Presented by Mary Radford "Recent Developments in Georgia Fiduciary Law"
April 2019 Atlanta Bar Estate Planning & Probate Section Luncheon
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All of the Estate Planning & Probate section meetings that feature Professor Mary Radford are incredible, but the April luncheon at the Capital City Club was an exceptionally informative meeting that dove into a broad scope of issues at the forefront of fiduciary law in Georgia. Topics ranged from legislative developments under the Gold Dome to case developments in the courts.

On the legislative side, Radford outlined a number of "housekeeping" changes in the 2019 session that should help to cleanup guardianship issues (under HB70). The changes range from correcting minor errors to adding language that was omitted in 2018. Among the most important changes, she notes that the new legislation helps to marry the Georgia law with the Uniform law passed in 2016. The new Code allows conservators' access to digital assets of a minor and addresses bonding requirements for guardians of a minor. Specifically, the updated language provides that when a guardian is required to give bond, the premium "shall" be paid from the estate of the minor, if so requested. As to which party should pay costs for court appointed attorneys in guardianship matters more generally, the updated legislation puts that question at the discretion of the Probate Court and gives the courts points to consider. These include the value of the estate of a minor, the conduct of the petitioners, and whether there has been a breach of fiduciary duty (particularly exploitation/elder abuse). The new Code also addresses foreign conservators who register their orders in Georgia and how orders from other states are registered generally. Overall, Radford considered the guardianship changes put in place to be an improvement.

Notable among legislation that did not pass in the 2019 session, Radford points out that there was another attempt to pass provisions for a "Self-Settled Asset Protection Trust" in Georgia. While used in some states to help protect property from creditors, she notes Georgia's strong creditor protection stance was one impediment. Additionally, the Fiduciary Law Section of the State Bar did not endorse this legislation. See the end of this article for a review of the 2018 laws that will more fully explain the laws that were modified in 2019.

Turning to case developments, Radford first discussed one particularly troublesome decision in which she thinks a future legislative fix may be needed. For *In Re Estate of Jones*, 346 Ga. App. 877, 815 S.E.2d 599 (June 2018) cert. denied (April 2019), the step-son of the decedent was not provided notice of a probate petition filed in November of 2015 for a 2013 will. Notice was not required, as he was merely an un-adopted stepson, not an heir-at-law. Several months after the 2013 will had been admitted to probate in solemn form, the step-son filed a separate petition to probate an older will, in which he was listed as a beneficiary. The probate court entered an order that denied the motion to intervene, denied his set-aside petition, and reaffirmed the order admitting the 2013 will to probate. This was done on the reasoning that he had not satisfied the requirements of O.C.G.A. §9-11-60 (the provision of the Civil Practice Act

pertaining to the grounds for obtaining relief from judgments) and no separate basis existed for obtaining such relief under O.C.G.A. §53-5-50 (the provision of the Probate Code pertaining to an action to set aside a probate court order admitting a will into probate). The Georgia Court of Appeals, however, found that the "plain language" of O.C.G.A. §53-5-50 & O.C.G.A. §53-5-51 reflect a legislative intent that the probate court entertain the merits of a claim, even if the probate court has already admitted a different will to probate. While admitting a tension between the Civil Practice Act and the Probate Code, the Appeals Court found that the constraints of O.C.G.A. §9-11-60 did not apply and remanded the case for the Probate Court to consider the petition's merits.

This strict construction, Radford notes, is a consistent trend in Georgia Courts. Her concern is that this reliance on Title 53 could actually make solemn form probate less binding than common form. Because the petitioner was not an heir-at-law and did not get notice, he would seem to have an open-ended ability to set-aside the prior probated will; whereas at least with common form, Radford explains, you start the clock on the statue of limitations for both the heir *and* the rest of the world. In April 2019, Radford had hoped that the Georgia Supreme Court would provide some clarity on the issue, but the court denied the petition for certiorari later that month.

There is another strict construction case that shows that a trial court should not ignore the **Uniform Partition of Heirs Property Act** (UPHPA) if there is a partition action filed on or after January 1, 2013. *Faison et al. v. Faison*, 344 Ga. App. 600, 811 S.E.2d 431 (Feb. 2018). It is mandatory to determine if the property is heirs property if the partition action is filed after the effective date. Under the UPHPA, an appraisal was required to show the property's fair market value. The Court of Appeals allowed defaulting heirs to set aside the trial court's final order based on a settlement agreement of the non-defaulting heirs and reversed the trial court's denial for a new trial. The case was remanded for further proceedings. All of the heirs would have had to agree to set aside the requirements of the UPHPA. The fourteen heirs became co-tenants of 400 acres of land in Wilcox County, GA when Alfonzo Faison died.

Notable tort cases included *Hayes v. Hines*, 347 Ga. App. 802, 821 S.E.2d 52 (Oct. 2018) and *Cooper Tire & Rubber Company v. Koch*, 303 Ga. 336, 812 S.E.2d 256 (March 2018) which are listed in Radford's outline under Administration of the Estate. For medical malpractice tort cases, *Hayes* establishes that the two year statute of limitations will toll from the time of death until a representative of the estate is appointed. Even where the future administrator had hired lawyers and experts prior to the opening of the estate opening (and thus at least entertaining litigation), the Court of Appeals found the statute did not start until he was actually appointed administrator. In *Cooper Tire*, the decedent's wife (and later executor of his estate) saved a single tire from the automobile accident that ultimately resulted in her husband's death; she did so at the decedents' direction shortly before his death, and she allowed the rest of the car to be destroyed by the salvage company. The Supreme Court chose to examine whether she should have saved more than just the tire from *her* perspective, and whether she should have reasonably foreseen the possibility that litigation would arise. Finding that her husband had not

given her a specific reason to save the tire and that she had not engaged counsel at the time, the Supreme Court of Georgia affirmed the admissibility of the tire as evidence.

Coleman v. United Health Services of Georgia, Inc. et al., 344 Ga. App. 682, 812 S.E.2d 24 (Feb. 2018) is also found in Professor Radford's outline under Administration of the Estate, specifically Claims By and Against the Estate, as is *Hayes*. The case revolved around the Advance Directive for Health Care when the agent signed the admission documents to a long-term healthcare facility. Biggerstaff, the agent and brother-in-law of Coleman, stated that he had power of attorney to a United Health Services memory unit staff, signed the admission paperwork and "executed a voluntary arbitration agreement." Coleman did not say anything as he was not present in March 2014 when his agent signed the paperwork. Coleman had earlier signed the admission documents and a voluntary arbitration agreement at another United Health Services facility the year before; he also noted on several forms that Biggerstaff was his "representative".

Coleman sued in December 2014 when he was injured at the second facility. The Georgia Court of Appeals reversed the trial court's decision that compelled arbitration. Radford wrote in her outline that the Appeals Court found "that an Advance Directive for Health Care did not serve to authorize the designated representative to bind the principal to an arbitration agreement that was included in documents preceding the principal's admission to a nursing care facility." Furthermore, the Appeals Court found that the Advance Directive agent was only for health care decisions and the arbitration agreement was not a health care decision. The agent would have only been bound if the arbitration agreement was mandatory before the patient could be admitted.

Continuing with the theme of strict construction, Radford laid out the failure of a public policy plea made to the Georgia Court of Appeals in *Duncan et al. v. Olga Rawls et al.*, 345 Ga. App. 345, 812 S.E.2d 647 (March 2018). The case dealt with the No Contest Clause. Olga Goizuetta, who later became Olga Rawls, was the widow of Roberto Goizuetta, the late CEO of the Coca-Cola Company; she inherited all of his wealth. Here, Olga, the decedent, and her children (named as trustees) had made a number of amendments to her revocable pour-over trust over the course of two years. First, they provided for specific monetary requests to current/former employees, later reducing that amount and finally eliminating it entirely. Each of these amendments contained a "no contest" in terrorem clause that applied even when such a contest was made "in good faith and with probable cause." Sticking with a strict constructionist vision, the Court declined to adopt a judicially imposed good faith/probable cause exception to an in terrorem clause in a trust. Radford clarified that while O.C.G.A. §53-4-68(a) does provide that an in terrorem clause deemed to be against public policy shall be void in matters regarding wills, O.C.G.A. §53-12-22(b) governing trusts contains no such language. This distinction was important to the Court of Appeals. Here Radford thinks there may be groundwork for possible new legislation on the issue, noting that several of the judges' opinions acknowledged the potential merits of a good faith/probable cause exception, if so enacted by the legislature.

Barnes et al. v. Channel et al., 303 Ga. 88, 810 S.E.2d 549 (February 2018) is a case under Radford's outline concerned with Procedural and Jurisdictional Matters, specifically Injunctions. *Barnes* primarily dealt with establishing the proper standards for interlocutory injunctive relief when the trial court ruled without a jury that an agent, Barnes, had given up his rights as a beneficiary under the will due to his "bad conduct" while procuring a quitclaim deed from his aunt, the principal. During the hearing, the attorney for Barnes made several objections that they did not want permanent relief. Radford's outline quoted that the Georgia Supreme Court said, "[T]he general rule is that entering permanent relief after an interlocutory hearing is improper." There are exceptions in certain circumstances under the Civil Practice Act. The court further noted that due process will be better served if the litigants have the opportunity for fair notice and a chance to be heard before a case is to be decided on the merits. Additionally, neither side had finished discovery; discovery had only been open for three and a half months while the normal time for discovery is six months. The Supreme Court ruled that it was not permissible for the trial court to curtail discovery.

The April luncheon included a litany of other interesting/important cases, all laid out with the precision and rapid-fire for which Mary Radford is known. We have chosen here to highlight just a few that stood out to us, but certainly there are many more cases of value she discussed.

Many of the 2018 laws Professor Radford covered in April 2019 may already be familiar to you. In case you missed the discussion last April 2018, we will provide you with the title and code section and possibly some important facts about those that follow. The 2018 laws provide a foundation for many of the 2019 laws passed and reviewed above.

On March 3, 2018, the Governor signed the **Supporting and Strengthening Families Act** as a replacement for the **2008 Grandparents' Power of Attorney Act.** The Act is described as far-reaching by giving parents a way to "transfer temporary caregiving authority to an adult relative or approved "agent" without a court proceeding or the involvement of the Division of Family and Children Services." O.C.G.A. §§19-9-120 through 19-9-134. The preamble states that the law allows for the saving of the time and expense of a court proceeding or the involvement of DFACS while also increasing a family's stability.

Under this new statute, the type of relatives who may be granted the power of attorney must be Georgia residents. For nonrelatives, they must be approved by certain entities and provide a criminal background check. The rights and duties for the temporary caregiving authority "shall have the same rights, duties, and responsibilities that would otherwise be exercised" by the child's parent. However, under this 2018 act, there are certain powers that a parent is not allowed to delegate such as the power to consent to the marriage or adoption of the child, the performance or inducement of an abortion on or for the child, and the termination of parental rights for the child.

The Uniform Power of Attorney Act Revisions O.C.G.A. §10-6B-1 were signed by the Governor on May 7, 2018. It changed the name to "**Georgia Power of Attorney Act**". It is important that practitioners update their Power of Attorney forms so clients will have the best chance for

banks and other financial institutions to honor them. The 2018 law also protects the principal more than the 2017 version of the Power of Attorney.

On May 3, 2018, there were major substantive revisions to the **Georgia Trust Code**. The period of the statutory **Rule against Perpetuities** was changed from 90 years to 360 years and is "effective for nonvested interests in property created on or after July 1, 2018." Under Representation in the Trust Code, it "contains an expanded list of individuals who can represent and bind another person for trust matters, codifies the common law doctrine of 'virtual representation', and clarifies that no person may represent another person if there is a conflict of interest." O.C.G.A. §52-12-8.

The ability of interested parties to enter into binding non-judicial settlements is now codified. O.C.G.A. §53-12-9. Furthermore, a trust instrument may now give a trustee or other person a power to modify or terminate the trust without court approval. O.C.G.A. §53-12-61. The new O.C.G.A. §53-12-62 "allows the trustee of a discretionary noncharitable trust appoint the trust property from the original trust to a second trust without court approval or beneficiary consent."

O.C.G.A. §53-12-65 has raised the threshold amount to $100,000 for **Small Trusts**; O.C.G.A. §53-12-210 added a basic dollar amount for Compensation; and O.C.G.A. §53-12-261 added a new subsection for Trustee Powers. Furthermore, Georgia has become the second state to adopt a version of the **Uniform Directed Trusts Act**. O.C.G.A. §53-12-500.

Before HB 190, the two witnesses for the signing of an **Antenuptial Agreement** did not have to be a notary public. O.C.G.A. §19-3-62 now requires Antenuptial Agreements to be attested by a Notary Public.

The **Revised Uniform Fiduciary Access to Digital Assets Act** O.C.G.A §53-13-1 et seq. distinguishes between a "catalogue of electronic communications" from the "content of an electronic communication". The identifying information of each person the user has had communication with is being distinguished from the actual information or meaning of the communication. Access to these digital assets may be granted with an online tool or in a will, trust, power of attorney or other record. If requested by the deceased user or ordered by the court, the custodian must divulge the content to the user's personal representative, but if not, the custodian only has to disclose the catalog. If a power of attorney grants authority over the content, the custodian must disclose; however, if the Power of Attorney only grants a power over digital assets, then the custodian is only required to disclose the catalogue. For trusts, the custodian must disclose content and catalog if the trustee is the original user of the account. For a conservator, they must ask the court for permission to handle a ward's digital assets. Radford's outline states that this Power of Attorney adds "that an agent may exercise all authority over digital assets for which an expert grant by the principal is not required and adds as a 'hot power' the power to 'exercise authority over the content of electronic communications sent or received by the principal.'"

SB 436 was signed by the Governor on May 3, 2018; the bill affected the **Georgia Probate Courts**. There were revisions to training requirements for probate judges and the make-up of the Probate Judges Training Council was clarified. The "requirement that the term of an associate judge end upon the termination of the term of the probate judge who appointed the associate judge" was repealed. The bond of probate judges was raised from $25,000 to $100,000 and stated that "the county authority shall pay the bond". The procedures for vacancies in the office of probate judge were updated. The **Self-Settled Asset Protection Trusts** (SSAPTs) was vetoed by the Governor on May 8, 2018 as well as in 2019.

Professor Radford's depth of knowledge together with up-to-date developments makes her talks an important part of staying abreast of fiduciary law in Georgia. We highly recommend our members of the Estate and Probate Section to attend future events that feature her insights.

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