petition of the child's parent or other person who has custody of the minor. O.C.G.A. § 29-2-5(a) (2007). The temporary guardian will serve while the parent is unavailable or unwilling to perform parental duties. See RADFORD, *supra* note 119, § 2-4.

121. *Zinkhan*, 305 Ga. App. at 511, 699 S.E.2d at 834-35.

122. *Id.* at 511, 699 S.E.2d at 835.

123. *Id.* at 511-12, 699 S.E.2d at 835.

124. O.C.G.A. §§ 19-9-40 to -104 (2010).

125. *Zinkhan*, 305 Ga. App. at 512, 699 S.E.2d at 835. The official report of this case indicates that the Bruces filed in Athens-Clarke County, but the custody order was issued by the McDuffie County Superior Court. See *id.*

neglected to consider whether the appointment of Zinkhan as the children's guardian was in the children's best interests.¹²⁶

The court of appeals affirmed the grant of the letters of testamentary guardianship and reversed the custody order because the superior court lacked jurisdiction.¹²⁷ The court of appeals agreed with Zinkhan that probate courts have exclusive jurisdiction to grant letters of testamentary guardianship.¹²⁸ Under the Georgia Guardianship Code,¹²⁹ as testamentary guardian Zinkhan had the exclusive power to take custody of the children and provide for their "support, care, education, health, and welfare . . ." ¹³⁰ The court dismissed the Bruces' contention that the McDuffie County Court somehow had jurisdiction of the children under the UCCJEA, as that statute applies only to interstate custody disputes.¹³¹ The court also noted that a court's custody jurisdiction under O.C.G.A. § 19-7-1¹³² applies only to cases "between a parent and specified relatives. . ." ¹³³ The court further noted that the Bruces had an appropriate legal remedy in probate court; thus, it would be improper for the superior court to intervene in the name of "equity."¹³⁴ The court of appeals determined that the Athens-Clarke County Probate Court acted in accordance with the Georgia Guardianship Code when it issued letters of testamentary guardianship to Zinkhan without notice or hearing.¹³⁵ The court noted that O.C.G.A. § 29-2-4(a)¹³⁶ was intended to promote the United States Supreme Court's recognition of the rights of parents to "raise their children without undue state interference."¹³⁷ This statute reflects the rights of parents to determine who will be their children's guardian in their absence or after their deaths.¹³⁸

126. *Id.* at 510-11, 699 S.E.2d at 834.

127. *Id.* at 511, 699 S.E.2d at 834.

128. *Id.* at 513, 699 S.E.2d at 835; *see also* O.C.G.A. § 15-9-30(a)(2), (5) (2011).

129. O.C.G.A. tit. 29, ch. 2 (2007 & Supp. 2011).

130. *Zinkhan*, 305 Ga. App. at 513, 699 S.E.2d at 836 (emphasis omitted); *see also* O.C.G.A. § 29-2-22(a)(5) (Supp. 2011).

131. *Zinkhan*, 305 Ga. App. at 514, 699 S.E.2d at 836.

132. O.C.G.A. § 19-7-1 (2010).

133. *Zinkhan*, 305 Ga. App. at 514, 699 S.E.2d at 836.

134. *Id.* at 514, 699 S.E.2d at 836-37.

135. *Id.* at 516, 699 S.E.2d at 837.

136. O.C.G.A. § 29-2-4(a) (2007).

137. *Zinkhan*, 305 Ga. App. at 515, 699 S.E.2d at 837 (quoting *Brooks v. Parkerson*, 265 Ga. 189, 191, 454 S.E.2d 769, 771 (1995)).

138. *See id.* at 515-16, 699 S.E.2d at 837.

*Boddie v. Daniels*¹³⁹ involved a temporary guardianship¹⁴⁰ rather than a permanent testamentary guardianship.¹⁴¹ In this case, a non-parent petitioned for temporary guardianship of a minor and the minor's mother consented to the petition. Two years later the mother sought to terminate the temporary guardianship, and the temporary guardian objected.¹⁴² The records were transferred by the probate court to the juvenile court to determine whether the continuation of the guardianship would be in the best interest of the minor.¹⁴³ The juvenile court "found by a preponderance of the evidence that the best interests of the child [would] be served by continuing the temporary guardianship."¹⁴⁴ The mother challenged the "best interest" standard claiming it was an unconstitutional violation of her fundamental "right to raise her child" as she sees fit.¹⁴⁵ The mother contended that the best interest standard should be construed narrowly to require a finding that termination of the guardianship would cause harm to the child.¹⁴⁶ The mother based her argument on a case that construed the best interest standard narrowly in a custody hearing.¹⁴⁷

The Georgia Supreme Court agreed and determined that a dispute between a parent and a non-parent for custody of a child was substantially similar to a dispute over temporary guardianship because the termination of the guardianship would vest custody and control over the child in the parent.¹⁴⁸ The court concluded that in such cases the state should not be allowed to interfere with the parent's right absent a finding that such interference is in the child's best interest and the parent's decision would result in harm to the child.¹⁴⁹ Accordingly, the court held that O.C.G.A. § 29-2-8¹⁵⁰ requires the third party to prove by clear and convincing evidence that the child will suffer physical or emotional harm if the guardianship is terminated.¹⁵¹ The court

139. 288 Ga. 143, 702 S.E.2d 172 (2010).

140. See RADFORD, *supra* note 119, § 2-4, for a description of temporary guardianships.

141. *Boddie*, 288 Ga. at 143, 702 S.E.2d at 173.

142. *Id.*

143. *Id.* at 143, 702 S.E.2d at 173-74; *see also* O.C.G.A. § 29-2-8(b) (2007).

144. *Boddie*, 288 Ga. at 143-44, 702 S.E.2d at 174.

145. *Id.* at 144, 702 S.E.2d at 174 (internal quotation marks omitted).

146. *Id.*

147. *Id.* (citing *Clark v. Wade*, 273 Ga. 587, 588, 544 S.E.2d 99, 101 (2001) (holding best-interest standard should be construed narrowly and requiring a third party to show parental custody would harm the child)).

148. *Id.*

149. *Id.* at 146, 702 S.E.2d at 175.

150. O.C.G.A. § 29-2-8 (2007).

151. *Boddie*, 288 Ga. at 146, 702 S.E.2d at 175 (quoting *Clark v. Wade*, 273 Ga. 587, 598, 544 S.E.2d 99, 107 (2001)).

reversed the juvenile court's holding because in this case the lower court used only a preponderance of the evidence standard and made no finding that termination of the guardianship would harm the child.¹⁵²

F. Beneficiary Designations in Retirement Plans

In *Alcorn v. Appleton*,¹⁵³ the executor of Mr. Alcorn's estate, his daughter, and the executor's sister brought suit against their father's second wife, claiming that she should return assets she received under their father's 401(k) and life insurance plans. The trial court granted partial summary judgment in favor of the wife.¹⁵⁴ The court of appeals reversed.¹⁵⁵ The Alcorns entered into a separate maintenance agreement prior to Mr. Alcorn's death.¹⁵⁶ Pursuant to that agreement, both waived any rights they had to receive "any retirement pay, benefits, or privileges earned by the other during the marriage."¹⁵⁷ When Mr. Alcorn died, it was discovered that he had not designated a beneficiary for his 401(k) plan and had named his wife as the beneficiary of his employer-sponsored life insurance plan. The sisters did not dispute that the plan administrator appropriately paid the proceeds under both plans to Mr. Alcorn's wife, but instead they sued her directly for breach of contract and breach of the settlement agreement. The wife filed a motion to dismiss, which was granted.¹⁵⁸

The trial court relied on a United States Supreme Court case, *Kennedy v. Plan Administrator*,¹⁵⁹ in which an estate sued a plan administrator for distributing plan proceeds to an ex-wife who waived her rights to those benefits in a court decree.¹⁶⁰ In a footnote in *Alcorn*, the court of appeals quoted the Supreme Court opinion in *Kennedy* where the Court stated it "did not 'express any view as to whether the [e]state could have brought an action in state or federal court against [decedent's ex-wife] to obtain the benefits after they were distributed.'"¹⁶¹ On appeal, the sisters asserted that their case was exactly the type of case on which the Court in *Kennedy* declined to rule.¹⁶² The sisters cited

152. *Id.* at 143-44, 147, 702 S.E.2d at 174, 176.

153. 308 Ga. App. 663, 708 S.E.2d 390 (2011).

154. *Id.* at 663, 708 S.E.2d at 390.

155. *Id.* at 663, 708 S.E.2d at 391.

156. *Id.* at 663, 708 S.E.2d at 390.

157. *Id.* at 664, 708 S.E.2d at 391.

158. *Id.*

159. 555 U.S. 285 (2009).

160. *Id.* at 869.

161. *Alcorn*, 308 Ga. App. at 665 n.1, 708 S.E.2d at 392 n.1 (alteration in original) (quoting *Kennedy*, 555 U.S. at 300 n.10).

162. *Id.* at 665, 708 S.E.2d at 392.

cases from other jurisdictions that persuaded the court of appeals to reverse the grant of partial summary judgment and allow the case to proceed.¹⁶³

II. GEORGIA LEGISLATION

The Revised Georgia Trust Code of 2010¹⁶⁴ became effective on July 1, 2010.¹⁶⁵ In 2011, the legislature adopted amendments to the code that were designed primarily to correct typographical and other errors in the 2010 code and to make a few necessary substantive changes.¹⁶⁶ The major substantive changes are discussed briefly in this section.

A. *Who Has the Rights of a Qualified Beneficiary*

O.C.G.A. § 53-12-2(10)¹⁶⁷ describes certain trust beneficiaries as “qualified beneficiar[ies].”¹⁶⁸ These beneficiaries have certain enhanced rights to notice that are not shared by more remote or contingent beneficiaries.¹⁶⁹ The 2011 amendment to the definition of qualified beneficiary expands the definition by providing that certain other persons are treated as qualified beneficiaries even though they are not in fact “beneficiaries” of the trust.¹⁷⁰ The first of these two additional qualified beneficiaries is the Attorney General of the State of Georgia.¹⁷¹ Often charitable trusts do not have specific beneficiaries, as they are established for the good of the public at large. O.C.G.A. § 53-12-174¹⁷² states that the attorney general has the authority to represent the interest of the charitable beneficiaries.¹⁷³ Thus, it is appropriate that the attorney general should be given the same rights relating to notice and consent as qualified beneficiaries. The second additional qualified beneficiary is a person who has been appointed to enforce a trust that has been set up for the care of an animal.¹⁷⁴ Because the

163. *Id.*

164. O.C.G.A. tit. 53, ch. 12 (2011).

165. O.C.G.A. § 53-12-364(c) (2011).

166. Ga. S. Bill 134, §§ 6-14, Reg. Sess. (codified as amended in scattered sections of O.C.G.A. tit. 53, ch. 12).

167. O.C.G.A. § 53-12-2(10) (2011); *see also* Radford, *supra* note 1, at 378 n.120.

168. O.C.G.A. § 53-12-2(10).

169. *See, e.g., id.* §§ 53-12-210, -242 (2011).

170. *See id.* § 53-12-2(10).

171. *Id.*

172. *Id.* § 53-12-174 (2011).

173. *Id.*

174. *Id.* § 53-12-2(10). O.C.G.A. § 53-12-28(a) (2011) allows a settlor to set up a trust for the care of an animal. O.C.G.A. § 53-12-28(b) (2011) allows the settlor or the court to appoint a person to enforce the trust.

animal beneficiary cannot receive notice or give consent, the appointee is the appropriate person to take on this role.¹⁷⁵

B. Parent May Represent Child Who Is a Beneficiary

Minor children and even unborn children may be beneficiaries of trusts. For example, a grandmother might set up a trust to benefit her living children for their lives and then direct the trust assets to be divided among her grandchildren. The children or grandchildren of the grandmother may be minors and, in some cases, the grandchildren may not yet be born. There are many provisions in the code that require either notice to or the consent of beneficiaries.¹⁷⁶ In situations in which a beneficiary is not sui juris,¹⁷⁷ the code allows a guardian¹⁷⁸ or conservator¹⁷⁹ who has been appointed for the non sui juris beneficiary to act for that beneficiary.¹⁸⁰ If no guardian or conservator has been appointed, newly-added O.C.G.A. § 53-12-8¹⁸¹ allows parents to “represent” or act for their minor or unborn child, provided there is no conflict of interest between the parent and the child.¹⁸² This eliminates the need for the court to appoint a guardian ad litem, guardian, or conservator for the sole purpose of receiving notice or giving consent on behalf of most minors or unborn beneficiaries.

C. Agent Creating Trust for Incapacitated Principal

O.C.G.A. § 53-12-20(a)¹⁸³ allows an agent by power of attorney to create a trust for the principal, but only if the instrument appointing the agent contains express authorization for the agent to do so.¹⁸⁴ There is one group of trusts for which this requirement was found to be more

175. *Id.* § 53-12-2(10).

176. *See, e.g., id.* §§ 53-12-210, -242.

177. “Sui juris” is defined as “of full age and capacity.” BLACK’S LAW DICTIONARY 1572 (9th ed. 2009).

178. A “guardian” is the individual who takes care of a minor’s or incapacitated adult’s personal affairs. *See generally* O.C.G.A. tit. 29, ch. 2, 4 (2007 & Supp. 2011). Parents whose parental rights have not been terminated are deemed to be the “natural guardians” of their children. RADFORD, *supra* note 119, § 2-2.

179. A “conservator” is the person who handles the financial affairs of a minor or incapacitated adult. *See generally* O.C.G.A. tit. 29, ch. 3, 5 (2007 & Supp. 2011). Parents are not automatically the conservators of their children. RADFORD, *supra* note 119, § 3-1. Rather, if the child’s assets are greater than \$15,000, a parent must be appointed by the court as conservator in order to manage the child’s assets. *Id.*

180. *See, e.g.,* O.C.G.A. §§ 53-12-210, -242.

181. *Id.* § 53-12-8 (2011).

182. *Id.*

183. *Id.* § 53-12-20(a) (2011).

184. *Id.*

harmful than helpful; thus, the 2011 amendment to O.C.G.A. § 53-12-20¹⁸⁵ excepted these trusts from the requirement that the power of attorney contain an express authorization.¹⁸⁶ The type of trust at issue is a trust where the beneficiary requires nursing home care that is funded solely with the beneficiary's income, including income from Social Security and other retirement sources, and that will pay back to the state at the beneficiary's death all unexpended funds in the trust up to the value of the total medical assistance provided by the state.¹⁸⁷ This type of trust is sometimes referred to as a "Qualifying Income Trust" or a "Miller Trust."¹⁸⁸ This type of trust is important in a state such as Georgia where only those individuals whose income is below a certain amount are eligible for Medicaid.¹⁸⁹ Under current Georgia law, individuals cannot qualify for Medicaid assistance if they receive income that exceeds the Medicaid income cap, which as of 2011 is \$2022 per month.¹⁹⁰ The average cost of nursing home care in Georgia as of 2011 is \$4916.55.¹⁹¹ Thus, there exists a group of individuals who are too "rich" to qualify for Medicaid yet too "poor" to afford to live in a nursing home. Under federal law, these individuals may set up a Qualifying Income Trust.¹⁹² Many of the individuals for whom such trusts become appropriate have already receded to such a low level of capacity that they no longer have the capacity to set up a trust.¹⁹³ These individuals also often have powers of attorney that were signed prior to the 2010 amendment, which requires that the power of attorney contain express authorization for the agent to set up a trust for the principal.¹⁹⁴ Thus, prior to the 2011 amendment, to set up a trust for

185. *Id.* § 53-12-20 (2011).

186. *See id.* § 53-12-20(d).

187. *See* 42 U.S.C. § 1396p(d)(4) (2006 & Supp. III 2009).

188. The Colorado case that first recognized the use of these trusts to make the settlor eligible for Medicaid was *Miller v. Ibarra*, 746 F. Supp. 19 (D. Colo. 1990). Congress codified the use of these trusts in the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993) (codified at 42 U.S.C. § 1396p(d)(4) (2006)).

189. *Medicaid ABCs*, GEORGIA.GOV, http://dch.georgia.gov/00/article/0,2086,31446711_31944826_165785703,00.html (last visited Aug. 25, 2011) ("Medicaid is a medical assistance program that helps many people who can't afford medical care pay for some or all of their medical bills.").

190. *Eligibility Criteria Chart*, GEORGIA.GOV, http://dch.georgia.gov/00/article/0,2086,31446711_31945377_31944881,00.html (last visited Aug. 25, 2011).

191. *Key Medicaid Information for Georgia 2011*, ELDERLAWANSWERS.COM, <http://www.elderlawanswers.com/Resources/Article.asp?scope=GA&key=keym> (last visited Aug. 25, 2011).

192. 42 U.S.C. § 1396p(d)(4).

193. O.C.G.A. § 53-12-23 (2011) describes the capacity necessary to establish a trust.

194. *See* O.C.G.A. § 53-12-20(a).

such individuals it was necessary to appoint a conservator for those individuals, a procedure which could be costly and time-consuming.¹⁹⁵ The exception that was added by the 2011 amendment now allows the agents of such individuals to set up a Miller Trust even if the power of attorney does not contain express authorization for an agent to establish a trust on behalf of the principal.¹⁹⁶

195. For a discussion of conservatorships for incapacitated adults, see RADFORD, *supra* note 119, ch. 5.

196. See O.C.G.A. § 53-12-20(d).