432+ FAQS About Drafting, Executing & Administering Simple Wills and Other Basic Estate Planning Documents in Georgia©

Updated 11/11/15

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Many thanks to Teri Townsend for helping to ensure these materials are kept current and up to date.

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PART I - THE BASICS

1. What Is A Decedent?

A. An individual who dies with or without a Will.

General Note: The term "Decedent" is sometimes used interchangeably to refer to the Testator or Testatrix.

2. What Is A Testator?

A. A ***Testator*** is a man making a Will.

3. What Is A Testatrix?

A. A ***Testatrix*** is a woman making a Will.

4. What Is An Estate?

A. An Estate consists of all property and other earthly possessions belonging to a Decedent.

5. What Are The Basic Estate Planning Documents?

A. The basic estate planning documents are:

1. A Simple Will;
2. An Advance Health Care Directive *a/k/a* Advance Directive *f/k/a* Living Will and Health Care Power of Attorney *a/k/a* Health Care POA;
3. A Financial Power of Attorney *a/k/a* Financial POA;
4. A Designation of Standby Guardian *a/k/a* Standby Guardianship;
5. A Nomination or Conservator and Guardian *a/k/a* Guardianship & Conservatorship, and;
6. A "Inter Vivos" Trust.

6. What Does A Will Do?

A. A Will performs 4 major functions:

1. Allows an individual ("***Testator***" male, "***Testatrix***" female) to "gift," "devise," "bequeath" or otherwise give away their property to others ("Beneficiaries") upon the death of the Testator/Testatrix[1].
2. Allows the Testator/Testatrix to appoint an ***Executor*** to oversee the management or administration of their Will[2].
3. Allows the Testator/Testatrix to establish a "***Testamentary Trust***" and appoint a "***Testamentary Trustee***" to hold and protect property passing to a Beneficiary such as a minor child or incapacitated adult.[3]
4. Allows the Testator/Testatrix to appoint a "***Testamentary Guardian***" or "***Testamentary Conservator***" to protect the interests of any minor children of the Testator/Testatrix.

General Notes: A Will is a powerful tool because it allows the Testator/Testatrix to accomplish in one document multiple tasks that would normally require multiple documents.

Everyone can benefit from a Will.

7. When Does A Will Take Effect?

A. A Will does not take effect until the death of the Testator/Testatrix

8. When Does A Will Terminate?

A. A Will terminates upon the distribution of all the assets, the completion of all the conditions or other requirements created by the Will, and/or completion of probate by the Court.[4]

9. What Does An Advance Directive Do?

A. An Advance Directive performs 3 major functions:

1. Allows an individual ("***Declarant***") to appoint a "***Health Care Agent***" to make decisions when the individual is unable to do so;

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1 O.C.G.A. § 53-1-2(17).
2 O.C.G.A. § 53-6-10.
3 O.C.G.A. § 53-1-2(17).
4 O.C.G.A. § 53-4-2.

2. Allows the Declarant to ***pre-select health care treatment preferences*** in the event they are later unable to do so, and;

3. Allows the Declarant to appoint a "***Guardian***" to watch over them and make decisions concerning their support, care, health (not covered by the Advance Directive) and welfare should they be needed.

General Notes: An Advance Directive is a powerful tool because it allows the Declarant to accomplish multiple tasks in one document, whereas this would normally require multiple documents.

Everyone can benefit from an Advance Directive.

10. When Does An Advance Directive Take Effect?

A. An Advance Directive does not take effect until the Declarant has a "***Terminal Condition***" or is in a "***State of Permanent Unconsciousness***" as determined by two Health Care Professionals

11. When Does An Advance Directive Terminate?

A. An Advance Directive terminates upon the death of the Declarant, or the disposition of the Declarant's remains.

12. What Does A Financial Power Of Attorney Do?

A. A Financial POA allows an individual ("***Principal***") to appoint another individual ("***Agent***") to conduct financial affairs on behalf of the Principal (i.e. banking, insurance, etc.) for the convenience of the Principal or if the Principal is physically unable to do so.

General Note: The incapacitated, elderly or their caregivers benefit most from a Financial POA.

13. When Does A Financial POA Take Effect?

A. A Financial POA does not take effect until the date selected by the Principal

14. When Does A Financial POA Terminate?

A. A Financial POA terminates upon the earlier of: the death of the Principal, revocation by the Principal, or the appointment of a guardian or conservator for the Principal.

15. What Does A Standby Guardianship Designation Do?

A. A Standby Guardian Designation allows the Natural Guardian (i.e. a Parent or Permanent Guardian) to appoint an individual to serve as a "***Standby Guardian***" to act as the guardian of a minor child on a temporary basis in the event of a temporary incapacity of the Parent or Guardian.

General Note: Single parents of minor children benefit most from a Standby Guardian Designation.

16. When Does A Standby Guardianship Take Effect?

A. A Standby Guardianship does not take effect until a "Health Care Professional" issues a determination that the individual appointing the Standby Guardian is unable to care for the minor child and the Standby Guardianship designation along with the health care determination are filed with the probate court.

17. When Does A Standby Guardianship Terminate?

A. A Standby Guardianship terminates no later than 120 days following the date of the health care determination, unless the Standby Guardian seeks an extension from the probate court, in which case the guardianship may be extended indefinitely.

18. What Does A Nomination Of Guardian And/Or Conservator Do?

A. A Nomination of Guardian and/or Conservator allows an individual, spouse, parent, or adult child to ***nominate a permanent guardian and/or conservator*** for themselves, a spouse, their minor children, an incapacitated adult relative or loved one.

General Note: The minor and adult children of the incapacitated or elderly benefit most from a Nomination of Guardian and Conservator.

Practice Tip: The nomination of a Testamentary Guardian and Conservator of a minor child by a parent (i.e. "Natural Guardian") in a Simple Will is given far more preference by the Probate Courts than a Nomination of Guardian and Conservator by a Natural Guardian.

19. When Does A Guardianship And/Or Conservatorship Take Effect?

A. A Guardianship and/or Conservatorship does not take effect until the Probate Court approves the Nomination of Guardian and/or Conservator and issues "***Letters of Guardianship/ Conservatorship***".

20. When Does A Guardianship And/Or Conservatorship Terminate?

A. A Guardianship or Conservatorship generally terminates when it is revoked or terminated, the minor becomes an adult or is emancipated, the adult Ward is no longer incapacitated, or upon the death of the minor child or adult Ward.

21. What Does an "*Inter" Vivos*" Trust do?

A. An "Inter Vivos" trust performs 4 major functions:

1. Allows the person or entity creating the trust ("Settlor'), to transfer legal title to the property into the hands of a Trustee
2. allows the Settlor name a person or entity ("Beneficiary") who receives the benefit of the property and any income derived there from ("Res");
3. In many circumstances allows the Settlor to Shelter the Res from creditors of both the Settlor and the Beneficiaries, and;
4. In some instances, allows the Executor of the Settlor the ability to avoid probating the will of the Settlor.

22. When Does an "*Inter Vivos*" Trust Take Effect?

A. When legal title to the trust property or Res is transferred over to the Trustee.

23. When Does an "*Inter Vivos*" Trust terminate?

A. Typically, when all of the trust property or Res has been distributed to the beneficiaries by the Trustee.

24. Who Are The Players In Administering Basic Estate Documents?

A. There are 6 principal players involved in administering the basic estate documents.

1. Executor;
2. Testamentary Trustee or Trustee;
3. Testamentary Guardian, Standby Guardian or Guardian;
4. Testamentary Conservator or Conservator;
5. Health Care Agent, and;
6. Financial Agent.

Practice Tip: One person can and often does serve all six positions.

25. What Does An Executor Do?

A. The primary responsibility of an Executor is to administer the distribution of assets and other wishes of the Testator/Testatrix as expressed in their Will.

General Note: If a Will does not appoint an executor, the Probate Court will appoint an "***Administrator With The Will Annexed***" to perform this same function.

26. When Do An Executor's Powers Take Effect?

A. An Executor does not take power until the Testator/Testatrix dies.

27. When Do An Executor's Powers Terminate?

A. The Executor's powers terminate once the property of the estate created under the Will has been distributed and the wishes of the Testator/Testatrix have been carried out.

28. What Does A Testamentary Trustee Or Trustee Do?

A. The primary responsibility of a Testamentary Trustee is to manage the assets ("the ***res***," money, land, personal property) held in a Testamentary Trust for the benefit of certain third parties (i.e. "***Beneficiaries***") under a Will.

B. The primary responsibility of a Trustee is to manage the ***res*** of a Trust created outside of a Will ("***Inter Vivos Trust***").

General Note: Trusts are created by either a Will (i.e***. Testamentary Trust***) putting the res into the trust upon the death of the Testator/Testatrix or by a separate Trust document (i.e. ***"Inter-Vivos Trust***") putting the res into the trust during the life of the person making the Trust (i.e. "**Settlor**").

A Testamentary Trustee manages a **Testamentary Trust** created by a Will and a Trustee manages an ***Inter-Vivos Trust*** created outside of a Will.

29. When Do A Trustee's Powers Take Effect?

A. A ***Testamentary Trustee's*** powers do not take effect until the death of the Testator/Testatrix and the ***res*** is placed into the Trust

B. A ***Trustee's*** powers do not take effect until the ***Res*** is placed into the trust.

30. When Do A Trustee's Powers Terminate?

A. A ***Testamentary Trustee's*** powers terminate upon the distribution of the entire ***res*** or dissolution of the Trust in accordance with the terms of the Will.

B. A ***Trustee's*** powers terminate upon the distribution of the entire ***Res*** or in accordance with the terms of the ***Inter Vivos Trust***.

31. What Does A Testamentary Guardian, Standby Guardian Or Guardian Do?

A. The primary responsibility of a Guardian is to make decisions about the ***support, care, education, health, welfare and general well being*** of minors[5] or incapacitated adults or ***Wards***.[6]

General Notes: Biological parents (even if estranged) are always presumed to be the "***Natural Guardians***" of their children.

A Guardian can be appointed for ***minor children*** under a Will (i.e. ***Testamentary Guardian***), or outside of a Will via a Designation of Standby Guardian or Nomination of Guardian and Conservator.

A Guardian for an adult ***Ward*** must be appointed outside of a Will through a Nomination of Guardian.

32. When Do A Guardian's Powers Take Effect?

A. A ***Testamentary Guardian's*** powers do not take effect until the death of the Testator/Testatrix.

B. A ***Standby Guardian's*** powers do not take effect until a "Health Care Professional" issues a determination that the individual appointing the Standby Guardian is unable to care for the minor child and the Standby Guardianship designation along with the health care determination are filed with the Probate Court.

C. A ***Guardian's*** powers do not take effect until the Probate Court approves the Nomination of Guardian issues "***Letters of Guardianship".***

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5 O.C.G.A. § 29-2-22(a)(5).

6 O.C.G.A. § 29-4-22(a).

33. When Do A Guardian's Powers Terminate?

A. A ***Testamentary Guardian's*** powers terminate once the minor child becomes an adult or the minor child is emancipated.

B. A ***Standby Guardian's*** powers terminate no later than 120 days following the date of the health care determination, unless the Standby Guardian seeks an extension from the probate court, in which case the guardianship may be extended indefinitely.

C. The ***Guardian's*** powers terminate when revoked or terminated, the minor becomes an adult or is emancipated, the adult Ward is no longer incapacitated, or upon the death of the minor child or adult Ward.

General Note: A ***Testamentary Guardian***, ***Standby Guardian*** and ***Guardian*** all perform the exact same functions, with the only difference being the method of appointment.

34. What Does A Testamentary Conservator Or Conservator Do?

A. The primary responsibility of a Conservator is to receive, collect and make decisions about the property owned by a minor child[7] or incapacitated adult Ward.[8]

General Notes: ***Conservators*** manage property held outside of a Trust, whereas ***Trustees*** manage property held within a trust.

A Conservator for ***minor children*** can be appointed under a Will (i.e. ***Testamentary Conservator***) or nominated outside a Will through a ***Nomination of Conservator***.

A Conservator for an adult ***Ward*** must be appointed outside of a Will through a Nomination of Conservator.

35. When Do A Conservator's Powers Take Effect?

A. A ***Testamentary Conservator's*** powers do not take effect until the death of the Testator/Testatrix.

B. A ***Conservator's*** powers do not take effect until the Probate Court approves the Nomination of Guardian issues "***Letters of Guardianship".***

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7 O.C.G.A. § 29-3-21(a).

8 O.C.G.A. § 29-5-22(a).

36. When Do A Conservator's Powers Terminate?

A. A ***Testamentary Conservator's*** powers terminate once the minor child becomes an adult or the minor child is emancipated.

B. A ***Conservator's*** powers terminate when revoked or terminated, the minor becomes an adult or is emancipated, the adult Ward is no longer incapacitated, or upon the death of the minor child or adult Ward.

General Note: A ***Testamentary Conservator*** and Conservator all perform the exact same functions, with the only difference being the method of appointment.

37. What Does A Health Care Agent Do?

A. The primary responsibility of a Health Care Agent is to make decisions about the health care of a ***Declarant*** in accordance with the treatment preferences identified in their Advance Directive.

38. When Do A Health Care Agent's Powers Take Effect?

A. A ***Health Care Agent's*** powers do not take effect until the Declarant has a "***Terminal Condition***" or is in a "***State of Permanent Unconsciousness***" as determined by two Health Care Professionals

39. When Do A Health Care Agent's Powers Terminate?

A. A ***Health Care Agent's*** powers terminate upon the death of the Declarant, or the disposition of the Declarant's remains.

40. What Does A Financial Agent Do?

A. The primary responsibility of a Financial Agent is to manage the money and property of the Principal in accordance with the terms of a Financial POA.

41. When Do A Financial Agent's Powers Take Effect?

A. A ***Financial Agent's*** powers do not take effect until the date selected by the Principal

42. When Do A Financial Agent's Powers Terminate?

A. A ***Financial Agent's*** powers terminate upon the earlier of: the death of the Principal, revocation by the Principal, or the appointment of a guardian or conservator for the Principal.

43. How Is The Information Needed To Draft The Basic Estate Documents Collected From the Client?

A. ***Standard Questionnaires***: Information is generally obtained from the client through the use of a Standard Questionnaires.

1. We suggest then use of a long form Questionnaire for healthy clients, a copy of which is under ***TAB #1*** of the Appendix.

2. We also have a short form questionnaire for clients who are unhealthy. feeble or very elderly, a copy of which is under ***TAB #2*** of the Appendix.

General Note: These Questionnaires are available in electronic format and can be completed in hard copy or electronically.

44. How Are The Basic Estate Documents Drafted?

A. ***Standard Forms***. Basic pro-bono estate documents are created through the use of the following Standard Forms.

1. ***Simple Wills***: blank Simple Will form is under ***TAB #3*** of the Appendix.

2. ***Advance Directives***: blank Advance Directive form is under ***TAB #4*** of the Appendix.

3. ***Financial POA***: blank long form and short form Financial POA are under ***TAB #5*** and ***TAB #6*** of the Appendix.

4. ***Standby Guardianships***: blank Designation of Standby Guardianship form is under ***TAB #7*** of the Appendix.

5. ***Nomination of Guardian and Conservator***: a blank Nomination of Guardian and Nomination of Conservator form is under ***TAB #8*** of the Appendix.

General Note: These ***Standard Forms*** are available in electronic format and can be completed in hard copy or electronically.

45. Are There General Guidelines Governing The Drafting Of Estate Documents?

A. ***Yes***. When in doubt of the specific legal guidelines governing the drafting of Estate Documents as explained in detail throughout the remainder of these materials, "***substantially comply***" with the "Standard Forms" subject to the following:

1. ***Modify the Standard Forms to express the intent of the individual executing the estate document.*** Always make every attempt to accurately

reflect the intent of the individual executing the estate document in simple and plain words so long as such intent is not inconsistent with the rule of law.[9]

2. If in doubt avoid legal lingo, since the Probate Court will give words and phrases their generally accepted meanings.[10]

3. All will be well if you simply make sure to accurately express the intent of the executing party since the interpretation and construction of ambiguities (if any) will be a matter subject to sound judgment by the Probate Court.[11]

Practice Tip: You should use plain and simple language when drafting Estate Documents and remove or exclude any words or terms which are not easily understood or are not needed.

46. Are There General Guidelines Governing The Execution Of Estate Documents?

A. ***Yes***. When in doubt of the specific legal guidelines governing the execution of Estate Documents as explained in detail throughout the remainder of these materials, here are some general guidelines to follow:

1. Make sure everyone executing the Estate Documents (Testator/Testatrix, Declarant, Principal, Witnesses, etc.) are ***18 years of age or older***;

2. Make sure the individual for whom the estate document is being created (Testator/Testatrix, Declarant, Principal, etc.) ***is lucid and capable of making rational decisions*** at the time the estate document is signed;

3. Make sure the individual for whom the estate document is being created (Testator/Testatrix, Declarant, Principal, etc.) ***signs the Estate Document in the presence of two witnesses and/or the number of witnesses indicated by the Standard Form***;

4. ***Make sure the Witnesses are not interested parties*** entitled to receive any property under the Estate Documents, make any decisions under the Estate Documents, are not named in the Estate Documents, and have no role under the Estate Documents other than acting as disinterested witnesses;

5. Make sure the witnesses sign the Estate Document after execution by the individual making the Estate Document and in the presence of the individual for whom the document is being made (Testator/Testatrix, Declarant, Principal, etc.); and

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9 *See e.g.* O.C.G.A. § 53-4-55.

10 *See e.g. Duke v. Huffman*, 138 Ga. 172, 75 S.E. 1 (1912).

11 *See e.g. Bennett v. Young*, 270 Ga. 422, 510 S.E. 2d 521 (1999).

6. Make sure the signatures are notarized by a Notary Public if indicated by the Standard Form, or if you have any doubt as to the need for a notary.

47. What Is A Domicile?

A. A Domicile is the "***permanent residence***" of an individual to which he or she intends to return even though they may actually reside elsewhere for months or years (i.e. military members, college students, traveling employees).

48. What Laws Generally Govern The Drafting, Execution And Administration Of Estate Documents?

A. The laws of the State wherein the individual maintains his or her ***Domicile***.

General Note: If an individual created a Will under the laws of another state and has since changed his or her domicile to Georgia, they should either verify that their existing Will complies with the laws of Georgia or execute a new Will.

PART II - SIMPLE WILLS

A. GENERAL INFORMATION ABOUT SIMPLE WILLS

49. What Makes A Will Simple?

A. ***No Tax Consequences***. The driving force behind a Simple Will is the disposition of property, not the avoidance of State and Federal taxes.

50. What Is The Federal Estate Tax?

A. The Federal Estate Tax is a tax imposed by the federal government upon the right of a Decedent to transfer property upon their death.

B. Estates valued at less than ***$5.45 Million Dollars are exempt*** from the Federal Estate Tax as of January 1, 2016[12].

Every dollar over the $5.45 Million Dollar federal estate tax exemption is ***taxed at the rate of 40% or 40 cents as of January 1, 2016[13].***

General Note: The Federal Estate Tax exemption was originally scheduled to be drastically reduced to apply to any estate in excess of ***$1.0 Million***

[12] https://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Estate-Tax

[13] https://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Estate-Tax

in 2013 and the tax rate was scheduled to increase to ***55%*** or 55 cents. The issue has since been deferred to be decided at a later date.

51. Who Is Responsible For Payment Of The Federal Estate Tax?

A. ***The Executor from the assets of the Estate***. If the taxable estate is valued over $5.12 Million Dollars, the assets from the estate must be used by the Executor for payment of the Federal Estate Tax.

52. What Property Is Included In The Taxable Estate?

A. The taxable Estate includes almost every asset belonging to the Decedent, including life insurance, pension plans, 401-Ks, real property, personal property, etc.

General Note: The taxable estate generally includes all of the Decedent's earthly belongings and typically has a greater value than the property passing under the Will, since it includes property that passes outside of the Will, like life insurance, pension plans, and 401Ks.

53. How Is The Taxable Estate Valued?

A. The taxable estate is valued on a ***fair market value*** basis, without regard to what the Decedent paid for the property or the value of the property when it was acquired.

54. What Is The Definition Fair Market Value When Appraising An Estate?

A. ***Fair Market Value*** is defined as: "The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts. The fair market value of a particular item of property includible in the decedent's gross estate is not to be determined by a forced sale price. Nor is the fair market value of an item of property to be determined by the sale price of the item in a market other than that in which such item is most commonly sold to the public, taking into account the location of the item wherever appropriate.[14]"

[14] IRS Regulation §20.2031-1.

55. What Deductions Are Available To Reduce The Estate Tax?

A. There are some deductions (not many) which can be used to reduce the Federal Estate Tax.

1. Marital Deduction: One of the primary deductions for married decedents is the Marital Deduction. All property that is included in the gross estate and passes to the surviving spouse is eligible for the marital deduction. The property must pass "outright." In some cases, certain life estates also qualify for the marital deduction.
2. Charitable Deduction: If the Decedent leaves property to a qualifying charity, it is deductible from the gross estate.
3. Mortgages and Debts.
4. Administration expenses of the estate. and
5. Losses during estate administration.

56. Are Charitable Gifts In A Will Exempt From The Federal Estate Tax?

A. ***Yes***. Gifts given under a Will to a qualified charity are not included in the taxable Estate of the Testator/Testatrix and are not subject to the federal estate tax.

57. Does Georgia Have An Estate Tax?

A. ***No.*** Georgia does not impose a state estate tax.

58. What Other States Do Not Impose An Estate Tax?

A. The ***35 other states that do not impose state estate taxes*** are as follows: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Indiana, ,•Iowa, Kansas, •Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, •Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, •Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, Wyoming.

General Note: The States denoted by a • do impose an ***inheritance tax***.

59. What States Do Impose An Estate Tax?

A. The ***15 states which impose state estate taxes*** as well as the estate tax exemption recognized in each of these States is as follows: Connecticut - $2,000,000, Delaware - $5,430,000, Hawaii - $5,430,000, Illinois - $4,000,000, Maine - $2,000,000, Maryland - $1,500,000, Massachusetts - $1,000,000, Minnesota – $1,400,000, New Jersey - $675,000, New York - $3,125,000, Oregon - $1,000,000,

Rhode Island - $1,500,000, Vermont - $2,750,000, Washington - $2,054,000, plus the District of Columbia - $1,000,000.

60. Should Georgia Residents Consider Estate Taxes Imposed By Other States When Drafting Their Wills?

A. ***Yes***, **if** they own property in 1 of the 15 states that imposes a state estate tax ***and*** the value of the property located in that State exceeds the estate tax exemption amount.

B. The Executor should also consider the location of property gifted under the Will since he or she will be responsible to see that all estate taxes due are paid out of the estate.

61. What Is An Inheritance Tax?

A. An inheritance tax is a tax imposed by a state government upon the privilege of a person or Beneficiary under a Will to receive assets upon the death of another person.

B. ***There is no Federal Inheritance Tax***.

62. Does Georgia Have An Inheritance Tax?

A. ***No.*** There is no inheritance tax in Georgia.

63. What States Do Impose An Inheritance Tax?

A. The *6* ***States that impose an inheritance tax*** as well as the applicable tax rates are as follows: Iowa – 5%-15%, Kentucky – 4%-16%, Maryland – 10%, Nebraska – 1%-18%, New Jersey – 11%-16%, and Pennsylvania – 4.5%-15%.

General Note: The inheritance tax does not apply to spouses in any of these States, except for Nebraska and does not apply to the Descendants in Iowa, Kentucky, Maryland or New Jersey

64. Should Georgia Residents Consider Inheritance Taxes Imposed by Other States When Drafting Their Wills?

A. ***Yes***, **if** they are gifting property to a Beneficiary who lives in one of the 6 states that impose an inheritance tax.

65. Do Any States Impose Both An Estate Tax And An Inheritance Tax?

A. ***Yes***. There are ***2 states that impose both an inheritance tax and a state estate tax*** – Maryland and New Jersey.

66. What Is The Death Tax?

A. There is no such thing as a "Death Tax". This is a phrase coined by the media to refer to an estate tax or an inheritance tax – in other words, it's the media's way of describing the taxes imposed upon the transfer of property due to someone's death.

67. What Is The Federal Gift Tax?

A. The Federal Gift Tax is a tax imposed by the federal government upon the right of an individual to "*give away*" property during their lifetime.

B. Gifts made by an individual that are valued at $13,000 or less to another individual during any calendar year are currently excluded from the Federal Gift tax.

C. If an individual provides gifts to another individual in excess of $13,000 during any single calendar year, the individual giving the gift must file a Federal Gift Tax return.

D. Every individual is given a $5.0 Million Dollar gift tax exemption, meaning they will not be required to pay a gift tax unless and until they have given away in excess of $5.0 Million Dollar over and above the annual $13,000 per individual exclusion during their lifetime.

68. Who Is Responsible For Payment Of The Federal Gift Tax?

A. ***The Executor makes payment from the assets of the Estate***. If the Testator/Testatrix exceeded their $5 Million Dollar Gift tax exemption during their lifetime, the Executor must pay the applicable federal gift tax out of the assets of the estate.

69. What Is Considered A Gift?

A. Any transfer to an individual, either directly or indirectly, where full consideration (measured in money or money's worth) is not received in return.

70. How Is A Gift Valued?

A. A Gift is valued on a ***fair market value*** basis, using the same standard applicable to Federal Estate Taxes, without regard to what the Decedent paid for the property or the value of the property when it was acquired.

71. What Gifts Are Excluded From the Gift Tax?

A. The general rule is that any gift is a taxable gift. However, there are many exceptions to this rule. Generally, the following gifts are not taxable gifts.

1. Gifts of less than $13,000 to an individual done in any 1 calendar year.
2. Tuition or medical expenses paid for another (the educational and medical exclusions).
3. Gifts to a spouse.
4. Gifts to a political organization for its use.

B. Gifts made to a qualified charity are deductible from the value of the gift(s) made.

72. Should Georgia Residents Consider the Federal Gift Tax When Drafting their Wills?

A. ***Yes***, **if** the Testator/Testatrix has exceeded their $5 Million Dollar Gift tax exemption during their lifetime.

73. Does Georgia Have A Gift Tax?

A. ***No.*** Georgia does not impose a gift tax.

74. What States Do Impose A Gift Tax?

A. The only ***2 states that do impose gift taxes*** are: Connecticut and Minnesota.

75. What Are The Benefits Of Having A Will?

A. ***There are 5 principal benefits,*** providing the individual with freedom of choice, as follows:

1. Allows a person to determine ***how and to whom their property is to be distributed*** at death;
2. Allows a person to appoint an "***Executor(s)" to oversee the administration and probate of the Will*** and ensures that the wishes of the Testator/Testatrix are followed;
3. Allows a person to appoint a ***"Trustee(s)" to oversee the management and distribution of property and assets passing under the Will*** to Minor Children, adult Wards, or irresponsible adults;
4. Allows a person to appoint a ***"Testamentary Guardian" who will oversee the care of Minor children*** for whom they are responsible in the event of the untimely death of the Testator/Testatrix:

a. A "Testamentary Guardian" makes crucial decisions concerning the care of Minor children, such as where they live, where a Minor child goes to school, where and how they receive medical care, etc.

b. The Court ***will not issue*** permanent letters of guardianship to a "testamentary guardian" over a Minor child without the consent of the remaining living parent.

5. Allows a person to appoint a ***"Testamentary Conservator" who will administer any property passing outside*** the Will to a Minor child:

a. A "Testamentary Conservator" oversees the management and distribution of property and assets previously owned or passing outside of the Will.

b. The Court ***will issue*** permanent letters of conservatorship to a "testamentary conservator" over a Minor child without the consent of the remaining living parent.

Practice Tips: Every Will should appoint an ***Executor***.

Trustees, Guardians and Conservators are generally not needed unless minor children or adult Wards are involved.

One person could serve in all 4 positions.

76. How Quickly Should A Will Be Reviewed After The Death Of The Testator/Testatrix?

A. ***Immediately***. The Executor should review the Will immediately upon the death of the Testator/Testatrix. Wills frequently contain instructions from the Testator/Testatrix concerning the disposition of their remains or other time sensitive instructions which cannot be followed unless and until the contents of the Will are understood.

Practice Tip: The Testator/Testatrix should consider providing their Executor with a copy of their Will, to avoid any miscommunication or confusion upon death.

77. Are All Of The Assets Of a Testator/Testatrix Governed By A Will?

A. ***No.*** There are a variety of assets that transfer upon the death of a Testator/Testatrix pursuant to pre-arranged contractual terms that are generally not governed by the terms of a Will, commonly called "***Non-Probate Assets***," including:

1. Life insurance policies;

2. Retirement accounts, pension plans, 401Ks;

3. Joint bank accounts, payable on death (POD) accounts, and trust accounts maintained with banks and other financial institutions;

4. Survivorship rights to real or personal property held in "Joint Tenancy" or "Life Estates";

5. Transfer on death (TOD) stocks or securities;

6. Living or ***inter vivos*** trusts; and

7. Gifts of real or personal property made during the life of the Testator.

B. These types of assets are generally governed by a contract established between the Testator/Testatrix and the employer/bank/broker/beneficiary and expressly define who the beneficiaries will be in the event of the death of the Testator/Testatrix.

General Note: The Federal Retirement Equity Act[15] governs qualified employer retirement plans (but not IRAs) and requires that the surviving spouse be named as a beneficiary of at least ½ of the retirement plan unless the spouse affirmatively waives such right after the marriage regardless of any prenuptial agreement executed prior to the marriage.

Practice Tips: If any of these Non-Probate Assets do not define a beneficiary, then the assets and property will pass under the Will.

These types of property transfers were created in part to help individuals avoid the probate process so the individuals should take advantage of these benefits.

78. Are There Statutory "Death Benefits" That Should Be Taken Into Account When Drafting Wills For Certain City, County And State Employees?

A. ***Yes.*** Police, Fireman, EMTs, Prison Guards and State Highway Employees may be entitled to receive a $75,000 "Death Benefit" ($25,000 for State Highway Employees) if "***killed within the line of duty***" payable to the un-remarried widow/widower or the Decedent's dependants as shown in the most recent tax return.[16]

B. National Guard members called into duty by the Governor are also entitled to the Death Benefit.

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15 2. Pub. L. No. 98-397, 98 Stat. 1426 (1984) (codified in scattered sections at 26 U.S.C. and 29 U.S.C.).

16 O.C.G.A § 45-9-85(b).

79. Who Can Make A Will?

A. An individual making a Will (***Testator***-male or ***Testatrix***-female) must:

1. Be ***14 years of age*** or older.[17]
   a. In contrast, an individual must be 18 years of age to reach majority and enter into a binding non-voidable contract.[18]
2. Have "***testamentary capacity***" to make a Will.[19]
   a. "Testamentary capacity" means the individual has the ability to form "a rational desire as to the disposition of their property."[20]
   b. "Testamentary capacity" may exist despite:
      (i) The incapacity to enter into a contract.[21]
      (ii) Advanced age.[22]
      (iii) Weakness of intellect.[23]
      (iv) Eccentricity of thought or habit.[24]
3. Act ***freely and voluntarily*** in signing the Will.[25]
   a. The Will is not freely and voluntarily signed where there are:
      (i) Fraudulent practices upon fears, affections or sympathies;[26]
      (ii) Misrepresentation;[27]
      (iii) Duress; or[28]
      (iv) Undue influence.[29]

Practice Tip: The witnesses to the Will should spend some time observing and speaking with the Testator/Testatrix to observe their mental state since the Witnesses may be called upon by the Probate Court to testify at a later date.

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17 O.C.G.A § 53-4-10(a).
18 *Cf.* O.C.G.A § 53-4-11(b) and O.C.G.A. §§ 39-1-1, 13-3-20.
19 O.C.G.A § 53-4-11(a).
20 *Id.*
21 O.C.G.A § 53-4-11(b).
22 O.C.G.A. § 53-4-11(d).
23 *Id.*
24 *Id.*
25 O.C.G.A. § 53-4-12.
26 *Id.*
27 *Id.*
28 *Id.*
29 *Id.*

B. DRAFTING SIMPLE WILLS

80. What Are The Legal Requirements For The Contents Of A Will?

A. A Will must:

1. Be a written document;[30]
2. Signed by the Testator/Testatrix or by some other disinterested individual in the Testator's/Testatrix's presence and at the Testator's/Testatrix's express direction;[31]
3. Signed by 2 competent witnesses in the presence of the Testator/Testatrix who:[32]
   a. Observe the Testator/Testatrix signing the Will; or
   b. Are told by the Testator/Testatrix that he/she signed the Will.
4. Transfer the property of the Testator/Testatrix upon his/her death:[33]
   a. A document that transfers property prior to death is not a Will.[34]

Practice Tip: It is good practice to date a Will, but the lack of a date, incorrect date, or incomplete date will not invalidate the Will.

81. Are Other Forms Of Wills Enforceable In Georgia?

A. ***No***. Other forms of Wills ***are not recognized*** in Georgia, even though valid in many other states.

B. Examples of Wills recognized in other states but not in Georgia, include:

1. ***Non-Cupative Wills*** - an oral Will spoken to witnesses on the death bed of a Testator/Testatrix.
2. ***Holographic Wills*** - a document written and signed in the hand of the Testator/Testatrix absent the signature of two competent witnesses.

Practice Tip: When an individual relocates to Georgia from another state you should verify if the existing Will complies with Georgia law.

If a Testator/Testatrix is currently domiciled in Georgia and has a Will from another state that does not comply with Georgia law,

30 O.C.G.A. § 53-4-20(a).
31 *Id.*
32 O.C.G.A § 53-4-20(b).
33 O.C.G.A. § 53-4-3; *Candies v. Hulsey*, 277 Ga. 630, 593 S.E. 2d 353 (2004).
34 O.C.G.A. § 53-4-3.

then the Will should be redone in compliance with the laws of Georgia.

82. What Is The Definition Of Intestacy?

A. An individual who dies without a Will.

83. Can A Will Incorporate An Extrinsic Or Separate Document?

A. ***Yes, but it is not good practice.*** The extrinsic document must be in existence prior to execution of the Will and be clearly, expressly and unambiguously identified in the Will such that the document can be identified without any doubt.[35]

B. Any documents created after the Will is executed are not legally binding even if contemplated within the Will itself.

Practice Tip: Avoid extrinsic documents such as letters or lists from the Testator/Testatrix if at all possible by inserting the terms, requirements or information into the Will prior to execution.

If an extrinsic document that is not in existence at the time the Will is executed, then warn the Testator/testatrix that it will not be legally binding.

84. What Are The Contents Of The Standard Will Form?

A. The accompanying model of a simple Will contains required, recommended and optional provisions (if applicable) as follows:

1. ***The Introduction*** – identifying the Testator/testatrix; revoking any prior Wills or Codicils (*always recommended*);
2. ***Article 1 – Background*** - defining the marital status and descendants of the Testator/Testatrix *(always recommended*);
3. ***Article 2- Burial*** - dealing with burial (*always recommended*);
4. ***Article 3 – Debts and Expenses*** - dealing with the debts and expenses of the Testator/Testatrix (*always recommended*);
5. ***Article 4 – Real Property*** - dealing with the transfer of real property (*recommended*);
6. ***Article 5 – Personal Property*** - dealing with the transfer of personal property (*always recommended*);

[35] *But see*, O.C.G.A. § 53-12-27.

7. ***Article 6 – Cash, bank Accounts and Investments*** – dealing with the transfer of cash, stocks, bonds and other investment vehicles (*recommended*);

8. ***Article 7 – Residual Estate*** - dealing with all remaining property of the Testator/Testatrix (*always recommended*);

9. ***Article 8 – Testamentary Trust*** - creating a testamentary trust for the benefit of Minor children and/or incapacitated or irresponsible adults (*optional, if minor children or adult Wards are involved*);

10. ***Article 9 – Special Needs Trust*** – creating a special needs trust to preserve entitlement of the Minor or ward to obtain state or federal assistance (*optional if a trust beneficiary receives state or federal assistance*);

11. ***Article 10 – Avoidance of Conservatorship*** – allowing the Executor to hold property passing to a Minor or incapacitated adult if no conservator has been appointed (*recommended*);

12. ***Article 11 – Spendthrift Provision*** – protecting the property put in a testamentary trust for a beneficiary (*always recommended if a trust is created*);

13. ***Article 12 – Executors and Trustees*** – appointing Executor(s) and Trustee(s) if a testamentary trust is established (*always recommended*);

14. ***Article 13 – Bonds and Audits*** – deleting the requirement for the Executor(s) to furnish a bond or provide audit reports to the Probate Court (*recommended*);

15. **Article 14 – Powers of Executors and Trustees** – defining the powers given to the Executor(s) or Trustee(s) (required if an Executor or Trustee is named);

16. ***Article 15 – Survivorship*** – dealing with the death of a beneficiary at or about the time of death of the Testator/Testatrix (*recommended*);

17. ***Article 16– Year's Support*** – dealing with the testamentary gifts given to a spouse or Minor children (*optional, if no spouse or Minor children are involved*);

18. ***Article 17 – Guardians and Conservators*** – dealing with the appointment of testamentary guardians and testamentary conservators for Minor children of the Testator/Testatrix (*recommended if Minor children are involved*);

19. ***Article 18 – Disinheritance*** – forbidding gifts to estranged heirs or descendants (*optional*);

20. ***Article 19 – No Contests Clause (In Terrorem)*** – prohibiting beneficiaries or heirs from a contest or "Caveat" over the Will (*optional*);

21. ***First Signature Page - Attestation Clause*** – signed by the Testator/Testatrix and two witnesses (*mandatory legal requirement*);

22. ***Second Signature Page - Self Proving Affidavit*** – signed by the Testator/Testatrix, two witnesses and a Notary (*always recommended*).

B. The "recommended" and "optional" provisions are not required, do not affect the validity of the Will and may be deleted if not used or needed.

a. The Introduction

85. How Should The Testator/Testatrix Be Identified In The Will?

A. ***Legal Name***. The Testator/Testatrix should always be identified by their full and complete legal name, spelled out without abbreviations. *Example: Caroline Ann Schlossberg*.

B. ***Nicknames/Common Names***. If the Testator/Testatrix has a nickname or is otherwise frequently referred to by a common name other than their legal name, such name should be listed after the legal name as an also known as or a/k/a. *Example: Caroline Ann Schlossberg a/k/a Caroline Kennedy*.

C. ***Maiden Names***. If the couple is recently married, uses a hyphenated marital name, or a spouse continues to use a maiden name, such name should be listed after the legal name as either an a/k/a or formerly known as f/k/a. *Example: Caroline Ann Schlossberg a/k/a Caroline Kennedy* a/k/a *Caroline Ann Kennedy-Schlossberg f/k/a Caroline Ann Kennedy*.

Practice Tip: Make sure to identify the Testator/Testatrix using the same names in both the introduction and signature pages.

86. Should The Name Of The Testator/Testatrix Be Capitalized? Bolded?

A. ***Yes and yes***. Although not a legal requirement, it is recommended that all names used in a Will be capitalized and bolded to ease the reading and interpretation of the Will.

87. Why Revoke All Prior Wills?

A. ***Clarity***. Wills are considered to be cumulative meaning the recent Will would be read together with the prior Will unless the prior Will was revoked.

88. What Happens If The Testator/Testatrix Has More Than 1 Will?

A. The Wills are read together with the contradictory provisions cancelling out and the un-contradicted portions remaining in full force and effect.

b. Marital Status And Descendants – Article 1

89. What Is The Definition Of A Descendant?

A. ***Descendants*** are lineal descendants or "blood relatives" of an individual (i.e. children, grandchildren), including those who are treated as descendants by virtue of adoption.[36]

90. Why Identify The Marital Status Of The Testator/Testatrix And Children/Descendants?

A. The spouse and Minor children of a Testator/Testatrix are entitled to receive a minimum distribution under a Will known as "***Year's Support***" (excluding Minor children of a Testator born out of wedlock) making it important for the Testator/Testatrix to identify their marital status and age of their children.

91. What Is Year's Support?

A. ***Year's Support***. The surviving spouse and minor children are statutorily entitled to an allowance out of the estate of the Testator/Testatrix called Year's Support.[37]

B. Year's Support is defined as property that is set aside for the family's support and maintenance for a period of 12 months from the death of the Testator/Testatrix.[38]

C. The surviving spouse and Minor children may challenge the Will and petition the Probate Court to obtain Year's Support in the event the Testamentary Gifts under the Will are deemed insufficient.

General Note: The Testator/Testatrix should identify all biological children, adopted children, and children born out of wedlock (if they want children born out of wedlock to inherit under the Will).

92. Is the Estate of a Testator/Testatrix Responsible for Past Due Alimony Payments?

A. **Yes**. Past due and unpaid alimony payments that accrued during the life of the Testator/Testatrix constitute debts of the estate that may be recovered from the estate.

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36 O.C.G.A. § 53-1-2(6).
37 O.C.G.A. § 53-3-1(b).
38 O.C.G.A. § 53-3-1(c).

93. Is the Estate of a Testator/Testatrix Responsible for Future Alimony Payments?

A. **Generally No.** The duty to make alimony payments to an ex-spouse generally terminates upon the death of the Testator/Testatrix responsible for making such payments.[39]

B. **Exception**. The estate will remain responsible for future alimony payments if the divorce decree or the settlement agreement underlying the divorce decree expressly provide that the obligation of the Testator/Testatrix to pay alimony is intended to survive their death.[40]

94. Is the Estate of a Testator/Testatrix Responsible for Past Due Child Support Payments?

A. **Yes**. Past due and unpaid child support payments that accrued during the life of the Testator/Testatrix constitute debts of the estate that may be recovered from the estate.

95. Is the Estate of a Testator/Testatrix Responsible for Future Child Support Payments?

A. **Generally No.** The duty of a parent to support a minor child terminates upon the death of the parent subject only to the rights of a minor to "Year's Support".[41]

B. **Exception**. The estate will remain responsible for future child support payments if the divorce decree or the settlement agreement underlying the divorce decree expressly provide that the obligation of the Testator/Testatrix to pay child support payments is intended to survive their death.[42]

General Note: It has become common place for a divorce decree or underlying settlement agreement to require the non-custodial parent to provide and maintain life insurance naming the minor children as the beneficiary and serving as a substitute for child support payments[43].

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39 *Dolvin v. Dolvin*, 248 Ga. 439, 440-41, note 4, (1981)
40 *Id.*
41 *Clavin v. Clavin*, 238 Ga. 421, 422-23 (1977), superseded by statute on other grounds, O.C.G.A. § 19-6-34.
42 *Dolvin v. Dolvin*, 248 Ga. 439, 440-41, note 4, (1981)
43 O.C.G.A. § 19-6-34.

96. What Happens If The Testator/Testatrix Gets Married After The Will Is Executed?

A. If the Will does not provide for the new spouse, the Will is recast to allow the spouse to receive what he or she would have received if the Testator/Testatrix had died intestate.[44]

B. The amount shall be taken from the residuary estate and if that is insufficient from the other testamentary gifts in the progression outlined under the FAQ dealing with "Is There a Priority as to How Testamentary Gifts are Abated to Pay the debts and Bills of the Testator/Testatrix?"[45]

97. What Happens If A Married Testator/Testatrix Gets Divorced After The Will Is Executed?

A. The Will is to be interpreted as if the ex-spouse dies before the Testator/Testatrix and the ex-spouse takes nothing under the Will.[46]

B. The Will may need to be changed depending upon if the testamentary gifts intended for the ex-spouse will not be received by another beneficiary.

98. What Should Be Done If The Testator/Testatrix Is Separated But The Divorce Is Not Final At The Time The Will Is Executed?

A. The Testator/Testatrix retains his or her marital status unless and until a Divorce Decree is entered by the Court entitling the estranged spouse to Year's Support. If the possibility exists that the Testator/Testatrix may expire before the Divorce Decree is issued by the Court, then the Testator/Testatrix may wish to draft the Will in contemplation of the Divorce becoming final. *Example: This Will is made in contemplation of my pending divorce from XYZ who shall be deemed to have predeceased me for all purposes under this Will.* (AVLF Materials)

99. What Should be Done if The Testator/Testatrix is in a Same Sex Marriage?

A. The United States Supreme Court recently ruled that same sex marriages are valid in all States therefore it is no longer necessary to take special precautions in order to protect the surviving spouse of a same sex marriage[47].

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44 O.C.G.A. § 53-4-48(c).

45 *Id.*

46 O.C.G.A. § 53-4-49.

47 *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

100. What Should Be Done If The Testator/Testatrix Is Engaged But Not Yet Married At The Time The Will Is Executed?

A. If the possibility exists that the Testator/Testatrix may expire before the marriage occurs, then the Testator/Testatrix may wish to draft the Will in contemplation of the marriage. *Example: This Will is made in contemplation of my upcoming marriage to XYZ who shall be deemed to be my legal spouse for all purposes under this Will [even if my death occurs prior to such marriage] or only after such marriage takes place].* (AVLF Materials)

101. What Should Be Done If The Testator/Testatrix Is Unmarried But Has A Domestic Partner?

A. Since the laws of Georgia do not legally recognize domestic partnerships, the surviving domestic partner must be identified as a beneficiary in the Will otherwise they will not receive any testamentary gifts or property of any kind owned by the Testator/Testatrix. A domestic partner is not entitled to Year's Support since they are not a legally recognized spouse, and is likewise not entitled to anything under the Intestacy Laws since they are neither Descendants, nor Heirs, nor a legally recognized spouse of the Decedent.

B. If the Testator/Testatrix intends to provide for a domestic partner they should name the domestic partner in the Will and specify the property which they intend to give to the domestic partner so as to avoid possible disputes with family members. The Testator/Testatrix may also wish to express their intent as to the legal status of relationship with their domestic partner. *Example: This Will is made with the understanding that I consider XYZ to be my legal spouse for all purposes under this Will and the laws of Georgia since [we have been lawfully wed under the laws of [Applicable State] or [despite the refusal of the laws of Georgia to recognize our marriage].*

102. What Happens If The Testator/Testatrix Has A Child Or Adopts A Minor Child After The Will Is Executed?

A. If the Will does not provide for the new child, the Will is recast to allow the child to receive what they would have received if the Testator/Testatrix had died intestate.[48]

B. The amount shall be taken from the residuary estate and if that is insufficient from the other testamentary gifts in the progression outlined under the FAQ dealing with

[48] O.C.G.A. §§ 53-4-48(c), 53-4-63(b).

"Is There a Priority as to How Testamentary Gifts are Abated to Pay the debts and Bills of the Testator/Testatrix?"[49]

General Note: The Will shall not be recast to provide for children who are over the age of 18 at the time of adoption unless the Testator/Testatrix expressly indicates otherwise.

103. What Happens If The Testatrix Has A Child Out Of Wedlock?

A. ***Unwed Testatrix***. Children born out of wedlock to a Testatrix ***are entitled*** to inherit in the same manner as any other children of the Testatrix.[50]

General Notes: If the Testatrix is pregnant at the time of the marriage and a divorce is sought and obtained upon that ground, then the child will be considered to be born out of wedlock.[51]

A child born after a marriage is annulled is also considered to be born out of wedlock.[52]

104. What Happens If The Testator Has A Child Out Of Wedlock?

A. **Unwed Testator**. Children born out of wedlock to a Testator ***are not entitled*** to inherit in the same manner as any other children of the Testator unless and until paternity is established or the Will provides for such child.[53]

B. The paternity of the Testator may be established as follows:[54]

1. By court order;
2. By executing a sworn statement acknowledging the parent-child relationship;
3. By signing the birth certificate of the child; or
4. DNA or similar type evidence[55] that has not been rebutted by clear and convincing evidence to the contrary.

Practice Tip: If the Testator intends to provide for a child born out of wedlock, he should do so expressly in his Will.

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49 *Id.*
50 O.C.G.A. § 53-2-3(1).
51 O.C.G.A. § 19-7-20(b).
52 O.C.G.A. § 19-3-5(a).
53 O.C.G.A. § 53-2-3(2).
54 O.C.G.A. § 53-2-3(2).
55 See e.g. O.C.G.A. § 53-2-3(2)(B)(ii).

105. What Is The Definition Of An Heir?

A. Any Individual who will receive property of the Decedent that is not disposed of by a Will but instead passes under the Intestacy Laws.[56]

c. Burial Status – Article 2

106. Why Should A Testator/Testatrix Make A Decision About Burial Status?

A. ***Conflict Avoidance***. The spouse and adult children often have conflict over burial versus cremation, internment location, post-death services, and memorial type arising from different beliefs including religion, military affiliation, prior marriages, etc., so it is best for the Testator/Testatrix to make such decisions.

107. What Happens In The Event Of A Conflict Between The Will And Other Documents Addressing Burial Status?

A. The Will generally prevails in the event of a conflict with another document (i.e. Advance Directive) defining the wishes of the Testator/Testatrix concerning their burial status.

General Note: The most common area of conflict arises when the terms of the Will conflict with the terms of an Advance Directive.

Practice Tip: The Will should be consistent with the Advance Directive. If there is any doubt as to the existence of a conflicting document the Will should clarify the instructions from the Testator/Testatrix. *Example: Any instructions concerning my burial status as expressed in this Will shall govern over any contrary instructions contained in any other document, including my Advance Directive for Health Care.*

d. Testator/Testatrix's Debts And Expenses - Article 3

108. Are The Debts Of The Testator/Testatrix Forgiven Upon Their Death?

A. ***No***. The creditors of the Testator/Testatrix may claim and recover against the estate.[57]

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[56] O.C.G.A. § 53-1-2(9).

109. Do The Debts And Bills Of The Testator/Testatrix Effect Testamentary Gifts?

A. ***Yes.*** The bills and debts of the Testator/Testatrix must be paid out of the Estate which may result in the reduction or extinguishment of all testamentary gifts (i.e. "Abatement") under the Will.[58]

110. Do The Debts And Bills Of The Testator/Testatrix Effect Year's Support?

A. ***No***. Year's Support is an encumbrance upon the estate of the Testator/Testatrix, not a testamentary gift, and is given the highest priority over all other claims, debts and bills against the estate of the Testator/Testatrix.[59]

111. What Priority Is Given To Debts And Expenses Of The Testator/ Testatrix?

A. Claims against the estate of a Testator/Testatrix are given priority as follows:[60]

1. Year's Support;
2. Funeral Expenses;
3. Expenses of Administering the Will;
4. Reasonable Expenses of the last illness;
5. Unpaid taxes or debts due a State or US Government;
6. Judgments, secured interests, and other liens according to their legal priority under other laws; and
7. All other debts and bills of the Testator/Testatrix.

General Note: It has become common practice for funeral homes to seek an individual guarantor, often the spouse, so they may seek to have a direct claim, apart from claims against the estate, against either the spouse or other family members.

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57 O.C.G.A. § 53-4-63.
58 O.C.G.A. § 53-4-63.
59 O.C.G.A. § 53-7-40.
60 O.C.G.A. § 53-7-40.

112. What Happens If Real Or Personal Property Gifted Under A Will Is Subject To A Mortgage, Loan Or Security Interest?

A. The Real or personal property remains subject to the mortgage, loan or security interest.

B. The Will should address whether such property is to be gifted subject to the mortgage, loan, or security interest or whether title should be delivered to the Beneficiary free and clear of any such encumbrance. Otherwise, disputes may arise as to whether the beneficiary is to assume the payments and refinance the property or is to be given title free and clear of all existing loans, mortgages and security interests.

Practice Tip: A Will should indicate whether property is financed or owned outright and whether such property is to be gifted to the beneficiary subject to the financing or the financing is to be paid off from the estate. *Example: I give my residence located at 77 Mockingbird Lane to my Son, XYZ, subject to the existing mortgage or request that my Executor use my estate to pay the existing mortgage in its entirety and deliver free and clear title to XYZ.*

e. Transferring Real And Personal Property – Articles 4 And 5

113. What Is A Testamentary Gift Under A Will?

A. Any tangible asset or property, whether real property, personal property or money transferred to a Beneficiary under a Will.[61]

General Note: A Testamentary gift is simply legal lingo for what non-lawyers typically call property "inherited" under a Will.

114. Is Special Language Required To Make A Testamentary Gift?

A. ***No***. Any language can be used to make the Gift so long as it is clear and understandable.

Practice Tip: Use simple plain English with the only exception being use of the terms "***per capita***" or "***per stirpes***" as defined below, or the designation of the ***type of testamentary gift*** as also defined below.

[61] O.C.G.A. § 53-1-2(16).

115. How Should Beneficiaries Be Identified In The Will? Should Their Names Be Capitalized? Bolded?

A. ***Legal Names***. The Beneficiaries should always be capitalized by their full legal name along with their relationship (if any) to the Testator/Testatrix.

B. ***Nicknames/Maiden Names***. The Beneficiary should also be identified by any nicknames or maiden names using the also known as ("a/k/a") or formerly known as ("f/k/a") designations.

C. The names of Beneficiaries should be capitalized and bolded to ease in the reading and interpretation of the Will.

116. What Are "Words Of Affection"?

A. *Words of Affection*, are simply statements expressing love, gratitude, forgiveness, repentance etc. towards an individual, entity or cause.

117. Can "Words Of Affection" Be Used In A Will?

A. ***Yes***. Words of Affection, may always be expressed in a Will and are typically used in connection with a testamentary gift. *Example: I give my 67 Chevy to my Brother XYZ, and although we have not spoken for many years, I love him dearly and deeply regret any pain which I have caused him during our years of estrangement.*

B. If the Testator/Testatrix wishes to express words of affection to an individual or entity that is not to receive a testamentary gift under the Will, such words should be expressed in a separate clause or paragraph which clearly indicates that no testamentary gift is to be received. *Example: Words cannot express the gratitude I feel towards my Nurse XYZ for the care and respect she has shown during my last illness, and I regret that I have nothing to give her under this Will.*

118. What Is A Conditional Gift?

A. A gift is conditional, if something must occur prior to ownership of the gift being transferred over to a Beneficiary. *Example: I give my residence located at 77 Mockingbird Lane, Atlanta, Georgia to my Daughter XYZ, so long as she graduates from UGA Medical School no later than January 1, 2020 and should she fail to do so, I then give such residence to my Son ABC.*

B. In order for the condition to be valid, the condition that must be performed in order for the testamentary gift to vest in the Beneficiary cannot be impossible, illegal or against public policy[62], or otherwise violate the rule against perpetuities.

119. What Is A Power of Appointment?

A. A Power of Appointment is a power delegated by a Testator/Testatrix in their Will to another person that entitles such person to choose or decide who will be the Beneficiary who will receive property that passes under the Will.

120. What Is A General Power Of Appointment?

A. A general power of appointment is a "Testamentary Power[63]" granted under a Will which gives the Appointee the unrestricted power to decide who should receive the designated property covered by the appointment, including the power to keep the property for themselves. ***Example****: "I leave my video game collection to be distributed as my son Andrew sees fit."*

B. If the Appointee fails or refuses to select a Beneficiary, or otherwise exercise the general power of appointment, they will be treated as the owner of the designated property.

121. What Is A Special Power Of Appointment?

A. A special power of appointment is a "Testamentary Power[64]" granted under a Will, which gives the Appointee the restricted power to decide who amongst a specified group or class of people should receive the designated property covered by the appointment, excluding the power to keep the property for themselves. ***Example****: "I leave my cactus collection to my children, my wife Pat to choose who receives which cactus."*

B. Unlike a general power of appointment, if the Appointee fails or refuses to select a Beneficiary, or otherwise exercise the special power of appointment, the ownership of the property shall pass to the members of the specified group or class of people should receive the designated property covered by the appointment.

C. A special power of appointment may be exclusive or nonexclusive. If exclusive, the Appointee may give all the property to one or more members of the specified group or class of people to the exclusion of any and all other members. If

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62 O.C.G.A. § 53-4-68(a).

63 A Testamentary Power is any power granted by a Testator/Testatrix to another under their Will.

64 A Testamentary Power is any power granted by a Testator/Testatrix to another under their Will.

nonexclusive, the Appointee must give some property to each and every member of the specified group or class.

122. What Is The Rule Against Perpetuities?

A. The rule against perpetuities[65] prohibits the conditional transfer of property (i.e. ***Conditional Gifts***) or the transfer of power (i.e. ***General and Special Powers of Appointment***) under circumstances in which the transfer is not certain to be completed or otherwise terminated within the time period defined within the rule.

B. As a practical matter, the rule prohibits a Testator/Testatrix from earmarking future interests (traditionally contingent remainders and executory interests) for remote Descendants. In essence, the rule prevents a person from putting qualifications and criteria in a will that will continue to control or affect the distribution of assets long after he or she has died, a concept often referred to as control by the "dead hand" or "mortmain".

123. What Restrictions Does The Rule Against Perpetuities Impose Upon Conditional Gifts Under A Will?

A. The Rule against Perpetuities may impact the drafting of a Will if: ***1.) the Client makes a conditional gift through a Will, and 2.)*** there is any uncertainty as to whether ***the transfer of ownership of the gift may not be completed within 21 years following the death of the Testator/Testatrix.***

B. The rule against perpetuities would void a conditional transfer of property under a Will unless the transfer is certain to be either completed or terminated:

1. Within the lifetime of the Beneficiary[66] who is to receive the conditional gift or within 21 years following the death of such Beneficiary[67], or;
2. Within 90 years following the creation [68] of the Beneficiaries interest[69].

Examples: ***Void Conditional Gift***. *"I give my residence located at 77 Mockingbird Lane, Atlanta, Georgia to my Daughter XYZ, so long as 1 of her Descendants graduate from UGA Medical School"*

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65 O.C.G.A. § 44-6-201 et. seq.

66 If the Beneficiary is not born when the Will takes effect, then the transfer of the gift to the unborn beneficiary must be certain to either transfer or terminate within 21 years after the Will takes effect. *St Regis Paper Co. v. Brown*, 247 Ga. 361, 276 S.E.2d 24 (1981). The Beneficiaries conditional property interest is created upon the death of the Testator/Testatrix. O.C.G.A. § 44-6-202(a).

67 O.C.G.A. § 44-6-201(a)(1).

68 The Beneficiaries conditional property interest is created upon the death of the Testator/Testatrix. O.C.G.A. § 44-6-202(a).

69 O.C.G.A. § 44-6-201(a)(2).

(This conditional gift violates the rule against perpetuities because there can be no certainty that a Descendant of the Daughter will graduate with a MD degree during her lifetime, or within 90 years after the death of the Testator/Testatrix.).

Valid Conditional Gift. *I give my residence located at 77 Mockingbird Lane, Atlanta, Georgia to my Daughter XYZ, so long as she graduates from UGA Medical School no later than January 1, 2020 and should she fail to do so, I then give such residence to my Son ABC.*

124. What Restrictions Does The Rule Against Perpetuities Impose Upon General Powers Of Appointment Under A Will Or Other Estate Document?

A. The Rule against Perpetuities may impact the drafting of a Will or other estate document if: ***1.) the Client grants a General Power of Appointment subject to a condition precedent, and 2.)*** there is any uncertainty as to whether ***the power will be exercised or is otherwise terminated within 21 years following the death of the Appointee.***

B. The rule against perpetuities would void a special power of appointment, under a Will (or other estate document) unless the power is certain to be either exercised or terminated:

1. Within the lifetime of the Appointee who is to exercise the power or within 21 years following the death of such Appointee[70], or;
2. Within 90 years following the creation [71] of the power[72].

[70] O.C.G.A. § 44-6-201(b)(1).

[71] The creation of the Appointee's conditional power of appointment is governed by general principles of property law. O.C.G.A. § 44-6-202(a).

[72] O.C.G.A. § 44-6-201(b)(2).

Examples: ***Void General Power of Appointment.*** "*I leave my video game collection to my Son Andrew and his Descendants as they see fit, and if he should have no descendants to my Daughter Sara as she should see fit.* (This would be a void power of appointment to Sara since there is no certainty that Andrew will have no Descendants within 90 years after the condition was created.).

Valid General Power of Appointment. "I leave my video game collection to be distributed as my son Andrew sees fit"

125. What Restrictions Does The Rule Against Perpetuities Impose Upon Special Powers Of Appointment Under A Will Or Other Estate Document?

A. The Rule against Perpetuities may impact the drafting of a Will or other estate document if: ***1.) the Client grants a Special Power of Appointment, and 2.)*** there is any uncertainty as to whether ***the power is exercised or the condition will not be satisfied within 21 years following the death of the Appointee.***

B. The rule against perpetuities would void a general power of appointment, subject to a condition precedent, under a Will (or other estate document) unless the condition precedent is certain to be either satisfied or becomes impossible to satisfy:

1. Within the lifetime of the Appointee who is to exercise the conditional power or within 21 years following the death of such Appointee[73], or;
2. Within 90 years following the creation [74] of the power[75].

Examples: ***Void Special Power of Appointment.*** "*I leave my cactus collection to my Descendants, the eldest child of each generation to choose who receives which cactus.".* (This would be a void special power of appointment to Sara since there is no certainty that the power will be exercised within 90 years after the power was created.).

Valid Special Power of Appointment*: "I leave my cactus collection to my children, my wife Pat to choose who receives which cactus."*

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73 O.C.G.A. § 44-6-201(c)(1).

74 The creation of the Appointee's special power of appointment is governed by general principles of property law. O.C.G.A. § 44-6-202(a).

75 O.C.G.A. § 44-6-201(c)(2).

126. What Happens If A Conditional Gift Or Power Of Appointment Is Voided Under The Rule Against Perpetuities?

A. The Court will reform the Gift or Power of Appointment in a manner that most closely approximates the original intent of the Testator/Testatrix[76].

127. What Is A Life Estate?

A. A Life Estate is an ownership interest in real or personal property given to an individual or entity in which their ownership interest terminates upon either: 1.) the death of the person to whom the property was given, 2.) the death of a third person or, 3.) the occurrence of a defined event or circumstance.[77] *Example: I give a Life Estate in my residence located at 600 Peachtree Street to my Wife XYZ, however upon either her remarriage or death, I give my home to my Brother ABC*.

General Note: The ownership interest upon expiration of the Life Estate is called a ***Remainder***.

128. What Is A Remainder?

A. A Remainder is an ownership interest in real or personal property wherein the right to physical possession of the property does not arise until a prior estate (***life estate, estate for years***) expires or is terminated.[78]

129. What Is A Vested Remainder?

A. A remainder is vested if (1) the remainder is given to a presently existing and ascertained person, and (2) it is not subject to a condition precedent.

B. A vested remainder may be indefeasibly vested, meaning that it is certain to become possessory in the future, and cannot be divested. An example, O conveys to "A for life, then to B and B's heirs." B has an "indefeasibly vested remainder" certain to become possessory upon termination of A's life estate. B or B's heirs will clearly be entitled to possession upon A's death.

C. A vested remainder may not be certain to become possessory. An example of this: O conveys "to A for life, then to A's children." A has one child, B, so B has a vested remainder because B is ascertainable. But, A may have no other children in his life, and B could die before A, so the vested remainder is not certain to become

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76 O.C.G.A. § 44-6-203.
77 O.C.G.A. §§ 44-6-68, -80, -81.
78 O.C.G.A. § 44-6-60(a).

possessory. Instead B is said to have a vested interest subject to partial (more children) and complete divestment (if B dies).

130. What Is A Contingent Remainder?

A. A remainder is contingent if one or more of the following is true: (1) it is given to an unascertained or unborn person, (2) it is made contingent upon the occurrence of some event other than the natural termination of the preceding estates. *Example: If we assume that B is alive, and O conveys "to A for life, then to the heirs of B...",* then the remainder is contingent because the heirs of B cannot be ascertained until B dies. No living person can have actual heirs, only heirs apparent.

131. What Is An Executory Interest?

A. An executory interest is a future interest, held by a third party transferee (i.e. someone other than the grantee), which either cuts off another's interest or begins after the natural termination of a preceding estate. An executory interest vests upon any condition subsequent except the natural termination of the original grantee's rights. In other words, an executory interest is any future interest held by a third party that isn't a remainder..

B. Executory interests usually arise when a grantor gives property to one person, provided that they use it a certain way. If the person fails to use it properly, the property transfers to a third party.

132. Can Testamentary Gifts Of Real And Personal Property Be Given Through Life Estates and Remainders?

A. ***Yes***. A Will may create a Life Estate in a testamentary gift given to a beneficiary of real property or personal property which is not destroyed through ordinary and customary usage.[79]

General Note: The definition of property "destroyed through ordinary and customary usage" is an elusive concept and specifically excludes property interests in money and livestock.

B. The ***Remainder*** may be given in Life Estate to a separate Beneficiary.

[79] O.C.G.A. § 44-6-82.

133. What Are The Benefits Of Giving A Gift Through A Life Estate And Remainder?

A. By giving a Life Estate in a testamentary gift, the Testator/Testatrix may retain control over who owns the property for many years or even generations to come through successive life estates.

134. Can A Life Estate Be Sold?

A. ***Yes, with respect to real property.*** . However, the purchaser of a Life Estate in ***real property*** only acquires the ownership interest held by the life tenant, meaning the purchaser will lose its entire interest upon the death or other condition upon which the Life Estate was created.[80] *Example: I have a life estate that terminates upon my death, and I sell my life estate to my Brother XYZ. However, then XYZ will lose any ownership interest in the property upon my death.*

B. The answer is also yes with respect to the purchaser of a Life Estate in ***personal property*** (i.e. painting, family heirlooms, etc.) however the ultimate outcome of the ownership issue is far less certain. A good faith purchaser for value who acquires a life estate in personal property will have a superior claim to ownership in the personal property over the individuals holding the Remainder interest. However, a purchaser who knows or should have known that the seller had a Life Estate in personal property will once again lose its entire interest upon the death or other condition upon which the Life Estate was created.

Practice Tip: The interests of Remainders in real property and motor vehicles may be expressed in deeds or titles which once recorded protect such interests by giving the world notice of the property interests held in remainder. If the Testator/Testatrix wishes to give a Life Estate in personal property, the interests of the Remainders in personal property may be expressed by recording a UCC-1 which once recorded protects such interests by giving the world notice of the personal property interests held in Remainder.

135. What Rights Do Individuals Owning The Remainder Have?

A. A Life Estate will be forfeited and the individuals owning the ***Remainder*** will be entitled to immediate possession if the tenant for life fails to exercise the ordinary care of a prudent person in preserving and protecting such property or otherwise

[80] O.C.G.A. § 44-6-87.

takes any action which would permanently injure the remainder interests in such property.[81]

B. Income from the real or personal property generated during the Life Estate will belong to the life tenant, however any increase in value, improvements or new shares with respect to corporate stocks belong to the individuals owning the Remainder.[82]

C. Personal property subject to a Life Estate may not be removed from Georgia without the consent of the individuals owning the Remainder and the life tenant will forfeit its life estate if they attempt to fraudulently remove such property without the consent of the individuals owning the Remainder.[83]

136. Can A Remainder Be Given To An Unborn Being?

A. ***Yes***. However, if the individual is still unborn at the time the remainder passes the unborn being shall not receive any interest in the property.[84] *Example: I give a Life Estate in my residence located at 600 Peachtree Street to my Wife XYZ, however upon either her remarriage or death, I give my home to my unborn children. Upon the death or remarriage of my Wife, the children of the Testator/Testatrix will receive the property and any unborn children will not be included*.

137. What Is An Estate For Years?

A. An Estate For Years is an ownership interest in real or personal property given to an individual or entity in which their ownership interest terminates upon a date certain or fixed number of years.[85] *Example: I give an Estate For Years in my residence located at 600 Peachtree Street to my Wife XYZ; however, upon January 1, 2025, I give my home to my Brother ABC*.

138. Can Testamentary Gifts Be Given Through An Estate For Years?

A. ***Yes***. A Will may create an Estate for Years in a testamentary gift given to a beneficiary of real or personal property.[86]

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81 O.C.G.A. § 44-6-83.
82 O.C.G.A. § 44-6-84.
83 O.C.G.A. § 44-6-89.
84 O.C.G.A. § 44-6-65.
85 O.C.G.A. § 44-6-100.
86 O.C.G.A. § 44-6-100.

139. What Are The Benefits Of Giving A Gift Through An Estate For Years?

A. As with a Life Estate, by giving an Estate for Years in a testamentary gift, the Testator/Testatrix may retain control over who owns the property for many years or even generations to come through successive Estates for Years.

140. What Statutory "Death Benefits" Are Available For Certain City And State Employees?

A. The State of Georgia provides a statutory death benefit for the following persons employed in hazardous occupations:

1. Every law enforcement officer, firefighter, emergency medical technician, emergency management specialist, prison guard, and state highway employee may be entitled up to a $100,000 "Death Benefit" if they are killed in the line of duty.[87]
2. The death benefit also extends to members of the Georgia National Guard who have been called into service by the Governor.[88]

141. When Is The Statutory "Death Benefit" Awarded?

A. The death benefit applies if "***During the Line of Duty***":[89]

1. The Testator/Testatrix is killed;
2. The death does not result from natural causes or the performance of "***routine duties***" which would not be strenuous or dangerous if performed by ordinary citizens;[90]
3. The death is not the result of suicide or self-inflicted injury.[91]

142. What Does "Line of Duty" Mean?

A. ***EMTs:*** responding to or returning from an emergency, performing duties at the scene of an emergency, transporting a person to a medical facility for emergency treatment, or returning therefrom ***while on duty***.[92]

87 O.C.G.A. § 45-9-85(a)(3).
88 O.C.G.A. §§ 45-9-81(7), 38-2-3.
89 O.C.G.A. § 45-9-85(a)(3).
90 O.C.G.A. § 45-9-88(b).
91 *Id.*
92 O.C.G.A. § 45-9-81(6)(A).

B. ***Volunteer Firefighter***: responding to or returning from a fire or other emergency, performing duties during any fire or emergency, or performing duties intended to protect life and property, including training exercises ***while on duty.***[93]

C. ***Firefighter:*** performing any activity for which compensation is received from the fire service employer ***while on duty*** or responding to any situation that would save a life, preserve the peace, or while attempting to prevent the commission of a crime or fire ***while off duty.***[94] However, the ***Firefighter*** will not be entitled to the death benefit when ***off duty*** if they are being compensated by a private employer and are entitled to workers compensation benefits from the employer or employer's insurer.[95]

D. ***Law Enforcement***: performing any activity for which compensation is received from the law enforcement agency while ***on duty*** or responding to any situation that would save a life, preserve the peace, or while attempting to prevent the commission of a crime or fire ***while off duty.***[96] However, the ***Law Enforcement Officer*** will not be entitled to the death benefit when ***off duty*** if they are being compensated by a private employer and are entitled to workers compensation benefits from the employer or employer's insurer.[97]

E. ***Prison Guards:*** performing any activity for which compensation is received from a public agency ***while on duty.***[98]

F. ***State Highway Employees:*** performing any work necessary for the construction, operation or maintenance ***while on duty*** when death results from working under hazardous conditions in close proximity to moving traffic or equipment.[99]

143. Who Is Entitled To The Death Benefit?

A. ***Emergency Management Rescue Specialists:*** defined as any person licensed as an emergency management rescue specialist.[100]

B. ***EMTs:*** defined as individuals employed as emergency medical technicians, paramedics or cardiac technicians by a municipality, county or the State of Georgia.[101]

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93 O.C.G.A. § 45-9-81(6)(B).
94 O.C.G.A. § 45-9-81(6)(C).
95 *Id.*
96 O.C.G.A. § 45-9-81(6)(C).
97 *Id.*
98 O.C.G.A. § 45-9-81(6)(D).
99 O.C.G.A. § 45-9-81(6)(E).
100 O.C.G.A. §§ 45-9-81(3), 38-3-36.

C. ***Firefighters:*** defined as individuals employed as professional firefighters on a full time basis by a municipal, county or State fire department with 3 or more employees, a volunteer fireman under a legally organized volunteer fire department, or an individual working for a private corporation under contract to provide firefighting services for a municipality, county or the State.[102]

D. ***Law Enforcement Officers:*** defined as individuals employed as police officers on either a full or part time basis by a municipal, county or State police department to enforce criminal or traffic laws, officers of the Georgia Department of Juvenile Justice, and members of the ***Georgia National Guard*** called into active state service by the Governor.[103] The Georgia National Guard consists of both the Army National Guard and the Air National Guard.[104]

E. ***Prison Guards:*** defined as individuals employed by a municipality, county or the State of Georgia to supervise the incarceration of persons accused or convicted of crimes, community supervision officers who supervise probationers or parolees, or persons who supervise youth who are charged with or adjudicated for an act which if committed by an adult would be considered a crime.[105]

F. ***State Highway Employees:*** defined as employees of the Georgia Department of Transportation engaged in the construction, operation or maintenance of public roads.[106]

144. Who Gets The Death Benefit?

A. The Death Benefit is to be paid to the un-remarried widow/widower of the Testator/Testatrix or to the dependents of the Testator/Testatrix or widow/widower as identified in their last tax return who may elect to receive $100,000 in equal payments over five years, or a lump sum reduced to present value (using 6% per annum reduction).[107]

145. Can A Will Apply The Death Benefit Towards Year's Support?

A. ***Yes.*** Although the Death Benefit is payable directly to the widow/widower or the dependents of the Testator/Testatrix, it can be applied towards Year's Support. *Example: I give any payments or death benefits paid under or with relation to the "Georgia State Indemnification Fund" to my Wife XYZ, [to be applied against*

101 O.C.G.A. § 45-9-81(4).
102 O.C.G.A. § 45-9-81(5).
103 O.C.G.A. § 45-9-81(7).
104 O.C.G.A. § 38-2-3(b)(1).
105 O.C.G.A. § 45-9-81(10).
106 O.C.G.A. § 45-9-81(11).
107 O.C.G.A. § 45-9-85(a)(3).

Year's Support] so long as she is not remarried at the time of the payment, and if she is remarried, then to my Daughter ABC [to be applied against Year's Support].

146. Is The Death Benefit Taxable?

A. ***No.*** The Death benefit is not taxable within the State of Georgia for any purpose[108].

147. Can The Testator/Testatrix Designate The Death Benefit Given Under The "Georgia State Indemnification Fund" To Someone Other Than Their Un-Remarried Spouse or Dependents?

A. ***No***. If the Testator/Testatrix has an un-remarried spouse or dependents as listed on their most recent tax return, the statutory language provides the Death Benefit "shall"[109] pass to them and deprives the Testator/Testatrix of any choice upon the matter.

General Note: The Death Benefit would apparently be treated as a "non-probate" asset similar to life insurance or a 401-K.

Practice Tip: The Testator may however, designate that the Death Benefit shall be applied towards Year's Support such that property of the estate may be designated to individuals other than the un-remarried spouse or designate in the event the spouse gets remarried. *Example: The death benefit to be received by my spouse and dependents under the "Georgia State Indemnification Fund" shall be applied towards Year's Support, however if my spouse and dependents are ineligible to receive such Death Benefit, then I give all proceeds from such death benefit to my Brother XYZ.*

148. Can The Testator/Testatrix Designate The Death Benefit Given Under The "Georgia State Indemnification Fund" If They Have No Spouse Or Dependents?

A. ***Yes***. There is nothing in the statutory language[110] to restrict the ability of the Testator/Testatrix to give the Death Benefit to a separate beneficiary if there is not a spouse or dependents to receive the Death Benefit.

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108 O.C.G.A. § 45-9-87.
109 O.C.G.A. § 45-9-85(a)(3).
110 O.C.G.A. § 45-9-85(a)(3).

149. Can The Terms Of A Deed Or Ownership Of Real Or Personal Property Void A Testamentary Gift Of Such Property?

A. ***Yes***. A Testator/Testatrix may gift their interest in real property held under a "***Tenancy in Common***" but may not gift their interests in real property held under a "***Joint Tenancy***" or "***Tenancy by the Entirety***" if the other joint owners are still alive.

150. What Is A Tenancy In Common?

A. ***Tenancy in Common –*** Defined in Georgia as real or personal property owned by two or more individuals with ***no rights of survivorship***. This is the presumed form of ownership in Georgia when two or more people own property unless the deed or ownership documents indicate otherwise.[111] Although tenants in common may own unequal shares of the property, it is presumed they own equal shares unless the Deed indicates otherwise.[112] ***Tenants in Common may devise their interests in the property under a Will*** and the beneficiary then becomes the new tenant in common with the other owners.[113]

151. What Is A Joint Tenancy?

A. ***Joint Tenancy*** – Defined in Georgia as real or personal property owned by two or more individuals ***with rights of survivorship***. The deed or ownership papers will only be construed to create a Joint Tenancy if it includes the defined words "joint tenants," "joint tenants and not as tenants in common" or "joint tenants with survivorship," or "jointly with survivorship."[114] If property is held in Joint Tenancy, then the property is automatically transferred to the surviving owners upon the death of any joint tenant, and any attempt by the deceased owner to devise his or her share under a Will is void as a matter of law[115]. ***Joint Tenants cannot devise their interests in the property under a Will unless they are the only surviving owners***.

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111 O.C.G.A. § 44-6-120.

112 *Id.*

113 *Motor Aid v. Ray*, 53 Ga. App. 772, 187 S.E. 120 (1936); *Heid v. Astrue*, No. CV 11-171, 2012 U.S. Dist. LEXIS 166667, *11-12 (S.D. Ga. Oct. 26, 2012).

114 O.C.G.A. § 44-6-190(a).

115 *Harbin v. Harbin*, 261 Ga. App. 244, 582 S.E.2d 131 (2003).

152. What Happens When Married Joint Tenants Get Divorced?

A. A Joint Tenancy may be disposed of in a final decree of divorce or annulment with the property sold or transferred into a Tenancy in Common[116].

B. Alternatively, either joint tenant can convert the joint tenancy into a tenancy in common by recording an affidavit upon the property records in the county where the property is located averring that: 1.) they are legally divorced or the marriage has been annulled, 2.) the tenant intends to terminate the joint tenancy, 3.) identifies the book and page of the deed creating the joint tenancy, 4.) attaches a copy of the final divorce decree or annulment, and 5.) attaches a legal description of the property held in joint tenancy[117].

153. What Is A Tenancy By The Entirety?

A. ***Tenancy by the Entirety*** – Not recognized in Georgia, but defined as property held by a husband and wife ***with rights of survivorship***. If property is held in Tenancy by the Entirety, then the property is automatically transferred to the surviving spouse upon death of a spouse, and any attempt by Testator/Testatrix to devise his or her share to anyone other than the surviving spouse under a Will is void as a matter of law.[118] ***Tenants By the Entirety <u>cannot devise</u> their interests in the property under a Will to anyone other than their surviving spouse.***

General Note: The surviving spouse's ***capital gains tax basis*** in the deceased spouse's one-half interest in the property is stepped up to the fair market value at the date of death, but the basis for step up only applies to the one-half interest held by the decedent's spouse. (AVLF Materials)

154. What Is Community Property?

A. There are 8 States (***not Georgia***) which provide that any property acquired by either spouse (other than through gift or inheritance) during the course of a marriage is owned equally by each spouse. Community property is generally subject to the debts of either spouse and cannot be disposed of without the mutual consent of either spouse.

General Note The Community Property States are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington. The

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116 O.C.G.A. § 44-16-190(4).

117 <u>*Id.*</u>

118 *Sams v. McDonald*, 117 Ga. App. 336, 160 SE. 2d. 594 (1968); *Ga. Farm Bureau Mut. Ins. Co. v. Franks*, 320 Ga. App. 131, 135, 739 S.E.2d 427, 431 (2013).

surviving spouse's ***capital gains tax basis*** for the entirety of Community Property is stepped up to fair market value upon the death of the first spouse. This is often beneficial for a married couple to retain the Community Property status.

155. Can Community Property Be Gifted Under A Will?

A. ***Yes***. Each spouse is entitled to gift his or her share of community property to whomever they choose unless there is an agreement to the contrary.

156. What Does "*Per Capita*" Mean With Respect To Testamentary Gifts?

A. The term "***Per Capita***" simply means that surviving Beneficiaries share and share alike. If a Beneficiary predeceases the Testator/Testatrix then his or her share goes to the surviving Beneficiaries.[119] The term "***Equal Division***" generally means a "***Per Capita***" distribution if a gift is made to a class and their children.[120]

157. What Does "*Per Stirpes*" Mean With Respect To Testamentary Gifts?

A. The term ***"Per Stirpes***" simply means that the Descendants of a deceased Beneficiary under a Will or Intestacy Laws are entitled to receive the property or inheritance that would have been received by the deceased Beneficiary had they been alive.

B. This is a very important term in conveying gifts. Example: If a Testator/Testatrix had three children listed as beneficiaries in a Will, one of whom predeceased the Testator/Testatrix, the two surviving children may receive the deceased child's inheritance unless the gift was given **"Per Stirpes"**.

Practice Tip: Under Georgia law, testamentary gifts are assumed to be given ***"Per Stirpes"*** unless indicated otherwise.

158. Are There Any Limits On Who Can Receive Testamentary Gifts Under A Will?

A. ***Yes, but very few***. A Testator/Testatrix can make any testamentary gifts under a Will that are not inconsistent with the laws or public policies of the State of Georgia subject to the following:[121]

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119 *MacGregor v. Roux*, 198 Ga. 520, 32 S.E. 2d 289 (1944).
120 *Barfield v. Aiken*, 209 Ga. 483, 74 S.E. 2d 100 (1953).
121 O.C.G.A. § 53-4-1.

1. Gifts may be made to any person so long as they are not intended by the Testator/Testatrix to be used for an illegal or immoral purpose.[122]
2. Gifts may be made to religious, educational and charitable organizations.
3. Gifts made to beneficiaries who kill or conspire to kill the Testator/Testatrix are void.
4. Gifts may be made to illegal aliens but not enemy aliens.
5. Gifts may be made to towns, cities or the State.
6. Gifts of personal property may be made to a foreign country; however, a gift of real property to a foreign country is void.

B. A person cannot be a beneficiary or receive property of the Testator/Testatrix under a Will unless named in the Will.

159. What Happens If A Beneficiary Predeceases The Testator/Testatrix?

A. In the event that a beneficiary is dead at the time the Will is executed or otherwise predeceases the Testator/Testatrix, the Testamentary Gift shall pass to the Descendants of the deceased beneficiary pursuant to the Intestacy Laws unless the Will indicates otherwise (i.e. per capita).[123]

160. What Happens If A Beneficiary Cannot Be Located?

A. If a beneficiary cannot be located, the Probate Court in the county where the Testator/Testatrix resides will take custodianship of the property and attempt to locate the beneficiary. If the Court cannot locate the beneficiary within 15 years, the property is automatically transferred to the Georgia Department of Revenue.[124]

161. What Types Of Testamentary Gifts Can Be Given?

A. There are ***four categories of testamentary gifts*** recognized under Georgia law:

1. A **specific testamentary gift** is a gift of real or personal property that is expressly identified in the Will.[125] Example: "I give my residence located at 600 Peachtree Street, Atlanta, Georgia, 30308 to my Son XYZ." The gift is limited to the specific property and is extinguished if that property has been destroyed or no longer owned when the Testator/Testatrix dies.

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122 *Smith v. Dubose*, 78 Ga. 413, 3 S.E. 309 (1887).
123 O.C.G.A. § 53-4-64.
124 O.C.G.A. § 53-9-8.
125 O.C.G.A. § 53-4-59.

2. A ***demonstrative testamentary gift*** is a gift of money to be paid from a specified source.[126] *Example: "I give my Son XYZ $10,000 to be paid out of the proceeds of the sale of my residence."* Although payable from a specified source, these gifts are not extinguished if the source no longer exists and must be paid out of the other assets of the estate.

3. A **general testamentary gift** is a gift of money to be paid from the general estate.[127] Example: "I give my Son XYZ $10,000."

4. A ***residuary testamentary gift*** is a gift of all remaining property that is not otherwise disposed of by other provisions of the Will.[128]

162. Is There A Priority As To How Testamentary Gifts Are Abated To Pay The Debts And Bills Of The Testator/Testatrix?

A. ***Yes.*** The testamentary gifts are abated by the debts of the Testator/Testatrix as follows:

1. ***First***, the assets and property not included in the Will are used to satisfy any outstanding debts and bills.

2. ***Second***, if the assets not included in the Will are insufficient to satisfy the debts and bills, the ***residual assets*** are used thereby reducing the residuary testamentary gifts proportionately.[129]

3. ***Third***, if the residuary assets are insufficient to satisfy the debts and bills, the ***general testamentary assets*** are used thereby reducing the general testamentary gifts proportionately.[130]

4. ***Fourth***, if the general testamentary assets are insufficient to satisfy the debts and bills, the ***demonstrative assets*** are used thereby reducing the demonstrative testamentary gifts proportionately.[131]

5. ***Fifth***, if the demonstrative assets are insufficient to satisfy the debts and bills, the ***specific assets*** are used thereby reducing the specific testamentary gifts proportionately.[132]

6. ***Finally***, if all the assets in the hands of the executor are insufficient to satisfy the debts and bills, the creditors may proceed against any

126 O.C.G.A. § 53-4-59.
127 O.C.G.A. § 53-4-59.
128 O.C.G.A. § 53-4-59.
129 O.C.G.A. § 53-4-63(a).
130 O.C.G.A. § 53-4-63(b).
131 O.C.G.A. § 53-4-63(b).
132 O.C.G.A. § 53-4-63(b).

beneficiary to recover any testamentary gift already received under the Will.[133]

163. Can The Real And Personal Property Gift Clauses Be Deleted From A Will?

A. ***No***. This is not recommended unless the Testator/Testatrix owns no property whatsoever and even then it is possible they could purchase, be given, inherit or otherwise obtain real or personal property at a future date.

f. Cash, Bank Accounts & Investments – Article 6

164. Why Treat Cash & Investments Separately?

A. Cash and some investments are not considered property (they are owned by the ***Federal Reserve***) and therefore are not subject to the same type of ownership interest as real or personal property. Consequently it is best to deal with them separately under a Will.

g. Residual Estates – Article 7

165. What Is The Residual Estate?

A. Any and all real property, personal property, cash or other assets belonging to the Testator/Testatrix which were not otherwise gifted within the Will.

166. What Is The Purpose Of The Residual Estate Clause?

A. This Clause ensures that any property not specifically gifted under the Will passes to a beneficiary in accordance with the wishes of the Testator/Testatrix.

B. Absent such a clause, residuary property or assets not gifted in the Will would pass pursuant to the Intestacy Laws.

C. Unless a contrary intent is stated in the Will, the gift under this clause includes all property not otherwise given as a gift in the Will.[134]

167. Can The Residual Property Clause Be Deleted From A Will?

A. ***No***. It should never be deleted since the Residual Estate will otherwise be transferred pursuant to the Intestacy Laws.

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133 O.C.G.A. §§ 53-4-63(c), 53-7-43.

134 O.C.G.A. § 53-4-72.

h. Testamentary Trusts – Article 8

168. What Is The Purpose Of A Testamentary Trust?

A. The Testamentary Trust is used to hold property gifted to a Minor child or adult Ward who would otherwise not be legally or pragmatically responsible to manage the property for themselves. It is also used to avoid the burden and expense of the bond and reporting requirements imposed upon conservators.

B. Although a Testamentary Trust is typically created for minor children, adult wards, or irresponsible adults; however, they can be used for any purpose to conserve or restrict the use of a testamentary gift.

169. How Does A Testamentary Trust Work?

A. The Testator/Testatrix places a testamentary gift into a Testamentary Trust subject to management by the Trustee. The Trust restricts the use of the trust property to expenditures that are required for the support, care, education, health and welfare of the Minor child or incapacitated adult. In the case of Minor children, the Trust typically provides for the distribution of the property held in trust once the beneficiary becomes an adult; however, there is no requirement as to at what age the property must be given to the beneficiary and the Trust is dissolved.

170. Do I Need A Separate Trust Document To Create A Trust Under The Will?

A. ***No***. Georgia law recognizes that "Testamentary Trusts" can be created by the Will and do not require a separate document[135].

B. The requirements to create a "Testamentary Trust" include:

1. A writing showing the intent of the Testator/Testatrix to create a trust;
2. Trust property;
3. A beneficiary who is reasonably identifiable at the time of the creation of the trust, except in the case of a charitable trust or a trust for care of an animal;
4. A trustee; and
5. Identification of the trustee's duties.[136]

[135] See e.g. O.C.G.A. § 53-12-2(14)

C. The beneficiaries of a "Testamentary Trust" are not entitled to any rights under the Trust until the Will has been probated, since the Trust will fail if the Will is found to be void due to improper execution.[137]

171. Can A Testamentary Trust Be Created For The Care Of A Pet Or Other Animal?

A. **Yes.** A testamentary trust may be established for the care, support, welfare and well being of 1 or more pets or other animals and is typically called a "Pet Trust"[138]. The standard trust language is simply modified to provide for the care and well being of the pet as opposed to a minor child or adult Ward.

172. Are There Any Restrictions Upon The Creation Of A Testamentary Pet Trust?

A. The only restriction upon the creation of such a Pet Trust is that the pet or animal must be alive during the life of the Testator/Testatrix[139].

173. When Does A Testamentary Pet Trust Terminate?

A. The Pet Trust terminates upon the death of the pet or last surviving animal named in the Pet Trust[140].

174. What Happens To The Res Upon Termination Of The Pet Trust?

A. Any property left in the trust following the death of the last surviving pet or animal named in the Testamentary Pet Trust is distributed in the following order[141]:

1. As directed by the language of the Testamentary Trust;
2. If no direction is given in the Testamentary Trust, in accordance with the residuary clause of the Will of the Testator/Testatrix.
3. If there is no taker identified under paragraphs 1 or 2 above, to the Heirs of the Testator/Testatrix in accordance with laws of intestacy.

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136 O.C.G.A. § 53-12-20.
137 *Woo v. Markwalter*, 210 Ga. 156, 78 S.E.2d 473 (1953).
138 O.C.G.A. §53-12-28(a)
139 *Id.*
140 *Id.*
141 O.C.G.A. §53-12-28(c)

175. Can A Testamentary Trust Be Created For The Support Of Charitable Causes?

A. **Yes.** A testamentary trust may be established for the support of certain charitable causes and is typically called a Charitable Trust[142]. The standard trust language is simply modified to provide for the support of the charity as opposed to a minor child or adult Ward.

176. Are There Any Restrictions Upon The Creation Of A Charitable Trust in a Will?

A. The following causes are considered acceptable purposes for the creation of a Charitable Trust:[143]

1. Relief of poverty;
2. Advancement of education;
3. Advancement of ethics and religion;
4. Advancement of health;
5. Advancement of sciences, arts or humanities;
6. Protection and preservation of the environment;
7. Improvement, maintenance or repair of graves, cemeteries and memorials;
8. Prevention of cruelty to animals;
9. Government purposes; and
10. Other similar subjects regarding the relief of human suffering or promotion of human civilization.

The Testator/Testatrix may retain or allow the Trustee to retain the power to select a charitable purpose or charitable beneficiary at some future date without invalidating the Charitable Trust.[144]

177. What Happens If The Charitable Cause Fails Or Ceases To Exist?

A. If the charitable beneficiary ceases to exist and a successor is not named in the Will, the Superior Court shall exercise its equitable ***Cy Pres*** powers in such a way to effectuate the intent of the Testator/Testatrix as nearly as possible.[145]

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142 O.C.G.A. §53-12-170(a)
143 O.C.G.A. §53-12-170(b).
144 O.C.G.A. §53-12-171.
145 O.C.G.A. §53-12-172.

178. When Does A Charitable Trust Terminate?

A. A Charitable Trust is allowed to continue for an indefinite or unlimited period of time.[146]

179. Can The Testamentary Trust Clause Be Deleted From A Will?

A. ***Yes***. It can and should be deleted if the Testator/Testatrix has no beneficiaries who are or could possibly be Minor children, adult Wards, irresponsible adults, pets, charitable causes or other potential beneficiaries.

i. Special Needs Trusts – Article 9

180. What Is The Purpose Of A Special Needs Trust?

A. The Special Needs Trust is used to preserve and protect the ability of a minor child or adult Ward to collect public or private financial assistance (i.e. Medicaid, Social Security, etc.). Most of the financial assistance available through public and private programs is "***means based***" and the beneficiary will not qualify for financial assistance unless they are deemed "***indigent***". The Standard "Testamentary Trust" requires the distribution of the principal and income of the trust to provide for the health and support of the beneficiary thereby destroying the requirement of Indigence. The "Special Needs Trust" limits the uses to which the principal and income from the trust can be used allowing the beneficiary to remain indigent thereby satisfying the "means based" requirements of many public and private programs.

181. How Does A Special Needs Trust Work?

A. The Testator/Testatrix places a testamentary gift into the Special Needs Trust subject to the management of the Trustee. The Trust restricts the use of the trust property to debts and expenditures that are not covered by public or private assistance programs but that improve the quality of life of the special needs beneficiary. The property held in such a trust is not included within the "means based" testing used by most public and private programs.

182. Can The Special Needs Trust Clause Be Deleted From A Will?

A. ***Yes***. It can and should be deleted if the Testator/Testatrix has no beneficiaries with special needs.

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[146] O.C.G.A. §53-12-173.

j. Avoidance Of Conservatorship – Article 10

183. Why Seek To Avoid Conservatorship?

A. ***Expense and Burden***. The Courts typically require the appointment of a Conservator for property transferred to a Minor child or incapacitated adult. In turn, Conservators appointed by the Court for incapacitated adults and Minor children are required to post a security bond with the Court and provide annual reports with relation to the management of the property they are managing.

General Note: This clause does not address the Minor children of the Testator/Testatrix, but rather the Minor children of others (i.e. Beneficiaries who predecease the Testator/Testatrix) and incapacitated adults for whom a testamentary trust was not established.

184. What Property Is Subject To A Conservatorship?

A. Any property transferred to a Minor child valued in excess of $15,000 or any property transferred to an incapacitated adult unless such property is held in trust.

General Note: Conservatorship can also be avoided even without a trust if the property of a Minor is turned over to a custodian under the "Georgia Transfers to Minors Act." Under the Act, a custodian has the same freedoms of a Trustee under a Testamentary Trust (no bonds, reporting requirements etc.); however, unlike a Trust, the custodian must turn the property over to the child when they reach 21 years of age.

185. Can The Avoidance Of Conservatorship Clause Be Deleted From A Will?

A. **No**. It should always be used as a safety net in case a Minor child or incapacitated adult becomes a beneficiary under a Will. Example: The Testator/Testatrix gives her entire estate to her Daughter XYZ **per stirpes**, but XYZ predeceases the Testator/Testatrix and the beneficiaries then become XYZ's Minor children.

k. Spendthrift Provision – Article 11

186. Why Prohibit The Attachment Of Trust Assets?

A. Absent such a clause, the testamentary gifts upon which the "Testamentary Trust" is based would be subject to attachment by the creditors of the Trust Beneficiary if such debts were not paid.[147]

187. Does A Spendthrift Provision Protect Against All Debts Of A Trust Beneficiary?

A. ***No.*** A Spendthrift provision does not protect against the following debts of the beneficiary to a Testamentary Trust:[148]

1. Alimony.
2. Child Support.
3. Taxes.
4. Governmental Claims.
5. Tort Judgments.
6. Restitution as a result of a criminal conviction.
7. Judgments for necessities not voluntarily provided by the claimant.

188. Can The Spendthrift Provision Be Deleted From A Will?

A. ***Yes***, but only if the Testator/Testatrix does not create a Trust.

l. Appointing Executors and Trustees –Article 12

189. Why Name An Executor And Trustee?

A. Every Will requires someone to administer the wishes of the Testator/Testatrix and an Executor(s) may be appointed by the Testator/Testatrix or an "Administrator with Will Annexed" will be appointed by the Probate Court. The rationale is the Testator/Testatrix is better off selecting an individual to administer the Will rather than letting the Court make such a decision.

B. A Will does not require a Trustee unless a Testamentary Trust is created by the Testator/Testatrix.

147 O.C.G.A. § 53-12-80(c).
148 O.C.G.A. § 53-12-80(d).

190. Is The Nomination Of An Executor By A Testator/Testatrix Given Preference By The Court?

A. ***Yes***. Unless the Court finds the proposed Executor unfit, they have the right to qualify in the Order determined by the Testator/Testatrix.[149]

191. Can The Executor And The Trustee Be The Same Person?

A. ***Yes***, they typically are.

192. Can The Testator/Testatrix Name Co-Executors Or Co-Trustees?

A. ***Yes***. However, Co-Executors must act unanimously unless the Will provides otherwise which has the possibility of creating serious problems should they be unable to reach agreement.[150] The Will must therefore take such a dilemma into account. *Example: I appoint my Son XYZ and my Daughter ABC to serve as Co-Executors under my Will. I would ask that they make every reasonable effort to make their decisions unanimously, however, in the event they are unable to do so, my Daughter ABC shall have the ultimate decision making power.*

193. Who Can Qualify As An Executor Under A Will?

A. The qualifications for an Executor are:

1. The Executor must be 18 years of age or older.[151]
2. Adjudged "fit" by the Probate Court.[152]

194. Who Can Qualify As A Trustee Under A Will?

A. The ***qualifications for a Trustee*** are:

1. The Trustee must be must be 18 years of age or older.[153]
2. Have the legal capacity to acquire, hold and transfer title to property.

149 O.C.G.A. § 53-6-10(b).
150 O.C.G.A. § 53-7-5
151 O.C.G.A. §§ 53-6-10(c), 39-1-1.
152 O.C.G.A. § 53-6-10(b).
153 O.C.G.A. § 39-1-1.

195. Can A Bank Or Other Entity Be The Executor Or Trustee Under A Will? Do Any Special Steps Have To Be Taken To Do So?

A. ***Yes***. Certain corporations, partnerships and business corporations may serve as the Executor and/or Trustee under a Will so long as they are qualified to act as a fiduciary under Georgia law.[154] The following persons may act as a fiduciary under the laws of Georgia:[155]

1. A financial institution.
2. A trust company.
3. A national or state bank.
4. A savings bank or savings and loan.
5. Attorneys at law, licensed in Georgia.
6. Certain investment advisors.
7. Certain securities brokers.

B. There are multiple restrictions upon foreign corporations or entities serving as fiduciaries in Georgia.[156]

C. The individual bank or other entities should be contacted to determine the requirements and compensation which they require.

196. What Happens If There Is No Trustee Named In The Will?

A. Although the Testator/Testatrix is free to appoint a Trustee under the Will to oversee the property in a "testamentary trust," the Probate Court will appoint a Trustee if one is not appointed or the appointed Trustee resigns.[157]

197. What Happens If There Is No Executor Named In The Will?

A. Although the Testator/Testatrix is free to appoint an Executor(s) under the Will to oversee the administration of the Will, the Probate Court will appoint an "Administrator annexed to the Will" if an Executor is not appointed or the appointed Executor resigns.

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154 O.C.G.A. § 53-6-1.
155 O.C.G.A. § 7-1-242(a).
156 O.C.G.A. § 53-12-323.
157 O.C.G.A. § 53-12-201(b), (e).

198. What Happens If The Testator/Testatrix Cannot Select A Successor Executor Or Trustee?

A. If they cannot identify a possible successor, the Testator/Testatrix may permit the Executor or Trustee to appoint a successor. *Example: If my appointed Executor or Trustee shall fail to qualify, resign or refuse to accept the appointment for any reason, then they shall be empowered to appoint a successor in a signed writing making express reference this power and any successor Executor or Trustee shall have all of the powers of my original Executor or Trustee.* (AVLF Materials)

199. Can A Testator/Testatrix Forbid An Individual From Becoming An Executor Or Trustee?

A. ***Yes***, but they must indicate such an expression in their Will. *Example: Under no circumstances shall my Brother XYZ become a fiduciary under my Will*. (AVLF Materials)

200. Can The Appointment Of Executor And Trustee Be Deleted From A Will?

A. ***No***. Every Testator/Testatrix should appoint an Executor and if a Testamentary Trust is created by the Will they should appoint a Trustee also.

m. Bonds And Reports – Article 13

201. Why Waive The Bond And Report Requirements For The Executor?

A. The Probate Court ***may*** require the Executor to file a bond and satisfy certain reporting requirements unless such requirements are expressly waived which could be burdensome upon the Executor and expensive for the Estate.

202. Can The Bond Requirement Be Deleted From A Will?

A. ***Yes,*** but only if the Testator/Testatrix does not trust the Executor.

General Note: If the beneficiaries of the Will discover evidence of mismanagement by the Executor, they can always petition the Court to require a Bond from the Executor at a later date.

n. Powers of Executors And Trustees – Article 14

203. What Is The Reason For Defining Fiduciary Powers Under A Will?

A. ***It is a legal requirement***. Executors and Trustees are considered as Fiduciaries and their powers must be defined in the Will.

204. How Should The Duties Of The Trustee And Executor Be Defined?

A. The best and easiest way to define such powers is by incorporating the powers defined by statute. The standard duties and obligations of an Executor and Trustee have been statutorily defined and can be incorporated into the Will thereby alleviating the need for lengthy and confusing provisions in the Will.[158]

Practice Tip: The statutory powers may be edited, reduced or added to in accordance with the wishes of the Testator/Testatrix.

205. What Are The Statutory Powers Of Executors And Trustees?

A. Executors and Trustees have broad statutory powers including the power to:[159]

1. Sell, exchange, partition or otherwise dispose of property of the Estate;
2. Invest and reinvest property of the Estate;
3. To continue the operation of any business enterprise of the Estate;
4. Form a corporation or other entity;
5. Transfer, assign, and convey to the entity all or part of the trust property;
6. Manage real property;
7. Lease personal property of the Estate;
8. Pay taxes, assessments and other expenses of the Estate;
9. Accept additional property into the Estate;
10. Borrow funds to pay taxes and expenses of the Estate, and pledge or encumber a portion of the Estate to secure the loan;
11. Make loans on behalf of the Estate;
12. Vote shares of stock and exercise options held by the Estate;
13. Hold securities
14. carry out any plan for the consolidation or merger, dissolution or liquidation, foreclosure, lease, or sale of the property or the incorporation

158 O.C.G.A. § 53-12-263.
159 O.C.G.A. § 53-12-261.

or reincorporation, reorganization or readjustment of the capital or financial structure of any corporation, company, or association the securities of which may form any portion of the Estate;

15. Serve as a member of a shareholders' or bondholders' protective committee;

16. Adjust interest rates upon Estate obligations;

17. Foreclose upon obligations owed the Estate;

18. Insure the assets of the Estate;

19. Receive rents, profits and income of the Estate;

20. Bring, defend, mediate, arbitrate, or compromise claims involving the Estate;

21. Employ third parties to assist in administering the Estate;

22. Acquire, receive, hold, and retain principal of the Estate;

23. Hold, manage, invest, reinvest, distribute, and account for assets of the Estate to beneficiaries of the Will or any Testamentary Trust;

24. Set up proper and reasonable reserves for taxes and expenses of the Estate;

25. Make contracts on behalf of the Estate; and

26. Serve without filing returns or reports to any Court.

206. Can The Powers Of The Trustee And Executor Be Deleted From A Will?

A. ***No***, not if the Will names an Executor or Trustee.

o. Survivorship – Article 15

207. What Is The Reason For The Survivorship Clause?

A. The survivorship clause is intended to protect the wishes of the Testator/Testatrix by voiding any testamentary gifts made to an individual who dies within a set date after the death of the Testator/Testatrix.

B. The rationale for the clause is that the Testator/Testatrix would prefer to have the gift pass to the intended beneficiary and not to the beneficiaries who may be named in the Will of the intended Beneficiary or Intestate Laws governing those Beneficiaries without a Will.

C. The time limitation can be chosen by the Testator/Testatrix and is generally 30 days but may be longer.

208. Can The Survivorship Clause Be Deleted From A Will?

A. ***Yes,*** but it is seldom wise to do so since the Testator/Testatrix may end up gifting their property pursuant to the terms of the Will of the deceased beneficiary as opposed to the wishes of the original Testator/Testatrix.

p. Year's Support – Article 16

209. What Is Year's Support?

A. The surviving spouse and Minor children are statutorily entitled to an allowance out of the estate of the Testator/Testatrix called Year's Support.[160]

B. The allowance is defined as property that is set aside for the family's support and maintenance for a period of 12 months from the death of the Testator/Testatrix.[161]

C. The surviving spouse and Minor children may petition the Probate Court to obtain Year's Support in the event the Testamentary Gifts under the Will are deemed insufficient.

210. What Is The Purpose Of The Year's Support Clause?

A. A Testator/Testatrix may insert a provision in the Will that the testamentary gifts are provided in lieu of "Year's Support." If such a provision is included the surviving spouse and Minor children must make an election to either 1.) accept what they receive under the Will, or 2.) reject what they receive under the Will and file a Petition to obtain Year's Support.[162]

B. If the Will does not contain this provision the surviving spouse and Minor children could retain the gifts under the Will and also petition the Probate Court for Year's Support.

211. Can Year's Support Be Attached By The Creditors Of The Surviving Spouse?

A. ***Yes***, and this often happens where the surviving spouse assumes liability for the burial expenses or expenses of the last illness of the Testator/Testatrix by signing

160 O.C.G.A. § 53-3-1(b).
161 O.C.G.A. § 53-3-1(c).
162 O.C.G.A. § 53-3-3.

forms at the funeral home after the death of the Testator/Testatrix or at the hospital during the last illness prior to death of the Testator/Testatrix.[163]

Practice Tip: The Executor should sign all post-death contracts on behalf of the estate of the Testator/Testatrix and the Health Care Agent should sign all pre-death contracts on behalf of the Testator/Testatrix – Declarant in order to avoid such a situation.

212. Can The Year's Support Clause Be Deleted From A Will?

A. ***Yes,*** but only if the Testator/Testatrix has no spouse or minor children.

q. Guardians And Conservators – Article 17

213. What Is A Natural Guardian?

A. The biological or adoptive parent of a Minor child.[164]

214. Can A Testator/Testatrix Deprive A Natural Guardian Of Their Status?

A. ***No.*** The surviving parent becomes the sole Natural Guardian of a minor child even if the surviving parent was: divorced from the Testator/Testatrix, the Testator/Testatrix had sole custody of the Minor, and the surviving parent was estranged from the Minor child and provided no financial or emotional support to the child for years, unless the surviving parent was previously judged unfit or gave up his or her parental rights.[165]

215. Does The Natural Guardian Automatically Become The Conservator Of A Minor?

A. ***No***. If the Minor has property valued in excess of $15,000 then the Natural Guardian must petition the Court to become the legally qualified Conservator of the Minor.[166]

216. Can A Testator/Testatrix Deprive The Natural Guardian Of Becoming The Conservator?

A. ***Yes, at least with respect to property passing under the Will***. The Testator/Testatrix can appoint a conservator other than the surviving parent and

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163 *See Martin v. Jones*, 266 Ga. 156, 465 S.E.2d 274 (1996).
164 O.C.G.A. § 29-2-3.
165 *Id.*
166 O.C.G.A. § 29-3-1(b).

can prohibit the surviving parent from becoming the conservator of property passing under the Will.

217. Who Can Qualify As A Testamentary Guardian Under A Will?

A. The ***qualifications for a Guardian*** are:

1. The guardian must be 18 years of age or older;[167] and
2. Have no conflict of interest with the Minor child or disabled adult unless the Probate Court finds the conflict is unsubstantial or the appointment is nonetheless in the ward's best interest.[168]

218. Who Can Qualify As A Testamentary Conservator Under A Will?

A. The qualifications for a Conservator are:

The Conservator must be 18 years of age or older;[169] and

1. Have no conflict of interest with the Minor child or disabled adult unless the Probate Court finds the conflict is unsubstantial or the appointment is nonetheless in the ward's best interest.[170]

219. Is The Nomination Of A Guardian Or Conservator Of Minor Children By A Testator/Testatrix Given Preference By The Court?

A. ***Yes***. The Court will appoint the Testamentary Guardian appointed by the Testator/Testatrix unless there is a surviving parent and will appoint the conservator appointed by the Testator/Testatrix even if there is a surviving parent.[171]

220. Why Not Waive The Bond Requirements For A Guardian And Conservator Named By A Will?

A. A testamentary Guardian or Conservator is not required to provide bonds.[172]

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167 O.C.G.A. § 29-2-2(b).
168 O.C.G.A. §§ 29-2-2(b), 29-4-2(b).
169 O.C.G.A. § 29-3-4(1).
170 O.C.G.A. §§ 29-3-4(2), 29-5-2(2).
171 O.C.G.A. § 29-2-4(b) for Guardians; O.C.G.A. § 29-3-5(b) for Conservators.
172 O.C.G.A. § 29-2-4(c) for Guardians; O.C.G.A. § 29-3-5(c) for Conservators.

221. Can The Guardian And Conservator Be The Same Person? When Would It Be Wise To Appoint Different Persons To Serve In Each Role?

A. ***Yes***. It is very common to name the same individual as both the Guardian and Conservator of a Minor child.

B. **When Should Different Persons Be Appointed to Each Role?** When the Guardian cannot be trusted with the property of a Minor child. Example: If there is an estranged spouse who may return as natural Guardian of the Minor child and it is feared they are doing so only to "steal" the property of the Minor child, then a separate independent conservator should be named in the Will.

222. What Powers Do Testamentary Guardians And Conservators Have?

A. The same powers, rights and duties as Guardians or Conservators appointed by the Court.[173]

223. Can A Testator/Testatrix Transfer Property To A Minor Under A Will Using The "Georgia Transfers To Minors Act"?

A. ***Yes***. A Testator/Testatrix can make testamentary gifts under a Will to Minors using the "Georgia Transfers to Minors Act."[174]

224. What Language Should be Used to Make Gift Under a Will using the "Georgia Transfers To Minors Act"?

A. The testamentary gift must use the words "as custodian for."[175] ***Example: I give my 1966 Chevy to XYZ as Custodian for my Son ABC under "The Georgia Transfers to Minors Act."***

225. What Advantages/Disadvantages Are There In Making Gifts Under A Will Using The Georgia Transfer To Minors Act?

A. The major advantage is that a custodian under the act has nearly the same freedom as does a Trustee under a Testamentary Trust.[176]

B. The major disadvantage is that the custodian must release the property to the Minor no later than when the Minor reaches the age of 21.[177]

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173 O.C.G.A. § 29-2-4(c) for Guardians; O.C.G.A. § 29-3-5(d) for Conservators.
174 O.C.G.A. § 44-5-110 *et. seq.*
175 O.C.G.A. §§ 44-5-113, 44-5-115.
176 O.C.G.A. § 44-5-122.

Practice Tip: A Testamentary Trust should be used over a Custodianship, if possible.

226. Can The Guardians And Conservators Clause Be Deleted From A Will?

A. ***Yes***, but only if the Testator/Testatrix has no Minor children.

r. Disinheritance – Article 18

227. Why Is There A Disinheritance Clause?

A. The Clause allows the Testator/Testatrix to specify any Heirs or Descendants who they do not wish to receive any of their property.

B. Disinheritance may also come into play, where an unintended beneficiary received property due to the death of an intended beneficiary. *Example: I give my 1966 Chevrolet to my Daughter XYZ, but if she should fail to survive me, then under no circumstances shall it be gifted to my Grandson/her Son ABC*.

General Note: The clause is typically used where the Testator/Testatrix is concerned that an estranged relative or ex-spouse may challenge the Will in which case, the disinheritance clause would prohibit any recovery by the disinherited individual.

Practice Tip: The Testator/Testatrix should also consider whether they wish to disinherit the Descendants and Heirs of the disinherited individual.

228. Are There Limits Upon Who Can Be Disinherited Under A Will?

A. ***Yes, but very few***. Spouses and Minor children may be excluded so long as they receive Year's Support.[178]

B. Otherwise, the Testator/Testatrix is free to give all of his or her property to anyone under the Will, including strangers.[179]

229. Can The Disinheritance Clause Be Deleted From A Will?

A. ***Yes***. If the Testator/Testatrix does not seek to disinherit any descendants or heirs.

s. In Terrorem – Article 19

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177 O.C.G.A. § 44-5-130.
178 O.C.G.A. § 53-3-1(c).
179 O.C.G.A. § 53-4-1.

230. Why Is There An "*In Terrorem*" Or "No Contest" Clause?

A. The "***In Terrorem***" or "No Contest" clause is intended to reduce or eliminate battles over the contents of a Will by and between beneficiaries. The clause is self enforcing in that any beneficiary who contests the Will is automatically disinherited and loses any testamentary gifts that they would otherwise receive if the contest had not been filed, unless the Will is successfully challenged.

General Note: The In Terrorem Clause has no deterrence effect upon individuals who are not beneficiaries to the Will so it can be beneficial to give a Minor gift to someone who may caveat the Will so as to give them an incentive not to do so. (AVLF materials)

231. Can the "*In-Terrorem*" Clause Be Deleted From A Will?

A. ***Yes***. It can and should be, if not needed by the Testator/Testatrix.

t. Attestation – Testator/Testatrix 1st Signature Page

232. Why Is There An Attestation Clause In The Will Form?

A. The attestation clause raises a rebuttable presumption in Probate Court that the Will was legally executed by the Testator/Testatrix and Witnesses.[180]

233. Can The Attestation Clause Be Deleted From A Will?

A. ***No.*** Not under any circumstances as this is a legal requirement.

u. Affidavit Form – Testator/Testatrix 2nd Signature Page

234. Why Is There A Self Proving Affidavit Attached To The Will Form?

A. The Self Proving Affidavit is a statutory form/clause that raises the rebuttable presumption in Probate Court that the requirements of execution and attestation were met.[181]

235. Can The Affidavit Form Be Deleted From A Will?

A. ***Yes***. However, it is highly recommended against doing so as this could require the witnesses to appear in Probate Court if and when the Will is probated.

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180 *Lamb v. Bryan*, 236 Ga. 237, 223 S.E.2d 122 (1976).

181 O.C.G.A §§ 53-4-24(a), 53-5-17(a), 53-5-21(a).

C. EXECUTING SIMPLE WILLS

236. What Constitutes A Valid Signature By The Testator/Testatrix?

A. Any of the following constitutes a valid signature of the Testator/Testatrix upon a will:

1. The mark of the Testator/Testatrix;[182]
2. Any imperfect name (i.e. nickname) signed by the Testator/Testatrix that is intended to reflect a signature;[183] or
3. Another disinterested person may sign for the Testator/Testatrix so long as:
   a. This is done before the Witnesses in the presence of the Testator/Testatrix and at the Testator's/Testatrix's "express direction."[184]
   b. The express direction may come in the form of either: i.) express words of authorization spoken by the Testator/Testatrix, or ii.) express conduct such as a nod of the head or a hand resting on the pen as the signature is produced.[185]

237. Does The Testator/Testatrix Have To Initial Each Page Of The Will?

A. ***No.*** It is good practice to have the Testator/Testatrix initial each page of the Will to avoid the fraudulent replacement of any pages; however, the failure to do so will not invalidate the Will.

238. Does The Testator/Testatrix Have To Sign The Will In The Presence Of The Witnesses?

A. ***No***. The Testator/Testatrix ***does not*** have to sign the Will in the presence of the Witnesses. However, if the Testator/Testatrix signs the Will outside the presence of the Witnesses, the Testator/Testatrix ***must*** acknowledge his or her signature in the presence of the Witnesses.[186]

1. The purpose of the rule is that the Witnesses simply need to know that the signature is that of the Testator/Testatrix whether by observation or affirmation.

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182 O.C.G.A. § 53-4-20(a).
183 *Id.*
184 *Id.*
185 *Mitchell v. Mitchell*, 245 Ga. 291, 264 S.E.2d 222 (1980).
186 *Cornelius v. Crosby*, 243 Ga. 26, 252 S.E.2d 455 (1979).

Practice Tip: The Testator/Testatrix should sign the Will or authorize another to sign the Will on his behalf in the presence of the Witnesses unless extenuating circumstances exist; in which case the Witnesses must be present when the Testator/Testatrix acknowledges his prior signature on the Will.

239. Does The Testator/Testatrix Have To Sign The Will Before The Witnesses Sign The Will?

A. ***No, but be careful in this situation***. The Testator/Testatrix may sign the Will after the Witnesses have signed so long as the Testator/Testatrix signs the Will in the presence of both Witnesses and all signatures are applied to the Will at the same time and place in a continuous transaction.[187]

240. Who Can Be A Witness To A Will?

A. An individual serving as a Witness to a Will must:

1. Be 14 years of age or older;[188] and
2. Be competent.[189]

B. The attorney preparing the Will may serve as a competent Witness.[190]

C. The Executor of a Will may be a competent Witness and still receive compensation from the estate for performing duties.[191]

Practice Tip: If possible, the Witnesses should be disinterested persons, which may or may not include the attorney preparing the Will.

241. Who Cannot Be A Witness To A Will?

A. ***A Beneficiary***. An individual who is a beneficiary of the Will may serve as a competent witness, but is deemed an "Interested Witness" and sacrifices any testamentary gift/inheritance under the Will subject to two exceptions:[192]

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187 *Waldrep v. Goodwin*, 230 Ga. 1, 195 S.E. 2d 432 (1973).

188 O.C.G.A. § 53-4-22(a).

189 *Id. See also* O.C.G.A. § 24-6-601. "Except as otherwise provided in this chapter, every person is competent to be a witness."

190 Although O.C.G.A. § 24-5-501 states that "communications between attorney and client" are "excluded from evidence on grounds of public policy," the Courts have recognized a "testamentary exception" for attorneys who are involved in the preparation of a Will and subsequently serve as a witness. *Manley v. Combs*, 197 Ga. 768, 30 S.E.2d 485 (1944).

191 *Brock v. Brock*, 140 Ga. 590, 79 S.E. 473 (1913).

192 O.C.G.A. § 53-4-23(a).

a. There are at least two other subscribing Witnesses who are not beneficiaries;[193] or

b. The spouse of a beneficiary may be a competent Witness without invalidating the inheritance.[194]

B. The purpose of the rule is to protect the Testator/Testatrix from fraud and undue influence.

C. Any testamentary gifts voided due to an Interested Witness are distributed to the remaining beneficiaries under the residuary clause.[195]

242. What Constitutes A Valid Signature By A Witness?

A. Any of the following constitutes a valid signature of a Witness upon a Will:

1. The mark of the Witness;[196] or

2. Any imperfect name (i.e. nickname) signed by a Witness that is intended to reflect a signature.[197]

B. Unlike the Testator/Testatrix, another individual cannot sign for the Witness even if done at the direction and in the presence of the Witness.[198]

C. The signatures of the Testator/Testatrix and the Witnesses do not need to be on the same page of the Will.[199]

243. Does The Testator/Testatrix Have To Be Present When The Witnesses Sign The Will?

A. ***Yes***. The Testator/Testatrix ***must be*** present when the Witnesses sign the Will.[200]

1. The purpose of the rule is that the Witnesses must be able to observe the mental state of the Testator/Testatrix when attesting to the Will.

B. The Testator/Testatrix must be present both mentally and physically, and the Testator/Testatrix must be conscious at the time the Witnesses sign the Will.[201]

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193 *Id.*
194 O.C.G.A. § 53-4-23(b).
195 O.C.G.A. § 53-4-65(a).
196 O.C.G.A. § 53-4-20(b).
197 *Gillis v. Gillis,* 96 Ga. 1, 23 S.E. 107 (1895).
198 O.C.G.A § 53-4-20(b).
199 *In re Estate of Brannon*, 264 Ga. 84, 441 S.E. 2d 248 (1994).
200 O.C.G.A § 53-4-20(b).
201 *Ragan v. Ragan*, 33 Ga. Supp. 106 (1864).

244. Must The Witnesses Sign The Will Together In The Presence Of Each Other?

A. ***No***. The Witnesses may sign the Will at separate times and outside the presence of each other.[202] However, each Witness must sign the Will in the presence of the Testator/Testatrix after having seen the Testator/Testatrix sign the Will or acknowledge his or her signature in the presence of the Witness.

245. Can A Will Be Changed Once It Is Executed?

A. ***Yes***. A Will can be changed or reaffirmed by a written amendment or ***Codicil***.[203]

246. What Are The required Contents Of A Codicil?

A. A ***Codicil*** must:

1. Expressly identify the original Will.
2. Be executed with the same formalities of the original Will.[204] A Codicil should be attached to the Will, but will be enforceable even if this is not done.

B. Codicils are typically used for making Minor changes to an existing Will such as changing the Executor[205] or republishing a Will that has been revoked.[206]

Practice Tip: Consider executing a new Will as opposed to a Codicil since both require the same level of formality.

D. ADMINISTERING SIMPLE WILLS

247. Can A Will Be Cancelled Or Revoked By The Testator/Testatrix?

A. ***Yes.*** A will can be revoked (in whole or in part) by any of the following acts:

1. The execution of a subsequent Will or Codicil that expressly revokes the prior Will;[207]
2. The execution of a subsequent Will that contradicts the prior Will and implicitly revokes all contradictory terms;[208] or

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202 O.C.G.A § 53-4-20(b).
203 O.C.G.A. § 53-1-2(4).
204 O.C.G.A. § 53-4-20(c).
205 *Jones v. Johnson*, 67 Ga. 269 (Ga. 1881).
206 O.C.G.A. § 53-4-50.
207 O.C.G.A. §§ 53-4-42(b), 53-4-43.

3. The obliteration or destruction of a Will by or at the direction of the Testator/Testatrix with the intent of revoking the Will.[209]

248. What Should Be Done With A Will Once It Has Been Executed?

A. The Will should be kept in a safe place and copies given to select individuals.[210]

Practice Tip: Make sure to tell the client to keep the original in a safe place but keep copies if possible.

249. Can The Original Will Be Filed With The Probate Court For Safe Keeping?

A. ***Yes.*** The Will may be filed with the Probate Court in the County where the Testator/Testatrix maintains his or her residence.[211]

1. The Court is required to keep the Will confidential and no person other than the Testator/Testatrix or his/her attorney shall have access to the Will prior to the death of the Testator/Testatrix.

2. The filing of a Will does not prohibit its subsequent revocation by the Testator/Testatrix.

250. What Happens If The Original Will Executed By The Testator Is Lost?

A. There is a rebuttable presumption that if the Original Will executed by the Testator/Testatrix cannot be found that the Testator/Testatrix intended to revoke the Will.[212]

B. Although the Executor may introduce a copy of the Will to the Probate Court, the Court will presume the Testator/Testatrix revoked the Original Will by destroying it and the Executor bears a heavy burden in refuting such a presumption.[213]

C. There can be only one Original Will and there is no legal distinction between a signed duplicate original of the Will and a copy.[214]

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208 O.C.G.A. §§ 53-4-42(c)
209 O.C.G.A. § 53-4-44.
210 O.C.G.A. § 7-1-356(a) authorizes banks to allow inspection of safe deposit boxes upon a death certificate and a Court order.
211 O.C.G.A. § 15-9-38.
212 O.C.G.A. § 53-4-46.
213 *Horton v. Burch*, 267 Ga. 1, 471 S.E2d 879 (1996).
214 *Id*.

251. Does A Will Need To Be Probated?

A. ***Yes and no***. Legally every Will must be probated, but practically many Wills do not need to be. In many cases, a Will is a conveyance of deeded real property (i.e. a residence) or titled personal property (i.e. a car) and must be probated for the Will to become operative as the method of conveyance.[215] In other cases, a Will establishes a "testamentary trust" and the Will must be probated or proven for the trust to take effect. In still other cases a Will appoints a guardian and conservator and the Will must be probated. If the Will does not convey real or personal property in which a formal chain of title must be established, does not establish a Testamentary Trust requiring the appointment of a Trustee, or appoint a guardian and conservator of Minor children requiring approval by the Court, there is often no practical reason to probate the Will.

252. What Is The Purpose Of Probating A Will?

A. The purpose of probating a Will is to establish before the Probate Court that the Will is not a forgery and was voluntarily executed by a competent Testator/Testatrix.

253. Where Should The Will Be Probated?

A. The probate proceedings are conducted in the Probate Court of the County where the Testator/Testatrix maintained a domicile, residence or otherwise intended to maintain permanent residence at the time of death.[216]

254. What Is Involved In Probating A Will?

A. A Will is probated through a filing with the Probate Court using either a either "Common Form" or "Solemn Form."

255. What Is Common Form Probate?

A. ***Common Form*** probate involves filing the Will with the Probate Court, without giving notice to all Beneficiaries, Descendants and Heirs requesting the Court to find the Will is authentic and valid. The common form is quick and efficient; however, offers little protection to the Executor and is not conclusive for a period of four years.[217]

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215 *Rogers v. Rogers*, 78 Ga. 688, 3 S.E. 451 (1887).
216 O.C.G.A. § 53-5-1(b).
217 O.C.G.A. §§ 53-5-16, 53-5-19.

256. What Is Solemn Form Probate?

A. ***Solemn Form*** probate differs in that notice is given to all Beneficiaries, Descendants and Heirs notifying them that they have an opportunity to file an objection and to dispute the authenticity of the Will by way of filing a Caveat. If no Caveats are filed, the Will is probated and is conclusive immediately.[218]

257. What Happens If An Individual Dies Without A Will?

A. The property of an individual who dies without a Will (i.e. intestate) shall be distributed to the descendants in the following categories in accordance with the Intestacy Laws and if there are no surviving descendants to the following categories of Heirs:

1. To the surviving spouse if there are no children;[219]
2. If there are children, to the surviving spouse and children "***per stirpes***" with the surviving spouse receiving no less than 1/3 of the estate;[220]
3. If there are children and the spouse is deceased, to the children equally "***per stirpes***";[221]
4. Surviving parents of the decedent equally;[222]
5. Surviving siblings of the decedent equally "***per stirpes***";[223]
6. If there are no surviving siblings, to the nieces and nephews equally "***per stirpes***";[224]
7. Surviving grandparents of the decedent equally;[225]
8. Surviving aunts and uncles of the decedent equally "***per stripes***";[226]
9. If there are no surviving aunts or uncles, to the first cousins of the decedent equally "***per stirpes***";[227] and
10. If there are no surviving Descendants or Heirs who seek an inheritance within four years of the decedent's death, the property shall pass to the County Board of Education where the decedent resided.[228]

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218 O.C.G.A. §§ 53-5-21, 53-5-22.
219 O.C.G.A. § 53-2-1(b)(1).
220 *Id.*
221 O.C.G.A. § 53-2-1(b)(3).
222 O.C.G.A. § 53-2-1(b)(4).
223 O.C.G.A. § 53-2-1(b)(5).
224 *Id.*
225 O.C.G.A. § 53-2-1(b)(6).
226 O.C.G.A. § 53-2-1(b)(7).
227 *Id.*

258. Can A Drafting Attorney Be Sued By Non-Client Beneficiaries?

A. ***Yes***. Preparing a Will for a client, including pro-bono clients is the practice of law. The Georgia Court of Appeals has recognized that the drafter of a Will may be sued by the Heirs and Beneficiaries of a Testator/Testatrix client based upon theories of negligence and third party beneficiary contract claims.[229]

PART III - ADVANCE HEALTH CARE DIRECTIVES

A. GENERAL INFORMATION ABOUT ADVANCE DIRECTIVES

259. Why Is There A Statutory Form For The Advance Directive For Health Care?

A. **To Simplify Things**. The Georgia legislature adopted a standardized "Advance Health Care Directive" form in 2007 to replace two estate documents previously referred to as: 1.) the "Living Will" and 2.) the "Durable Power of Attorney for Health Care" or "Health Care Power of Attorney."

1. The standardized form was intended to eliminate the interpretation problems created by the use of customized forms for "Living Wills" and "Health Care Powers of Attorney" which arose when family members and health care professionals were required to interpret multiple non-uniform documents to identify the intent of the patient.
2. The Advance Directive Form is not the exclusive form for "end of life" decisions.

260. Are "Living Wills" And "Health Care Powers Of Attorney" Still Valid?

A. ***Yes.*** They were widely used prior to July 1, 2007, when the "Georgia Advance Directive for Health Care Act" ("Act") took effect, [230] and may still be used so long as they comply with the legal requirements for an Advance Directive.

1. Living Wills and Durable Health Care Powers of Attorney executed before July 1 ,2007 are valid even if they do not comply with the Act.[231]
2. Living Wills and Durable Health Care Powers of Attorney executed after July 1, 2007 are invalid unless they comply with the Act.[232]

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228 O.C.G.A. §§ 53-2-50, 53-2-51.
229 *Young v. Williams*, 285 Ga. App. 208, 645 S.E. 2d 624 (2007).
230 O.C.G.A. §§ 31-32-1, 31-32-3.
231 O.C.G.A. §§ 31-32-3.
232 O.C.G.A. § 31-32-5(b).

Practice Tip: It is recommended that clients use the Advance Health Care Directive as it is easily recognized and honored by health care professionals.

If the client insists on using a Living Will or Durable Health Care Powers of Attorney, then they must be executed and signed by two witnesses just like an Advance Directive.

261. Are Living Wills, Advance Directives Or Health Care Powers Of Attorney Executed Outside Of Georgia Valid Even If They Do Not Comply With Georgia Law?

A. ***Yes***. They will be recognized and legally enforceable in Georgia so long as they are valid under the laws of the State where they were originally executed.[233]

262. What Is A Declarant?

A. The individual who signs an Advance Directive.[234]

263. What Are The Benefits Of An Advance Directive?

A. **There are three principal benefits**. Aside from simplifying the process by combining the Living Will with the Durable Health Care Power of Attorney into one form and gaining general recognition within the medical profession, the Advance Directive provides three principal benefits:

1. Allows the Declarant to select and appoint a Health Care Agent to make critical health care decisions;
2. Allows the Declarant to pre-select treatment preferences to guide the Health Care Agent in the event the Declarant is unable to make such decisions due to physical or mental incapacity at a later date; and
3. Allows the Declarant to appoint a Guardian to all other facets of the Declarant's support, health, care, welfare and general well being not otherwise controlled by the health Care Agent.

264. Who Can Make An Advance Directive?

A. Any person making an Advance Health Care Directive must be:

1. 18 years of age or older or emancipated;[235] and

233 O.C.G.A. § 31-32-5(b).
234 O.C.G.A. § 31-32-2(3).
235 O.C.G.A. § 31-32-5(a).

2. of sound mind.[236]

General Note: A Declarant executing an Advance Directive must be 18 years of age, whereas a Testator/Testatrix executing a Simple Will need only be 14 years of age.

B. DRAFTING ADVANCE DIRECTIVES

265. What Are The Legal Requirements For The Contents Of An Advance Health Care Directive?

A. An Advanced Health Care Directive must:

1. Be a written document;[237]
2. Be signed by the Declarant or by a disinterested person in the Declarant's presence and at the Declarant's express direction;[238]
3. Be signed by two competent witnesses in the Declarant's presence who:[239]
   a. Observe the Declarant signing the Advanced Directive, or
   b. Are told by the Declarant that he/she signed the Advance Directive.
4. appoint a Health Care Agent ***and/or*** direct the withholding or withdrawal of life-sustaining procedures/provision of nourishment or hydration when the Declarant is in a "Terminal Condition" or "State of Permanent Unconsciousness."[240]

266. What Are The Required Contents Of An Advance Directive?

A. The required contents of a Health Care Directive are:

1. Part 1 – The Selection of a Health Care Agent;
   a. Autopsy
   b. Organ Donation
   c. Final Disposition of Body
2. Part 2 – End of Life Treatment preferences:
   a. Conditions

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236 *Id.*
237 O.C.G.A. § 31-32-5(a).
238 *Id.*
239 O.C.G.A §31-32-5(c)(1).
240 O.C.G.A. § 31-32-5(a).

b. Preferences

c. Additional Instructions

d. Pregnancy

3. Part 3 – Appointment of a Guardian

a. Guardians

4. Part 4 – Signatures and Effective Date

Part 1 Selection of a Health Care Agent

267. Who Can Be A Health Care Agent Under An Advance Directive?

A. The qualifications for a Health Care Agent are:

1. The Agent must be ***18 years*** of age or older;[241] and

2. The Agent has no conflicts of interest with the Declarant unless the Probate Court finds the conflict is unsubstantial or the appointment is nonetheless in the Declarant's best interest.[242]

268. Who Cannot Be A Health Care Agent Under An Advance Directive?

A. The physician or health care provider who is directly involved in the Declarant's health care ***may not serve*** as the Declarant's Health Care Agent.[243]

269. What Are The General Powers Of A Health Care Agent?

A. The Agent cannot delegate decision making authority to others, but is empowered to act on his or her own or through others employed by the agent[244] in exercising the following general powers:

1. The Agent ***cannot make a decision contrary to the Declarant's consent or rejection of a health care procedure*** so long as the attending physician makes a good faith judgment that the Declarant understands the general nature of such decision;[245]

2. The Agent ***has no duty to exercise powers*** under the Advance Directive or to assume responsibility for the Declarant's health care;[246]

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241 *See e.g.* O.C.G.A. §§ 31-32-5(a)(2); 31-21-7(b)(1)

242 See e.g. O.C.G.A. § 31-32-5(d); *Head v. Head*, 234 Ga. App. 469, 507 S.E.2d 214 (Ga. App. 1998).

243 O.C.G.A. § 31-32-5(d).

244 O.C.G.A. § 31-32-7(c).

245 O.C.G.A. § 31-32-7(a).

246 O.C.G.A. § 31-32-7(b).

3. If the Agent does exercise powers under the Advance Directive, they must exercise such powers with due care, in accordance with the Advance Directive, and consistent with the intentions and desires of the Declarant;[247]

4. If the Declarant's "intentions and desires" are unclear, the Agent shall act in the Declarant's best interest considering the benefits, burdens, and risks associated with the treatment options;[248] and

5. The Agent may sign all necessary papers to exercise the powers granted to them, accompany the Declarant in an ambulance, and visit the Declarant in a health care facility.[249]

270. What Specific Legal Authority Is Given To A Health Care Agent Under An Advance Directive?

A. In the event the Declarant is in a "Terminal Condition," "State of Permanent Unconsciousness," or Declarant agrees, the Health Care Agent has authority to exercise the following powers under an Advance Directive, unless indicated otherwise by the Advance Directive:

1. The Agent may authorize, reject, withhold or withdraw any and all types of medical care or treatment or procedures relating to the physical or mental health of the Declarant, including medications, surgery, life-sustaining procedures, nourishment and hydration;[250]

2. The Agent may admit or discharge the Declarant from any health care facility;[251]

3. The Agent is authorized to contract with a health care facility for and on behalf of the Declarant without the threat of personal liability by the Declarant;[252]

4. The Agent has the same rights as the Declarant to review and obtain copies of the Declarant's medical records deemed relevant to the exercise of the Agent's powers;[253] and

5. The Agent may authorize an autopsy of the Declarant's body; make an anatomical gift of all or any part of the Declarant's body; or direct final

247 *Id.*
248 *Id.*
249 O.C.G.A. § 31-32-7(d).
250 O.C.G.A. § 31-32-7(e)(1).
251 O.C.G.A. § 31-32-7(e)(2).
252 O.C.G.A. § 31-32-7(e)(3).
253 O.C.G.A. § 31-32-7(e)(4).

disposition of the Declarant's body, including funeral arrangements, burial or cremation.[254]

271. Can The Declarant Modify The Powers Of The Health Care Agent?

A. ***Yes***. The standard form is set up to allow the rescission of autopsies, organ donation, disposition of the body and the powers of the Health Care Agent may be further modified in accordance with the desires of the Declarant.

Part 2 Treatment Preferences

272. What Treatment Preferences Are Available?

A. There are 4 treatment preferences available under the Advance Directive:

1. ***Preference #1 - Do everything possible***. Extend the Declarant's life for as long as possible, using all medications, machines, or other medical procedures that in reasonable medical judgment could keep them alive. If the Declarant is unable to take nutrition or fluids by mouth, they should be given nutrition or fluids by tube or other medical means.

2. ***Preference #2 - Do nothing extraordinary***. Allow the Declarant's natural death to occur. The Declarant does not want any medications, machines, or other medical procedures that in reasonable medical judgment could keep them alive but cannot cure them. The Declarant does not want to receive nutrition or fluids by tube or other medical means except as needed to provide pain medication, if such nutrition or fluids would only serve artificially prolong the dying process and could be withheld or withdrawn without causing significant discomfort.

3. ***Preference #3 - Do nothing extraordinary, except as indicated below.*** The Declarant does not want any medications, machines, or other medical procedures that in reasonable medical judgment would only serve to artificially prolong the dying process and could be withheld or withdrawn without causing significant discomfort, except as follows:

   Exceptions to PREFERENCE #3:
   These exceptions are optional, however if the Declarant chooses none of them, it will be equivalent to Preference #2 and if the Declarant chooses all of them it will be equivalent to Preference #1

   Nutrition: If the Declarant is unable to take nutrition by mouth, they want to receive nutrition by tube or other medical means.

[254] O.C.G.A. § 31-32-7(e)(5).

Hydration: If the Declarant is unable to take fluids by mouth, they want to receive fluids by tube or other medical means.

Respiration: If the Declarant need assistance to breathe, they want to have a ventilator used.

Cardiac: If the Declarant's heart or pulse has stopped, they want to have cardiopulmonary resuscitation (CPR) used.

4. ***Preference #4 - Customized Preference***. The Declarant may Customize their preference to include portions of Preferences #1, #2 or #3 as modified by their own personalized instructions or they may create their own custom personalized preference.

Examples of PREFERENCE #4:

I select Preference #1, however, if there is no reasonable objective medical data showing a material improvement in my condition within the first 72 hours indicating that the length and quality of my life will be significantly increased then I direct that my Health Care Agent implement Preference #2 and allow my natural death to occur.

I select Preference #2, however, I instruct my Health Care Agent to authorize whatever steps or medical procedures are reasonably necessary to avoid pain, discomfort or suffering.

I select Preference #3, however, I authorize my Health Care Agent to make contemporaneous decisions as to whether and to what extent I should receive nutrition, hydration, respiratory and cardiac assistance, or other medical procedures based upon my existing medical condition. In making such decisions, I ask that my Agent be guided by my desire to: 1) avoid pain, discomfort or suffering, and 2) invoke the use of only those medical procedures that could have a reasonable likelihood of increasing the length and quality of my life, as opposed to merely prolonging the dying process.

My treatment preferences are as follows: (Inserted by Declarant).

273. When Do The Treatment Preferences Apply?

A. The Treatment Preferences only apply if the Declarant is suffering from:

1. A "Terminal Condition"
2. A "State of Permanent Unconsciousness"

274. What Is A "Terminal Condition"?

A. "An incurable or irreversible condition which would result in the Declarant's death in a relatively short period of time."[255]

Practice Tip: As a practical matter, a "short period of time" is considered by most medical professionals to be hours or days, not weeks.

275. What Is A "State Of Permanent Unconsciousness"?

A. "An incurable or irreversible condition in which the Declarant is not aware of himself or herself or his or her environment and in which the Declarant is showing no behavioral response to his or her environment."[256]

Practice Tip: As a practical matter, this is considered by most medical professionals to be the equivalent of a permanent coma.

276. Who Determines Whether The Declarant Has A "Terminal Condition" Or Is In A "State of Permanent Unconsciousness"?

A. Two physicians: one of whom must be the attending physician, must personally examine the Declarant and certify in writing that the Declarant is in a "Terminal Condition" or "Permanent State of Unconsciousness" based upon the conditions found during the course of their examination and in accordance with currently accepted medical standards.[257]

277. Can The Declarant Receive Pain Medications If They Reject Life Sustaining Procedures?

A. ***Yes***. The term "life-sustaining procedures" specifically excludes pain medications or procedures to alleviate pain.[258] The term also specifically excludes provisions for nourishment and hydration.

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255 O.C.G.A. § 31-32-2(14).
256 O.C.G.A. § 31-32-2(13).
257 O.C.G.A. § 31-32-9(b).
258 O.C.G.A. § 31-32-2(9).

Part 3 Guardians

278. Why Nominate A Guardian?

A. A Health Care Agent has control over the medical treatment provided to the Declarant, but does not have the same broad powers as a Guardian would have over the Declarant's general health, safety, welfare, and well being.

B. The Court will give first preference to the appointment of a Guardian selected by an adult.

279. Who Cannot Be A Guardian Under An Advance Directive?

A. No Individual or Entity may be appointed as a Guardian of an adult if they:

1. Are a Minor, Ward, or a protected person;[259]
2. Have a conflict of interest with the adult unless the Court finds that the conflict is insubstantial or that the appointment would nonetheless be in the adult's best interest;[260] or
3. Are the owner, operator or employee of a long term care or other care giving institution or facility at which the adult is receiving care unless related to the adult by blood, marriage or adoption.[261]

280. When Does The Guardian Become Empowered To Make Decisions?

A. Not until approved by the Court.

281. Under What Circumstances Will The Court Appoint The Guardian Nominated Under The Advance Directive?

A. Only if the Probate Court finds the adult lacks sufficient capacity to make or communicate significant responsible decisions concerning his or her health or safety.[262]

B. The appointment must also be in the "best interests" of the adult.[263]

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259 O.C.G.A. § 29-4-2(b)(1).
260 O.C.G.A. §§ 29-4-2(b)(2), 29-4-2(c)(1).
261 O.C.G.A. §§ 29-4-2(b)(3), 29-4-2(c)(2).
262 O.C.G.A. § 29-4-1(a).
263 O.C.G.A. § 29-4-1(c).

282. What Powers And Duties Will The Guardian Nominated By An Advance Directive Have?

A. The same as those of a permanent guardian appointed by the Court.

C. EXECUTING ADVANCE DIRECTIVES

283. What Constitutes A Valid Signature By The Declarant?

A. Any of the following constitutes a valid signature of the Declarant:

1. The mark of the Declarant:
2. Any imperfect name (i.e. nickname) signed by the Declarant;
3. Another person may sign for the Declarant so long as:
   a. This is done before the Witnesses in the presence of the Declarant at their "express direction";
   b. The express direction may come in the form of either: i.) express words of authorization spoken by the Declarant, or ii.) express conduct such as a nod of the head or a hand resting on the pen as the signature is produced.

284. Who Can Be A Witness To An Advance Directive?

A. An individual serving as a Witness to an Advanced Directive ***Must*** be:

1. ***18 years*** of age or older;[264] and
2. Of sound mind.[265]

General Note: A Witness to an Advance Directive must be 18 years of age, whereas a Witness to a will need only be 14 years of age.

285. Who Cannot Be A Witness To An Advance Directive?

A. An individual serving as a Witness to an Advanced Directive ***cannot*** be:

1. The individual(s) selected as Health Care Agent(s) under the Advance Directive;[266]

264 O.C.G.A. § 31-32-5(c)(1).
265 *Id.*
266 O.C.G.A. § 31-32-5(c)(2)(A).

2. Any beneficiary under the Declarant's Will who will knowingly inherit anything;[267]

3. Any individual who will knowingly gain a benefit from the Declarant's death;[268] or

4. Any individual directly involved with the Declarant's health care.[269]

B. No more than one employee, agent or medical staff member of the health care facility (not directly involved with the health care of the Declarant) may serve as a Witness.[270]

286. Does The Declarant Have To Sign The Advance Directive In The Presence Of The Witnesses?

A. ***No***. The Declarant ***does not*** have to sign the Advance Directive in the presence of the Witnesses. However, if the Declarant signs the Advance Directive outside the presence of the Witnesses, the Declarant ***must*** acknowledge his signature in the presence of the Witnesses.[271]

287. Does The Declarant Have To Be Present When The Witnesses Sign The Advance Directive?

A. ***Yes***. The Declarant ***must be*** present when the Witnesses sign the Advance Directive.[272]

D. ADMINISTERING ADVANCE DIRECTIVES

288. Can An Advance Directive Be Changed After It Is Executed?

Yes. An Advance Directive may be changed by a written document so long as it is executed with the same formalities of the original Advance Directive.[273]

289. Can An Advance Directive Be Revoked After It Is Executed?

A. ***Yes***. An Advance Directive may be revoked at any time by the Declarant, without regard to the Declarant's mental state or competency by any of the following:

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267 O.C.G.A. § 31-32-5(c)(2)(B).
268 *Id.*
269 O.C.G.A. § 31-32-5(c)(2)(C).
270 O.C.G.A. § 31-32-5(c)(3)
271 O.C.G.A. § 31-32-5(c)(1).
272 *Id.*
273 O.C.G.A. § 31-32-5(f).

1. By executing a new Advance Directive that is inconsistent with the original, then the original is revoked to the extent the new Directive is inconsistent;[274]

2. By being burned, obliterated or otherwise destroyed by the Declarant or some other person in the presence of and at the direction of the Declarant;[275]

3. By written revocation signed and dated by the Declarant or by another person acting at the direction of the Declarant expressing the intent to revoke the Advance Directive;[276] or

4. By oral revocation of the Declarant within the presence of a Witness 18 years of age or older where the Witness signs and dates a writing confirming the oral revocation within 30 days after the Declarant issues the oral revocation.[277]

290. Is A Copy Of An Advance Directive As Effective As The Original?

A. ***Yes***. Unlike a Will, a copy of an Advance Directive is just as effective as the original.[278]

General Note: This is opposite to a Will where revocation is presumed if the original cannot be located.

291. What Happens If A Declarant Gets Married Or Divorced After Executing An Advance Directive?

A. ***Agent Revocation***. If the Declarant gets married, the marriage will automatically revoke the designation of any health care agent other than the Declarant's new spouse. If the Declarant gets divorced, the divorce will automatically revoke the designation of the Declarant's ex-spouse as a health care agent.[279]

274 O.C.G.A. § 31-32-6(a)(1).
275 O.C.G.A. § 31-32-6(a)(2).
276 O.C.G.A. § 31-32-6(a)(3).
277 O.C.G.A. § 31-32-6(a)(4).
278 O.C.G.A. § 31-32-5(e).
279 O.C.G.A. § 31-32-6(b).

292. Who Controls Health Care Decisions: The Declarant's Health Care Agent Or The Declarant's Guardian?

A. ***The Agent.*** The Health Care Agent controls over the Guardian with respect to all health care matters covered by the Advance Directive, unless the Directive provides otherwise.[280]

PART IV - FINANCIAL POWERS OF ATTORNEY

A. GENERAL INFORMATION ABOUT FINANCIAL POAS

293. Why Is There A Statutory Form For The Financial Power Of Attorney?

A. ***To Simplify Things***. The Georgia legislature adopted a standardized "Financial Power of Attorney Form" in 1995 to serve as a template for Financial Powers of Attorney.

1. The standardized form was intended to eliminate the interpretation problems created by the use of customized forms for "Financial Powers of Attorney" which arose when family members, lawyers, bankers and others were required to interpret multiple non-uniform documents to identify the intent of the Principal.

294. Can Other Forms Of Financial Powers Of Attorney Be Used?

A. ***Yes.*** Any form or variant of the statutory form may be used.[281]

295. Who is The Principal With Relation To A Financial Power Of Attorney?

A. The person who executes a Financial Power of Attorney appointing an Agent to act on their behalf.[282]

296. Who Can Be A Principal Under A Financial POA?

A. Any Individual over 18 years of age who has the capacity to contract.

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280 O.C.G.A. § 31-32-14(e); *see also* O.C.G.A. § 31-32-6(c).
281 O.C.G.A. § 10-6-140.
282 O.C.G.A. § 10-6-141.

297. What Are The Benefits Of A Financial Power Of Attorney?

A. A Financial Power of Attorney allows the individual to appoint an Agent to transact financial affairs on their behalf if or when the Principal is unable to do so.[283]

B. DRAFTING FINANCIAL POAS

298. What Are The Legal Requirements For A Financial POA?

A. A Financial POA must:

1. Be a written document;[284]
2. Be signed by the Principal;[285]
3. Be signed by two competent Witnesses in the Principal's presence who:[286]
   a. Observe the Principal signing the Financial POA, or
   b. Are told by the Principal that he/she signed the Financial POA.
4. Appoint an Agent to conduct financial affairs on behalf of the Principal in the event the Principal is unable to do so.

299. What Are The Suggested Contents Of A Financial POA?

A. The following types of transactions are typically suggested for inclusion within a Financial POA:[287]

1. Bank and Credit Union Transactions;
2. Payment Transactions;
3. Real Property Transactions;
4. Personal Property Transactions;
5. Stock and Bond Transactions;
6. Safe Deposits;
7. Borrowing;
8. Business Operating Transactions;

283 *Id.*
284 O.C.G.A. § 10-6-142.
285 *Id.*
286 *Id.*
287 *Id.*

9. Insurance Transactions;
10. Disputes and Proceedings;
11. Hiring Representatives;
12. Tax, Social Security and Unemployment; and
13. Broad Powers.

B. The powers which are not used can be deleted from the Financial POA Form.

300. Who Can Be An Agent?

A. ***"Any person who is of sound mind"*** regardless of age.[288]

Practice Tip: Although Minors can be financial agents, they cannot enter into valid contracts under Georgia law rendering their agency severely limited if not useless.

301. Can The Principal Appoint Co-Agents?

A. ***Yes***. However, it is not recommended as this can produce practical problems concerning accountability, confusion, and conflict relative to the administration and management of the bills and accounts of the Principal.

C. EXECUTING FINANCIAL POAS

302. What Constitutes A Valid Signature By The Principal?

A. Any of the following constitutes a valid signature of the Principal:

1. The mark of the Principal:
2. Any imperfect name (i.e. nickname) signed by the Principal; or
3. Another person may sign for the Principal so long as;
   a. This is done before the Witnesses in the presence of the Principal at their "express direction"; and
   b. The express direction may come in the form of either: i.) express words of authorization spoken by the Principal, or ii.) express conduct such as a nod of the head or a hand resting on the pen as the signature is produced.

[288] O.C.G.A. § 10-6-3.

303. Who Can Be A Witness To A Financial Power Of Attorney?

A. An individual serving as a Witness to a Financial Power of Attorney ***must***:

1. Be 18 years of age or older;[289] and
2. At least one of the Witnesses must be someone other than the Principal's spouse or blood relative.[290]

304. Who Cannot Be A Witness To A Financial POA?

A. The agent or any successor agent under the financial POA.

305. Does The Principal Have To Sign The Financial POA In The Presence Of The Witnesses?

A. ***No***. The Principal ***does not*** have to sign the Financial POA in the presence of the Witnesses. However, if the Principal signs the Financial POA outside the presence of the Witnesses, the Principal ***must*** acknowledge his or her signature in the presence of the Witnesses.

306. Does The Principal Have To Be Present When The Witnesses Sign The Financial POA?

A. ***Yes***. The Principal ***must be*** present when the Witnesses sign the Financial POA.

307. Does A Financial Power Of Attorney Have To Be Notarized?

A. ***No***. The only exception is if the Agent is given power to sell, lease or convey personal or real property in which case the Financial Power of Attorney must be notarized so it can be recorded in the appropriate docket for public records.[291]

D. ADMINISTERING FINANCIAL POAS

308. Can A Financial Power Of Attorney Be Revoked After Execution?

A. ***Yes.*** A Financial Power of Attorney may be revoked at any time by the principal by delivering a signed and dated "Revocation of Power of Attorney" to the Agent

289 O.C.G.A. § 10-6-141.
290 *Id.*
291 *Id.*

and giving notice (written or oral) to all entities that deal or may deal with the Agent.[292]

309. What Happens If The Agent Exceeds/Violates Their Scope Of Authority?

A. ***The Agent is personally liable***. Agents are personally liable to the Principal if they exceed or violate the scope of authority granted under the Financial Power of Attorney.[293] The Principal may also either ratify or accept the Agent's act or reject it.[294]

310. What Happens If The Principal Dies? Does The Agent Lose Their Powers Under The Financial POA?

A. The Financial POA automatically terminates upon the death of the Principal and the Executor assumes power over all the debts and accounts of the Principal.

311. Can Executors Convey Property Via A Financial Power Of Attorney?

A. ***Yes.*** Executors, Administrators, Guardians, Conservators and Trustees can sell and convey property through the use of a Financial Power of Attorney.[295]

PART V - DESIGNATION OF STANDBY GUARDIAN

A. GENERAL INFORMATION ABOUT STANDBY GUARDIANSHIPS

312. What Is A Designation Of Standby Guardian?

A. A document that allows the Parent or Guardian of a Minor child to appoint or designate a "Standby Guardian" to act on their behalf for a limited period of time (e.g. 120 days) in the event the Parent or Guardian cannot care for the Minor due to a physical or mental incapacity.

313. What Are The Benefits Of Designating A Standby Guardian?

A. A Standby Guardian can step in and legally act as the Guardian of a Minor child in the event the Parent or Permanent Guardian is unable to do so.

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292 *Id.*
293 O.C.G.A. § 10-6-21.
294 *Id.*
295 O.C.G.A. § 10-6-4.

314. What Is A Designating Individual?

A. The Parent or Guardian who appoints a Standby Guardian for a Minor.[296]

315. Who Can Be A Designating Individual And Appoint A Standby Guardian?

A. A Designating Individual or Person appointing a Standby Guardian must be:

1. The Parent of a Minor provided that:[297]
   a. they have physical custody of the Minor and their parental rights have not been terminated, and
   b. the other Parent is either, deceased, parental rights have been terminated, cannot be found after diligent search, or has consented to the appointment of the Standby Guardian.
2. A Guardian of a Minor appointed by the Court.[298]

B. DRAFTING STANDBY GUARDIAN DESIGNATIONS

316. What Are The Legal Requirements For The Contents Of A Standby Guardian Designation?

A. A Standby Guardian Designation must:

1. Be a written document;[299]
2. Be signed by the Designating Individual or by some other disinterested individual in the Designating Individual's presence and at his/her express direction;[300]
3. Identify the name, address and county of domicile of the Designating Individual and the Standby Guardian;[301]
4. Identify the name, address, county of domicile, and date of birth of the Minor child;[302]

296 O.C.G.A. § 29-2-9(1).
297 O.C.G.A. § 29-2-9(1)(A).
298 O.C.G.A. § 29-2-9(1)(B).
299 O.C.G.A. § 29-2-11(a).
300 *Id.*
301 O.C.G.A. § 29-2-11(b).
302 *Id.*

5. Identify the name and address of the non-designating Parent and state whether that parent is deceased, had his or her parental rights terminated, and whether they can be located,[303] and

6. A statement of consent to serve signed by the Standby Guardian.[304]

317. Who Can Be A Standby Guardian?

A. An adult named by the Designating Individual who is 18 years of age or older.[305]

318. What are the Rights and Duties of a Standby Guardian?

A. A Standby Guardian assumes all of the rights and duties and responsibilities of a Guardian appointed by the Court.[306]

319. When Does A Standby Guardianship Take Effect?

A. Upon a "***Health Determination***" issued by a "***Health Care Professional***."[307]

B. The Standby Guardian must file a copy of the "Designation of Standby Guardian" along with a copy of the Health Determination with the Probate Court in the county where the Minor resides.[308]

320. What Is A "Health Determination"?

A. A written statement dated and signed by a "***Health Care Professional***" indicating that the Designating Individual is unable to care for a Minor due to physical or mental condition or health, including a condition created by medical treatment.[309]

321. What Is A "Health Care Professional"?

A. A person licensed to practice medicine under Georgia law or a person licensed as a registered professional nurse who is authorized to practice as a nurse practitioner.[310]

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303 *Id.*
304 O.C.G.A. § 29-2-11(b), (c).
305 O.C.G.A. § 29-2-9(4).
306 O.C.G.A. § 29-2-10(b).
307 *Id.*
308 O.C.G.A. § 29-2-10(c).
309 O.C.G.A. § 29-2-9(3).
310 O.C.G.A. § 29-2-9(2).

C. EXECUTING STANDBY GUARDIAN DESIGNATIONS

322. What Constitutes A Valid Signature By A Designating Individual?

A. A Designating Individual may appoint a Standby Guardian Designation by either:

1. Signing the designation;[311] or
2. Having another person sign on their behalf, so long as this is done before the Witnesses in the presence of the Designating Individual and at the "express direction" of the Designating Individual.[312]

323. Who Can Be A Witness To A Standby Guardian Designation?

A. A witness to a Standby Guardianship must:

1. Be 18 years of age or older;[313] and
2. Be "competent."[314]

324. Who Cannot Be A Witness To A Standby Guardian Designation?

A. The Standby Guardian ***cannot*** be a witness.[315]

325. Does The Designating Individual Have To Sign The Designation In The Presence Of The Witnesses?

A. ***No***. The designating Individual ***does not*** have to sign the Designation in the presence of the Witnesses. However, if the Designating Individual signs the Designation outside the presence of the Witnesses, the Designating Individual ***must*** acknowledge his or her signature in the presence of the Witnesses.

326. Does The Designating Individual Have To Be Present When The Witnesses Sign The Designation?

A. ***Yes***. The Designating Individual ***must be*** present when the Witnesses sign the designation.

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311 O.C.G.A. § 29-2-11(a).
312 *Id.*
313 O.C.G.A. § 29-2-11(c).
314 O.C.G.A. § 29-2-11(a).
315 *Id.*

D. ADMINISTERING STANDBY GUARDIAN DESIGNATIONS

327. Does A Standby Guardian Have To Take Any Steps To Implement The Designation Of Standby Guardianship?

A. ***Yes***. Once the Health Determination is made, the Standby Guardian must file a "Notice of Standby Guardianship" with the Probate Court in the County where the Minor child is domiciled. A copy of the designation of Standby Guardianship along with the Health Determination must be attached to the Notice.[316]

328. Does A Standby Guardianship Expire?

A. ***Yes***. The Standby Guardianship automatically ***expires 120 days after the date of the Health Determination***.[317]

329. Can A Standby Guardianship Be Extended?

A. ***Yes***. The Standby Guardian may file a petition seeking temporary guardianship over the Minor within 120 days of the date of the Health Determination in which case the Standby Guardianship will be extended until the petition is ruled upon.[318]

330. What Happens To The Status Of The Standby Guardian If The Designating Individual Dies?

A. ***Automatic revocation***. The Standby Guardianship is automatically revoked upon the death of the ***Designating Individual***.[319]

General Note: Upon the death of the ***Designating Individual***, the ***Natural Guardian*** or ***Testamentary Guardian*** designated under the Will assumes Guardianship over the Minor.

316 O.C.G.A. § 29-2-10(c).
317 O.C.G.A. § 29-2-13(b).
318 O.C.G.A. § 29-2-13(a), (b).
319 O.C.G.A. § 29-2-13(c).

PART VI - NOMINATIONS OF GUARDIANS/CONSERVATORS

A. GENERAL INFORMATION ABOUT GUARDIANS/CONSERVATORS

331. What Is A Minor?

A. A Minor is a person who is less than 18 years of age and is not emancipated.[320]

332. What Is Emancipation?

A. Emancipation occurs when an individual less than 18 years of age is treated as an adult.

B. Emancipation may occur by operation of law if a Minor becomes validly married or is in active military duty with the Unites States Armed Forces.[321]

C. Emancipation may also occur by Court order filed in response to a petition in the County where the Minor is domiciled.[322]

333. What Is A Ward?

A. A Ward is an Adult for whom a Guardian or Conservator has been appointed.[323]

334. What Is A Guardian Ad Litem?

A. An individual appointed at the discretion of the Probate Court to represent the interests of a Minor, Ward, or proposed Ward in proceedings relating to the guardianship or conservatorship of the individual.[324]

335. What Is A Permanent Guardian?

A. An individual appointed by the Court to act as the guardian of a Minor.[325]

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320 O.C.G.A. § 29-1-1(11).
321 O.C.G.A. § 15-11-720(b).
322 O.C.G.A. §§ 15-11-720(c), 15-11-721.
323 O.C.G.A. § 29-1-1(27).
324 O.C.G.A. §§ 29-1-1(8), 29-9-2(a).
325 O.C.G.A. § 29-1-1(14).

336. What Are The Benefits Of Nominating A Guardian Or Conservator?

A. The Court will give ***first preference*** to a Guardian and Conservator who is the preference of a Minor who is 14 years of age or older, and a ***fifth preference*** to those who have been nominated by the Minor's Natural Guardian.[326]

337. Is It More Difficult To Appoint A Guardian And Conservator For A Minor Via Nomination As Opposed To A Will?

A. ***Yes, very much so***. The Court typically automatically approves Testamentary Guardians and Conservators without the need for a bond, whereas the Court will not automatically approve a Guardian and Conservator nominated outside a Will and must require a bond from a nominated Conservator.

338. What Must Be Done With The Nomination To Establish The Guardianship Or Conservatorship?

A. A petition must be filed with the Court, a hearing held, and "Letters of Guardianship and Conservatorship" issued before the nominated Guardian or Conservator is empowered to act.

B. DRAFTING NOMINATIONS OF GUARDIANS/CONSERVATORS FOR MINORS

339. What Are The Legal Requirements For The Contents Of A Nomination Of A Guardian/Conservator For A Minor?

A. The nomination must be:[327]

1. In writing;
2. Nominating the individual who shall serve as the Guardian or the Conservator;
3. Signed or acknowledged by the Natural Guardian making the nomination; and
4. Signed by two Witnesses in the presence of the Natural Guardian individual making the nomination.

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326 O.C.G.A. § 29-2-16(a) for Guardians of Minors; O.C.G.A. § 29-3-7(a) for Conservators of Minors.

327 O.C.G.A. § 29-2-16(a)(5)for Guardians; O.C.G.A. § 29-3-7(a)(5) for Conservators.

340. Who Can Nominate A Guardian Or Conservator For A Minor?

A. The Minor's Natural Guardians.[328]

341. Who Can Be The Guardian Or Conservator Of A Minor?

A. Only individuals can serve as Guardians of Minors.[329]

342. What Are The Qualifications To Become The Guardian Or Conservator Of A Minor?

A. No individual may be appointed the Guardian or Conservator of a Minor if they:

1. Are a Minor, Ward or protected person;[330] or
2. Have a conflict of interest with the Minor unless the Court finds that the conflict is insubstantial or that the appointment would nonetheless be in the Minor's best interest.[331]

343. What Order Of Preference Must The Court Give In Appointing A Guardian Or Conservator For A Minor?

A. The Court shall give preference in appointing Guardians and Conservators in accordance with the following order unless good cause is shown to disregard such preference:[332]

1. The Adult selected by the Minor if the Minor is 14 years of age or older;
2. The nearest adult relative of the Minor;
3. Other adult relatives of the Minor;
4. Other adults related to the Minor by marriage;
5. An adult designated in writing by either of the Minor's Natural Guardians in a notarized document or a document witnessed by two or more persons;
6. An adult who has provided care or support for the Minor or with whom the Minor has lived; or
7. The County Guardian (applies only to Conservators).

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328 O.C.G.A. § 29-2-16(a)(5) for Guardians; O.C.G.A. § 29-3-7(a)(5) for Conservators.
329 O.C.G.A. § 29-2-2(a).
330 O.C.G.A. § 29-2-2(b)(1) for Guardians; O.C.G.A. § 29-3-4 (b)(1) for Conservators.
331 O.C.G.A. § 29-2-2(b)(2) for Guardians; O.C.G.A. § 29-3-4(b)(2) for Conservators.
332 O.C.G.A. § 29-2-16(a) for Guardians; O.C.G.A. § 29-3-7(a) for Conservators.

General Note: The Nomination made by the Natural Guardian of a minor child is given a ***fifth preference*** by the Court

344. Does A Guardianship Or Conservatorship Effect The Rights Of A Minor To Make A Will?

A. ***No.*** A Guardianship or Conservatorship is not a determination that a Minor who is 14 years of age or older is incapable of making a will.[333]

345. What Rights Does A Minor Child Retain Upon The Appointment Of A Guardian Or Conservator?

A. In every guardianship or conservatorship, a Minor child has the right to:

1. A qualified Guardian or Conservator who acts in the best interests of the Minor;[334]
2. A Guardian or Conservator who is reasonably accessible to the Minor;[335]
3. Have the Minor's property be utilized to adequately provide for the Minor's support, care, education, health and welfare;[336] and
4. File a lawsuit relating to the Guardianship or Conservatorship.[337]

C. ADMINISTERING GUARDIANSHIPS FOR MINORS

346. Under What Circumstances Will The Court Appoint A Guardian For A Minor?

A. Only if the Probate Court finds the Minor has no Natural Guardian, Testamentary Guardian, or Permanent Guardian.

B. The appointment of the Guardian must be in the "***best interests***" of the Minor.[338]

347. What Powers Does The Guardian Of A Minor Have?

A. The Guardian of a Minor may:

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333 O.C.G.A. § 29-2-20(b) for Guardians; O.C.G.A. § 29-3-20(b) for Conservators.
334 O.C.G.A. § 29-2-20(a)(1) for Guardians; O.C.G.A. § 29-3-20(a)(1) for Conservators.
335 O.C.G.A. § 29-2-20(a)(2) for Guardians; O.C.G.A. § 29-3-20(a)(2) for Conservators.
336 O.C.G.A. § 29-2-20(a)(3) for Guardians; O.C.G.A. § 29-3-20(a)(3) for Conservators.
337 O.C.G.A. § 29-2-20(a)(4) for Guardians; O.C.G.A. § 29-3-20(a)(4) for Conservators.
338 O.C.G.A. § 29-2-18.

1. Take custody of the Minor and establish the Minor's place of dwelling within Georgia;[339]
2. Provide consent or approval for medical or other professional care, counsel, ~~or~~ treatment, or services for the Minor;[340]
3. Bring, defend or participate in any legal proceedings relating to the support, care, education, health or welfare of the Minor in the name and on behalf of the Minor;[341]
4. Execute a surrender of rights to enable the adoption of the Minor;[342] and
5. Exercise those other powers reasonably necessary to provide adequately for the support, care, education, health or welfare of the Minor in the name and on behalf of the Minor.[343]

348. What Are The Duties Of A Guardian For A Minor?

A. A Guardian must:

1. Respect the rights and dignity of the Minor;[344]
2. Arrange for the support, care, education, health and welfare of the Minor considering the Minor's available resources;[345]
3. Take reasonable care of the Minor's personal effects;[346]
4. Spend the Minor's money for the Minor's current needs for support, care, education, health and welfare;[347]
5. Conserve the Minor's excess money for future needs and give it to the Conservator if any;[348]
6. Petition for the appointment of a Conservator if needed;[349]
7. Cooperate with the Conservator;[350] and
8. Act promptly to terminate the Guardianship when the Minor dies, reaches age 18, is adopted, or becomes emancipated.[351]

339 O.C.G.A. § 29-2-22(a)(1).
340 O.C.G.A. § 29-2-22(a)(2).
341 O.C.G.A. § 29-2-22(a)(3).
342 O.C.G.A. § 29-2-22(a)(4).
343 O.C.G.A. § 29-2-22(a)(5).
344 O.C.G.A. § 29-2-21(b)(1).
345 O.C.G.A. § 29-2-21(b)(2).
346 O.C.G.A. § 29-2-21(b)(3).
347 O.C.G.A. § 29-2-21(b)(4).
348 O.C.G.A. § 29-2-21(b)(5).
349 O.C.G.A. § 29-2-21(b)(6).
350 O.C.G.A. § 29-2-21(b)(7).

349. Does The Guardian Of A Minor Have Any Reporting Obligations To The Court?

A. ***Yes***. The Guardian must report to the Court as follows:

1. Provide a written report to the Court and the Conservator within 60 days of appointment and 60 days after each anniversary date of appointment detailing the following:[352]
   a. The Minor's general condition, changes since the last report, and the Minor's needs;
   b. All addresses and living arrangements of the Minor during the reporting period;
   c. Recommendations for any alteration of the Guardianship.
2. Report conflicts of interest between the guardian and the Minor to the Court;[353] and
3. Keep the court informed of the Guardian's current address.[354]

350. Must The Guardian Of A Minor Post A Bond?

A. ***Possibly***. The Court has authority to require a bond from the Guardian of a Minor in whatever amount deemed necessary.[355]

D. ADMINISTERING CONSERVATORSHIPS FOR MINORS

351. Under What Circumstances Will The Court Appoint A Conservator For A Minor?

A. If and when the Probate Court finds the Minor has personal property with a value in excess of $15,000.[356]

352. What Powers Does The Conservator Of A Minor Have?

A. A Conservator may:

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351 O.C.G.A. § 29-2-21(b)(11).
352 O.C.G.A. § 29-2-21(b)(8).
353 O.C.G.A. §§ 29-2-21(b)(9), 29-2-23.
354 O.C.G.A. § 29-2-21(b)(10).
355 O.C.G.A. § 29-2-25.
356 O.C.G.A. §§ 29-3-6(a), 29-3-1(b)

1. Make reasonable disbursements from the Minor's budget or income for the support, care education, health and welfare of the Minor and to those persons entitled to support from the Minor;[357]
2. Enter into contracts for labor or services on behalf of the Minor;[358]
3. Borrow money for one year or less secured by the Minor's property if done for purposes of paying the Minor's debts, repairing the Minor's dwelling place, or providing for the support, care, education, health and welfare of the Minor;[359]
4. Receive, collect and hold the Minor's property and all related records;[360]
5. Retain the property received;[361]
6. Bring, defend or participate in legal proceedings relating to the support, care, education, health and welfare of the Minor in the name of the Minor and on behalf of the Minor;[362]
7. Fulfill or disaffirm executory contracts and comply with executed contracts;[363]
8. Examine the Will and Estate Planning Documents of the Minor;[364]
9. Appoint an Attorney in Fact to act if the Conservator is unable to do so;[365]
10. Invest the Minor's property;[366]
11. Sell the Minor's stocks and bonds;[367]
12. Compromise any doubtful or disputed claim made against the Minor if the gross settlement is less than $15,000;[368] and
13. Compromise and release any doubtful or disputed claims in the amount of $15,000 or less;[369]

357 O.C.G.A. § 29-3-22(a)(1).
358 O.C.G.A. § 29-3-22(a)(2).
359 O.C.G.A. § 29-3-22(a)(3).
360 O.C.G.A. § 29-3-22(a)(4).
361 O.C.G.A. § 29-3-22(a)(5).
362 O.C.G.A. § 29-3-22(a)(6).
363 O.C.G.A. § 29-3-223(a)(7).
364 O.C.G.A. § 29-3-21(a)(8).
365 O.C.G.A. § 29-3-21(a)(90).
366 O.C.G.A. §§ 29-3-21(a)(10), 29-3-32, 29-3-33.
367 O.C.G.A. §§ 29-3-21(a)(11), 29-3-35(b).
368 O.C.G.A. § 29-3-21(a)(12).
369 O.C.G.A. § 29-3-21(a)(13).

353. What Are The Duties Of A Conservator For A Minor?

A. A Conservator must:

1. Respect the rights and dignity of the Minor;[370]
2. Be reasonably accessible and maintain regular communications with the Minor;[371]
3. Petition for the appointment of a Guardian if needed;[372]
4. Cooperate with the Guardian;[373]
5. Provide for the support, care, education, health and welfare of the Minor, considering the Minor's needs and resources;[374]
6. Provide a security bond;[375]
7. Consider the estate plan of the Minor known to the Conservator in the administration of the Conservatorship;[376]
8. Maintain accurate records including adequate supporting data and file annual returns;[377] and
9. Act promptly to terminate the Conservatorship when the Minor turns the age of 18.[378]

354. Does The Conservator Of A Minor Have Any Reporting Obligations To The Court?

A. ***Yes***. The Conservator of a Minor must report to the Court as follows:

1. Provide a written report to the court and the Guardian within two months of appointment containing an inventory of the Minor's property and a plan for administering the property;[379]
2. Keep accurate records and file annual returns as required;[380]

370 O.C.G.A. § 29-3-21(b)(1).
371 O.C.G.A. § 29-3-21(b)(2).
372 O.C.G.A. § 29-3-21(b)(3).
373 O.C.G.A. § 29-3-21(b)(4).
374 O.C.G.A. § 29-3-21(b)(5).
375 O.C.G.A. §§ 29-3-21(b)(6), 29-3-40.
376 O.C.G.A. § 29-3-21(b)(8).
377 O.C.G.A. § 29-3-21(b)(9).
378 O.C.G.A. § 29-3-21(b)(12).
379 O.C.G.A. § 29-3-21(b)(7).
380 O.C.G.A. § 29-3-21(b)(9).

3. Report conflicts of interest between the Conservator and the Minor to the Court;[381] and

4. Keep the court informed of the Conservator's current address.[382]

355. Must The Conservator Of A Minor Post A Bond?

A. ***Yes.*** The Conservator of a Minor must post a Bond.[383]

E. DRAFTING NOMINATIONS OF GUARDIANS/CONSERVATORS FOR ADULTS

356. What Are The Legal Requirements For The Contents Of A Nomination Of A Guardian And/Or Conservator For An Adult?

A. The nomination must be:[384]

1. In writing;

2. Nominating the individual or entity who shall serve as the Guardian or the individual who shall serve as the Conservator;

3. Signed or acknowledged by the individual making the nomination; and

4. Signed by two Witnesses in the presence of the individual making the nomination.

357. Who Can Nominate A Guardian Or Conservator For An Adult?

A. The following individuals may nominate a Guardian or Conservator for an Adult:

1. Any adult may nominate a Guardian or Conservator for themselves; and

2. Any spouse, adult child, or parent of an adult may nominate a Guardian or Conservator for the Adult.[385]

358. Who Can be the Guardian or Conservator of an Adult?

A. Either an individual or an entity.[386]

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381 O.C.G.A. § 29-3-21(b)(10).
382 O.C.G.A. § 29-3-21(b)(11).
383 O.C.G.A. § 29-3-40.
384 O.C.G.A. § 29-4-3(e) for Guardians; O.C.G.A. § 29-5-3(e) for Conservators.
385 O.C.G.A. § 29-4-3(d) for Guardians; O.C.G.A. § 29-5-3(d) for Conservators.
386 O.C.G.A. § 29-4-2 for Guardians; O.C.G.A. § 29-5-2 for Conservators.

359. What Order Of Preference Must The Court Give In Appointing A Guardian Or Conservator For An Adult Ward?

A. The Court shall give preference in appointing guardians and conservators in accordance with the following order unless good cause is shown to disregard such preference:[387]

1. The individual last nominated by the Ward;
2. The spouse of the Ward or the individual nominated by the Ward's spouse;
3. The adult child of the Ward or the individual nominated by the adult child of the Ward;
4. The parent of the Ward or the individual nominated by the parent of the Ward;
5. A Guardian or Conservator appointed when the Ward was a Minor;
6. A Guardian or Conservator previously appointed for the Ward in Georgia or another state;
7. A friend, relative or any other individual;
8. Any person willing to accept the appointment;
9. The county guardian; or
10. A public Guardian appointed by the Court.

360. Does The Appointment Of A Guardian Or Conservator Effect A Pre-Existing Power Of Attorney For Health Care Or Pre-Existing Advance Directive?

A. ***No.*** The subsequent appointment of a Guardian or Conservator does not revoke the powers of a Health Care Agent previously appointed by the Ward under a Power of Attorney for Health Care or an Advance Directive.[388]

361. What Rights Does An Adult Ward <u>Retain</u> Upon The Appointment Of A Guardian Or Conservator?

A. In every guardianship or conservatorship, an adult Ward has the right to:

1. A qualified Guardian or Conservator who acts in the best interests of the Ward;[389]

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387 O.C.G.A. § 29-4-3(b), (b.1) for Guardians; O.C.G.A. § 29-5-3(b) for Conservators.

388 O.C.G.A. § 29-4-21(b) for Guardians; O.C.G.A. § 29-5-21(b) for Conservators.

2. A Guardian or Conservator who is reasonably accessible to the Ward;[390]

3. Have the Ward's property be utilized to adequately provide for the Ward's support, care, education, health and welfare;[391]

4. Communicate freely and privately with persons other than the Guardian or Conservator;[392]

5. File a lawsuit relating to the Guardianship or Conservatorship;[393]

6. Receive the least restrictive form of Guardianship or Conservatorship, considering the Ward's functional limitations, personal needs, and preferences;[394] and

7. Be restored to capacity at the earliest possible time.[395]

362. Does A Guardianship Or Conservatorship Effect The Ward's Rights To Make A Will Or Vote?

A. ***No.*** A Guardianship is not a determination that the Ward is incapable of making a will or voting.[396]

363. Can The Nomination Of A Guardian Or Conservator Be Revoked After Execution?

A. ***Yes***. The nomination may be revoked by the individual making the nomination by obliteration, cancellation, or by a subsequent inconsistent writing, whether or not witnessed.[397]

B. However, such revocation must occur before the nominated Guardian or Conservator is appointed by the court.

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389 O.C.G.A. § 29-4-20(a)(1) for Guardians; O.C.G.A. 29-5-20(a)(1) for Conservators.
390 O.C.G.A. § 29-4-20(a)(2) for Guardians; O.C.G.A. 29-5-20(a)(2) for Conservators.
391 O.C.G.A. § 29-4-20(a)(3) for Guardians; O.C.G.A. 29-5-20(a)(3) for Conservators.
392 O.C.G.A. § 29-4-20(a)(4) for Guardians; O.C.G.A. 29-5-20(a)(4) for Conservators.
393 O.C.G.A. § 29-4-20(a)(5) for Guardians; O.C.G.A. 29-5-20(a)(5) for Conservators.
394 O.C.G.A. § 29-4-20(a)(6) for Guardians; O.C.G.A. 29-5-20(a)(6) for Conservators.
395 O.C.G.A. § 29-4-20(a)(7) for Guardians; O.C.G.A. 29-5-20(a)(7) for Conservators.
396 O.C.G.A. § 29-4-20(b), (c) for Guardians; O.C.G.A. 29-5-20(b), (c) for Conservators.
397 O.C.G.A. § 29-4-3(e)(2) for Guardians; O.C.G.A. § 29-5-3(e)(2) for Conservators.

F. ADMINISTERING GUARDIANSHIPS FOR ADULT WARDS

364. Under What Circumstances Will The Court Appoint A Guardian For An Adult Ward?

A. Only if the Probate Court finds the Ward lacks sufficient capacity to make or communicate significant responsible decisions concerning his or her health or safety.[398]

B. The appointment must also be in the "best interests" of the Ward.[399]

365. What Are The Qualifications To Become The Guardian Of An Adult Ward?

A. No Individual may be appointed as a Guardian of a Ward if they:

1. Are a Minor, Ward, or a Protected Person;[400]
2. Have a conflict of interest with the Ward unless the Court finds that the conflict is insubstantial or that the appointment would nonetheless be in the Ward's best interest;[401] or
3. Are the Owner, operator or employee of a long term care or other care giving institution or facility at which the Ward is receiving care, unless related to the Ward by blood, marriage or adoption.[402]

B. No Entity may be appointed as a Guardian of a Ward if it:

1. Has a conflict of interest with the Ward unless the Court finds that the conflict is insubstantial or that the appointment would nonetheless be in the Ward's best interest;[403] or
2. Is a long term care or other care-giving institution or facility at which the Ward is receiving care.[404]

398 O.C.G.A. § 29-4-1(a).
399 O.C.G.A. § 29-4-1(c).
400 O.C.G.A. § 29-4-2(b)(1).
401 O.C.G.A. § 29-4-2(b)(2).
402 O.C.G.A. § 29-4-2(b)(3).
403 O.C.G.A. § 29-4-2(c)(1).
404 O.C.G.A. § 29-4-2(c)(2).

366. What Rights Does An Adult Ward Lose Upon The Appointment Of A Guardian?

A. Unless the Court indicates otherwise, an Adult Ward loses the following rights upon the appointment of a Guardian and ***cannot***:

1. Make contracts of marriage;[405]
2. Make, modify or terminate contracts;[406]
3. Consent to medical treatment;[407]
4. Establish a residence or dwelling place;[408]
5. Change domicile;[409]
6. Revoke a revocable trust established by the Ward;[410] and
7. Bring or defend any action in law or equity, except actions relating to the Guardianship.[411]

367. What Powers Does The Guardian Of An Adult Ward Have?

A. A Guardian ***may***:

1. Take custody of the Ward and establish the Ward's place of dwelling within Georgia;[412]
2. Provide consent or approval for medical or other professional care, counsel or treatment for the Ward;[413]
3. Bring, defend or participate in any legal proceedings relating to the support, care, education, health or welfare of the Ward in the name and on behalf of the Ward;[414] and
4. Exercise those other powers reasonably necessary to provide adequately for the support, care, education, health or welfare of the Ward in the name and on behalf of the Ward.[415]

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405 O.C.G.A. § 29-4-21(a)(1).
406 O.C.G.A. § 29-4-21(a)(2).
407 O.C.G.A. § 29-4-21(a)(3).
408 O.C.G.A. § 29-4-21(a)(4).
409 O.C.G.A. § 29-4-21(a)(5).
410 O.C.G.A. § 29-4-21(a)(6).
411 O.C.G.A. § 29-4-21(a)(7).
412 O.C.G.A. § 29-4-23(a)(1).
413 O.C.G.A. § 29-4-23(a)(2).
414 O.C.G.A. § 29-4-23(a)(3).
415 O.C.G.A. § 29-4-23(a)(4).

368. What Are The Duties Of A Guardian For An Adult Ward?

A. A Guardian ***must***:

1. Respect the rights and dignity of the Ward;[416]
2. Become or remain personally acquainted with the Ward and be familiar with the Ward's capacities, limitations, needs, opportunities, and physical and mental health;[417]
3. Petition for the appointment of a Conservator, if needed;[418]
4. Cooperate with the Conservator;[419]
5. Take reasonable care of the Ward's personal effects;[420]
6. Arrange for the support, care, education, health and welfare of the Ward, considering the Ward's needs and resources;[421]
7. Spend the Ward's money for the Ward's current needs for support, care, education, health and welfare;[422] and
8. Conserve the Ward's excess money and give it to the Conservator, if any;[423]

369. Does The Guardian Of An Adult Ward Have Any Reporting Obligations To The Court?

A. ***Yes***. The Guardian ***must report*** to the Court as follows:

1. Provide a written report to the court, the Ward and the Conservator within 60 days of appointment and 60 days after each anniversary date of appointment detailing the following:[424]
   a. The Ward's general condition, changes since the last report and needs;
   b. All addresses and living arrangements of the Ward during the reporting period;

416 O.C.G.A. § 29-4-22(b)(1).
417 O.C.G.A. § 29-4-22(b)(2).
418 O.C.G.A. § 29-4-22(b)(3).
419 O.C.G.A. § 29-4-22(b)(4).
420 O.C.G.A. § 29-4-22(b)(5).
421 O.C.G.A. § 29-4-22(b)(6).
422 O.C.G.A. § 29-4-22(b)(7).
423 O.C.G.A. § 29-4-22(b)(8).
424 O.C.G.A. § 29-4-22(b)(9).

c. The description and amount of any funds spent and received by the Guardian;

d. Recommendations for any alteration of the Guardianship.

2. Notify the Court of any change in condition that may require modification or termination of the Guardianship;[425]

3. Report conflicts of interest between the Guardian and the Ward to the court;[426] and

4. Keep the court informed of the Guardian's current address.[427]

370. Must The Guardian Of An Adult Ward Post A Bond?

A. ***Possibly***. The Court has authority to require a bond from the Guardian of an adult Ward in whatever amount deemed necessary.[428]

G. ADMINISTERING CONSERVATORSHIPS FOR ADULT WARDS

371. Under What Circumstances Will The Court Appoint A Conservator For An Adult?

A. Only if the Probate Court finds the Ward lacks sufficient capacity to make or communicate significant responsible decisions concerning the management of his or her property.[429]

B. The appointment must be in the "best interests" of the Ward.[430]

372. What Are The Qualifications To Become The Conservator Of An Adult Ward?

A. No Individual may be appointed as a Conservator of an Ward if they:

1. Are a Minor, Ward, or a Protected Person;[431]

2. Have a conflict of interest with the Ward unless the Court finds that the conflict is insubstantial or that the appointment would nonetheless be in the Ward's best interest;[432] or

425 O.C.G.A. § 29-4-22(b)(10).
426 O.C.G.A. §§ 29-4-22(b)(11), 29-4-24.
427 O.C.G.A. § 29-4-22(b)(12).
428 O.C.G.A. § 29-4-30(a).
429 O.C.G.A. § 29-5-1(a).
430 O.C.G.A. § 29-5-1(c).
431 O.C.G.A. § 29-5-2(1).

3. Are the Owner, operator or employee of a long term care or other care giving institution or facility at which the Ward is receiving care unless related to the Ward by blood, marriage or adoption.[433]

373. What Rights Does An Adult Ward Lose Upon The Appointment Of A Conservator?

A. Unless the Court indicates otherwise, an Adult Ward loses the following rights upon the appointment of a guardian and ***cannot***:

1. Make, modify or terminate contracts, other than contracts of marriage;[434]
2. Buy, sell, dispose or otherwise encumber property;[435]
3. enter into or conduct other business or commercial transactions;[436]
4. Revoke a revocable trust established by the Ward;[437] and
5. Bring or defend any legal action, except an action relating to the Conservatorship.[438]

374. What Powers Does A Conservator For An Adult Ward Have?

A. A Conservator ***may***:

1. Make reasonable disbursements from the Ward's annual budget or income for the support, care education, health and welfare of the Ward and to those persons entitled to support from the Ward;[439]
2. Enter into contracts for labor or services on behalf of the Ward;[440]
3. Borrow money for one year or less secured by the Ward's property if done for purposes of paying the Ward's debts, repairing the Ward's dwelling place, or providing for the support, care, education, health and welfare of the Ward and for those persons entitled to support from the Ward;[441]
4. Receive, collect and hold the Ward's property and all related records;[442]
5. Retain the property received;[443]

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432 O.C.G.A. § 29-5-2(2).
433 O.C.G.A. § 29-5-2(3).
434 O.C.G.A. § 29-5-21(a)(1).
435 O.C.G.A. § 29-5-21(a)(2).
436 O.C.G.A. § 29-5-21(a)(3).
437 O.C.G.A. § 29-5-21(a)(4).
438 O.C.G.A. § 29-5-21(a)(5).
439 O.C.G.A. § 29-5-23(a)(1).
440 O.C.G.A. § 29-5-23(a)(2).
441 O.C.G.A. § 29-5-23(a)(3).
442 O.C.G.A. § 29-5-23(a)(4).

6. Bring, defend or participate in legal proceedings relating to the support, care, education, health and welfare of the Ward in the name of the Ward and on behalf of the Ward;[444]

7. Fulfill or disaffirm executory contracts and comply with executed contracts;[445]

8. Revoke a revocable trust if the trust allows revocation by a Conservator;[446]

9. Examine the Will and estate planning documents of the Ward;[447]

10. Appoint an attorney-in-fact to act if the Conservator is unable to do so;[448]

11. Invest the Ward's property;[449]

12. Sell the Ward's stocks and bonds;[450]

13. Compromise any doubtful or disputed claim made against the Ward if the gross settlement is less than $15,000;[451] and

14. Compromise and release any doubtful or disputed claims in the amount of $15,000 or less.[452]

375. What Are The Duties Of A Conservator For An Adult Ward?

A. A Conservator ***must***:

1. Respect the rights and dignity of the Ward;[453]

2. Be reasonably accessible and maintain regular communications with the Ward;[454]

3. Petition for the appointment of a Guardian, if needed;[455]

4. Cooperate with the Guardian;[456]

5. Provide for the support, care, education, health and welfare of the Ward, considering the Ward's needs and resources;[457]

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443 O.C.G.A. § 29-5-23(a)(5).
444 O.C.G.A. § 29-5-23(a)(6).
445 O.C.G.A. § 29-5-23(a)(7).
446 O.C.G.A. § 29-5-23(a)(8).
447 O.C.G.A. § 29-5-23(a)(9).
448 O.C.G.A. § 29-5-23(a)(10).
449 O.C.G.A. § 29-5-23(a)(11).
450 O.C.G.A. § 29-5-23(a)(12).
451 O.C.G.A. § 29-5-23(a)(13).
452 O.C.G.A. § 29-5-23(a)(14.)
453 O.C.G.A. § 29-5-22(b)(1).
454 O.C.G.A. § 29-5-22(b)(2).
455 O.C.G.A. § 29-5-22(b)(3).
456 O.C.G.A. § 29-5-22(b)(4).

6. Provide a security bond;[458]

7. Consider the estate plan of the Ward known to the Conservator in the administration of the Conservatorship;[459] and

8. Maintain accurate records including adequate supporting data and file annual returns.[460]

376. Does The Conservator Of An Adult Ward Have Any Reporting Obligations To The Court?

A. ***Yes***. The Conservator of a Ward ***must report*** to the Court as follows:

1. Provide a written report to the court and the Guardian within two months of appointment an inventory of the Ward's property and a plan for administering the property;[461]

2. Notify the court of any change in condition that may require modification or termination of the Conservatorship;[462]

3. Report conflicts of interest between the Conservator and the Ward to the court;[463] and

4. Keep the court informed of the Conservator's current address.[464]

377. Must The Conservator Of An Adult Ward Post A Bond?

A. ***Yes.*** The Conservator of an adult Ward ***must post*** a Bond.[465]

PART VII - SIMPLE TRUSTS

A. GENERAL INFORMATION ABOUT SIMPLE TRUSTS

378. What Is A Settlor?

A. A Person who creates a Trust, including the Testator/Testatrix in the case of a Testamentary Trust[466].

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457 O.C.G.A. § 29-5-22(b)(5).
458 O.C.G.A. §§ 29-5-22(b)(6), 29-5-40.
459 O.C.G.A. § 29-5-22(b)(8).
460 O.C.G.A. §§ 29-5-22(b)(9), 29-5-60.
461 O.C.G.A. § 29-5-22(b)(7).
462 O.C.G.A. § 29-5-22(b)(10).
463 O.C.G.A. § 29-5-22(b)(11).
464 O.C.G.A. § 29-5-22(b)(12).
465 O.C.G.A. § 29-5-40.

B. The Persons entitled to be a Settlor, Beneficiary or Trustee are very broadly defined to include: an individual, corporation, partnership, association, joint-stock company, business trust, unincorporated organization, limited liability company, or other legal entity, including any of these acting in a fiduciary capacity.

379. Can Multiple Settlors Create a Single Trust?

A. Yes, multiple Settlors may create a single "Inter Vivos" trust, each contributing some or all of the Trust Property.

380. What Purposes Can a "*Inter Vivos*" Trust Serve?

A. A trust may be established to serve any lawful purpose.[467]

381. What Types of "*Inter Vivos*" Trusts Are Typically Created by a Settlor?

A. The typical types of Trusts created by a Settlor are:

1. A Testamentary Trust[468]; (See Testamentary Trust Discussion, supra.)
2. An Express "*Inter Vivos*" Trust[469];
3. A Pet Trust[470];
4. A Charitable Trust[471];

General Note: There are also "Implied Trusts" which are created by operation of law to avoid an injustice, including: Resulting Trusts[472], Purchase Money Trusts[473], and Constructive Trusts[474].

382. What is a Trust Instrument?

A. The document that creates a Trust, including trust provisions in a Will[475].

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466 O.C.G.A. § 53-12-2(11).
467 O.C.G.A. § 53-12-22(1).
468 O.C.G.A. § 53-12-2(14).
469 O.C.G.A. §§ 53-12-2, 53-12-20.
470 O.C.G.A. § 53-12-28.
471 O.C.G.A. § 53-12-170.
472 O.C.G.A. § 53-12-130.
473 O.C.G.A. § 53-12-131.
474 O.C.G.A. § 53-12-132.
475 O.C.G.A. § 53-12-2(14).

383. What Is A Beneficiary?

A. The Person for whose benefit property is held in trust, whether vested or contingent, born or unborn, ascertained or unascertained[476].

384. What is an "*Inter Vivos*" Trustee?

A. The Person holding legal title to the Trust Property held under a Trust[477].

385. Can the Settlor, Trustee and Beneficiary Be the Same Person?

A. ***Yes***, however when the Settlor and Beneficiary are the same person, the Trust Property or Res is generally subject to attachment by their creditors.

386. What Is Trust Property?

A. Any type of property, whether real or personal, tangible or intangible, legal or equitable, the legal title to which is held by a Trustee, including claims, choses in action, contract rights, and death benefits under an insurance policy, employee trust or other arrangement[478].

387. What is *Res*?

A. ***Res*** is the cumulative trust property and resulting income held within a Trust.

388. How is Property Transferred Into a Trust?

A. The Settlor must transfer legal title to the Property to the Trustee to be held in Trust.[479]

B. In the case of real property, the deed or other instrument of conveyance must also be recorded in the real property records of the county where such property is located.[480]

389. What Is A Spendthrift Provision?

A. A provision in a Trust Instrument, including a Testamentary Trust, that prohibits transfers of a Beneficiary's interests in the Res, trust income or both[481].

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476 O.C.G.A. § 53-12-2(2).
477 O.C.G.A. § 53-12-2(15).
478 O.C.G.A. §§ 53-12-2(9), 53-12-2(15).
479 O.C.G.A. § 53-12-25(a).
480 O.C.G.A. § 53-12-25(b).

390. What Are the Requirements For a Valid Spendthrift Provision?

A. The provision must prohibit both voluntary and involuntary transfers.[482]

B. Any term providing that the trust property is held subject to a spendthrift provision, or words of similar import are sufficient to prohibit both voluntary and involuntary transfers.[483]

391. Can the Creditors of a Beneficiary Make Claims Against a Trust?

A. ***Generally No,*** if the trust contains a spendthrift provision.[484]

B. However, the Creditors of a debtor Beneficiary may make claims against any portion of the Res or trust income after it has been distributed to the beneficiary.[485]

392. What Are the Limited Circumstances Under Which The Creditors of A Beneficiary May Make Claims Against a Trust?

A. The creditors of a debtor Beneficiary may make claims against a Trust containing a Spendthrift Provision to recover:

1. Alimony or child support;[486]
2. Taxes or other governmental claims;[487]
3. Tort judgments;[488]
4. Judgments or orders of restitution as a result of a criminal conviction of the Beneficiary;[489]
5. Judgments for necessaries for the Beneficiary[490], or;
6. To the extent the Beneficiary contributed to the Res.[491]

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481 O.C.G.A. § 53-12-2(12).
482 O.C.G.A. § 53-12-80(a).
483 O.C.G.A. § 53-12-80(b).
484 O.C.G.A. § 53-12-80(c).
485 *Id.*
486 O.C.G.A. § 53-12-80(d)(1).
487 O.C.G.A. § 53-12-80(d)(2).
488 O.C.G.A. § 53-12-80(d)(3).
489 O.C.G.A. § 53-12-80(d)(4).
490 O.C.G.A. § 53-12-80(d)(4).
491 O.C.G.A. § 53-12-80(f).

393. What Other Provisions Can a Trust Contain to Protect Against Attachment by the Creditors of a Beneficiary?

A. A Trust Instrument may contain a "*Savings Clause*" providing that the interest of a Beneficiary shall terminate or become discretionary upon:

1. Any attempt by the Beneficiary to transfer his/her interest;
2. Any attempt by the creditors of a Beneficiary to claim against the trust, or;
3. Upon the bankruptcy or receivership of the beneficiary.[492]

B. A *Savings Clause* shall be valid except to the extent the Res was contributed by the Beneficiary.[493]

394. Can The Creditors of a Beneficiary Compel a Trustee to Make Discretionary Distributions of the Res or Trust Income to a Beneficiary?

A. ***Generally No***. The Creditors of a debtor Beneficiary cannot compel a Trustee to make discretionary distributions of the Res or trust income to a debtor beneficiary, regardless of whether the beneficiary is also the Trustee.[494]

B. ***Sometime Yes***. The Creditors of a debtor Beneficiary can compel a Trustee to make discretionary disbursements to the extent the Res was contributed by the debtor Beneficiary.[495]

395. What Is A Revocable Trust?

A. A Trust is revocable if the Settlor retains the ability to revoke, dissolve or modify the Trust Instrument during his or her lifetime.[496]

396. Can The Creditors of a Settlor Make Claims Against a Revocable Trust During the Lifetime of The Settlor?

A. ***Yes.*** The creditors of a debtor Settlor ***can make claims*** against either the Res or the Income of a Revocable Trust during the lifetime of the Settlor.[497]

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492 O.C.G.A. § 53-12-80(e).
493 *Id.*
494 O.C.G.A. § 53-12-81.
495 *Id.*
496 O.C.G.A. § 53-12-40(a).
497 O.C.G.A. § 53-12-82(1).

397. Can The Creditors of a Settlor Make Claims Against a Revocable Trust Following The Death of The Settlor?

A. ***Yes***. However, the creditors of a debtor Settlor must first show that the Settlor's probate estate is insufficient to satisfy the debt, unless the debtor Settlor has expressly directed that his/her liabilities are first to be paid from the Trust.[498]

398. What is a Irrevocable Trust?

A. A Trust is irrevocable if the Settlor relinquishes the ability to revoke, dissolve or modify the Trust Instrument during his or her lifetime.[499]

399. What Makes a Trust Revocable?

A. A Trust is presumed to be Irrevocable unless the Settlor expressly reserves the right of revocation in the Trust Instrument.[500]

B. Language reserving the "right to revoke" a Trust Instrument includes the power to modify and the reservation of an unrestricted "power to modify" a Trust Instrument includes the power to revoke.[501]

400. Can The Creditors Of a Settlor Make Claims Against a Irrevocable Trust During the Lifetime of the Settlor?

A. ***No***. The creditors of a debtor Settlor ***cannot make claims*** against either the Res or the trust income during the lifetime of the Settlor.[502]

B. However, the creditors of a debtor Settlor can make claims against the Res or trust income that is distributed to or for the benefit of the debtor Settlor during his/her lifetime.[503]

401. Can The Creditors of a Settlor Make Claims Against a Irrevocable Trust Following The Death of The Settlor?

A. ***No***. The creditors of a Settlor ***cannot make claims*** against either the Res or the trust income during the lifetime of the Settlor.[504]

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498 O.C.G.A. § 53-12-82(3).
499 O.C.G.A. § 53-12-40(a).
500 *Id.*
501 O.C.G.A. § 53-12-40(b).
502 O.C.G.A. § 53-12-82(2).
503 *Id.*
504 O.C.G.A. § 53-12-82(2).

B. However, the creditors of a debtor Settlor can make claims against the Res or trust income that could have been distributed to or for the benefit of the Settlor during his/her lifetime.[505]

402. What is a Power of Withdrawal?

A. A power granted to a Beneficiary allowing the Beneficiary discretion to voluntarily withdraw some or all of the Res and trust income from an "*Inter Vivos*" Trust.[506]

403. How Does a Power of Withdrawal Effect Claims by Creditors of a Beneficiary?

A. A power of withdrawal, subjects the Trust to claims from creditors of the debtor Beneficiary to the extent of trust property subject to the power[507].

B. Once the power of withdrawal lapses, is released, or is waived, the trust property reverts back to the typical rules regarding claims from creditors of a Beneficiary.[508]

404. What Laws Govern the Validity of a "*Inter Vivos*" Trust?

A. In the case of real property, the laws of the state where the property is located.[509]

B. In the case of all other Trust Property, the laws designated in the Trust Instrument unless, the effect of the designation is contrary to the public policy of the State having the most significant relationship to the Trust Property at issue.[510]

C. If no law is designated in the "*Inter Vivos*" trust, or the designation is held invalid, the laws of State having the most significant relationship to the Trust Property at issue.[511]

405. What Laws Govern the Interpretation of a Trust?

A. The laws designated in the Trust Instrument unless, the effect of the designation is contrary to the public policy of the State having the most significant relationship to the Trust Property at issue.[512]

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505 *Id.*
506 O.C.G.A. § 53-12-83.
507 *Id.*
508 *Id.*
509 O.C.G.A. §53-12-4(a).
510 O.C.G.A. §53-12-4(b)(1).
511 O.C.G.A. §53-12-4(b)(2).
512 O.C.G.A. §53-12-5(1).

B. If no law is designated in the "*Inter Vivos*" trust, or the designation is held invalid, the laws of State having the most significant relationship to the Trust Property at issue.[513]

B. DRAFTING "INTER VIVOS" TRUSTS

406. What Are The Legal Requirements For The Contents of An "*Inter Vivos*" Trust?

A. A "*Inter Vivos*" trust must:

1. Be a written document;[514]
2. Signed by the Settlor or an agent for the Settlor acting under a power of attorney containing a specific authorization to do so;[515]
3. An Intention by the Settlor to create the Trust;[516]
4. A transfer of Trust Property to the Trustee;[517]
5. Except for pet Trusts or Charitable Trusts, a beneficiary who is reasonable ascertainable at the time the trust is created, or reasonably ascertainable within the period of the rule against perpetuities;[518]
6. A Trustee,[519] and;
7. Trustee duties specified in writing or provided by law.[520]

407. What is The Standard For Determining if a Beneficiary is Reasonably Ascertainable?

A. A Beneficiary is reasonably ascertainable if:

1. The Trust Instrument gives the Trustee or another person the power to select a beneficiary based upon a defined standard,[521] or;
2. The Trust Instrument gives the Trustee or another person the power to select a beneficiary based upon their discretion.[522]

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513 O.C.G.A. §53-12-5(2).
514 O.C.G.A. §53-12-20(a).
515 *Id.*
516 O.C.G.A. §53-12-20(b)(1).
517 O.C.G.A. §53-12-20(b)(2).
518 O.C.G.A. §53-12-20(b)(3).
519 O.C.G.A. §53-12-20(b)(4).
520 O.C.G.A. §53-12-20(b)(5).
521 O.C.G.A. §53-12-20(c).
522 *Id.*

408. Are Any Formal Words required to Create a "*Inter Vivos*" Trust?

A. No, so long as the Trust Instrument shows the intent to impose enforceable duties upon the Trustee, and the legal requirements for creating a trust have been met.[523]

409. Who Can Be the Settlor of an "*Inter Vivos*" Trust?

A. Any Person who has the legal capacity to transfer property.[524]

B. In the case of an individual, this means generally means someone who is over the age of 18 years old or emancipated, and of sound mind.

C. Although an individual must be 18 years of age or emancipated to create an "Inter Vivos" trust, a Testator/Testatrix need only be 14 years old to create a Testamentary Trust.

410. Can a Trust Contain an "*In Terrorem*" Clause?

A. Yes, however for the clause to be valid, the Trust Instrument must provide direction as to what is to be done with the Res in the event the condition "*In Terrorem*" is violated[525].

411. Can Property Be Added to an Existing "*Inter Vivos*" Trust?

A. Yes, property may be added to an existing "*Inter Vivos*" trust from any source in any manner so long as: 1.) the addition is not prohibited by the Trust Instrument, and 2.) the property is acceptable to the Trustee.[526]

C. DRAFTING PET TRUSTS

412. Can A "*Inter Vivos*" Trust Be Created For The Care Of A Pet Or Other Animal?

A. **Yes.** A "*Inter Vivos*" trust may be established for the care, support, welfare and well being of 1 or more pets or other animals and is typically called a "Pet Trust"[527]. The standard trust language is simply modified to provide for the care and well being of the pet as opposed to a human.

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523 O.C.G.A. § 53-12-21.
524 O.C.G.A. § 53-12-23.
525 O.C.G.A. § 53-12-22.
526 O.C.G.A. § 53-12-26.
527 O.C.G.A. §53-12-28(a)

413. Are There Any Restrictions Upon The Creation Of A "*Inter Vivos*" Pet Trust?

A. The only restriction upon the creation of a "*Inter Vivos*" Pet Trust is that the pet or animal must be alive during the life of the Settlor[528].

414. When Does A "Inter Vivos" Pet Trust Terminate?

A. A "*Inter Vivos*" Pet Trust terminates upon the death of the pet or last surviving animal named in the Pet Trust[529].

415. What Happens To The Res Upon Termination Of The Pet Trust?

A. Any property left in a "Inter Vivos" Pet Trust following the death of the last surviving pet or animal named in the Pet Trust is distributed in the following order[530]:

1. As directed by the language of the "*Inter Vivos*" Trust;
2. If no direction is given in the "*Inter Vivos*" Trust, in accordance with the residuary clause of the Will of the Testator/Testatrix.
3. If there is no taker identified under paragraphs 1 or 2 above, to the Heirs of the Testator/Testatrix in accordance with laws of intestacy.

D. DRAFTING CHARITABLE TRUSTS

416. Can A "*Inter Vivos*" Trust Be Created For The Support Of Charitable Causes?

A. **Yes.** A "*Inter Vivos*" trust may be established for the support of certain charitable causes and is typically called a Charitable Trust[531]. The standard trust language is simply modified to provide for the support of the charity as opposed to a Human.

417. Are There Any Restrictions Upon The Creation Of A "*Inter Vivos*" Charitable Trust?

A. The following causes are considered acceptable purposes for the creation of a Charitable Trust:[532]

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528 *Id.*
529 *Id.*
530 O.C.G.A. §53-12-28(c)
531 O.C.G.A. §53-12-170(a)

1. Relief of poverty;
2. Advancement of education;
3. Advancement of ethics and religion;
4. Advancement of health;
5. Advancement of sciences, arts or humanities;
6. Protection and preservation of the environment;
7. Improvement, maintenance or repair of graves, cemeteries and memorials;
8. Prevention of cruelty to animals;
9. Government purposes; and
10. Other similar subjects regarding the relief of human suffering or promotion of human civilization.

The Settlor may retain or allow the Trustee to retain the power to select a charitable purpose or charitable beneficiary at some future date without invalidating the Charitable Trust.[533]

418. What Happens If The Charitable Cause Fails Or Ceases To Exist?

A. If the charitable beneficiary ceases to exist and a successor is not named in the Trust Instrument, the Superior Court shall exercise its equitable ***Cy Pres*** powers in such a way to effectuate the intent of the Settlor nearly as possible.[534]

419. When Does A Charitable Trust Terminate?

A. A Charitable Trust is allowed to continue for an indefinite or unlimited period of time.[535]

E. "POUR OVER" WILLS

420. What is a "Pour Over" Will?

A. A will that bequeaths some or all of the property of a Testator/Testatrix into an existing "*Inter Vivos*" trust.

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532 O.C.G.A. §53-12-170(b).
533 O.C.G.A. §53-12-171.
534 O.C.G.A. §53-12-172.
535 O.C.G.A. §53-12-173.

421. Can a Pour Over Will Add Property to an "*Inter Vivos*" Trust?

A. ***Yes,*** a "Pour Over" will may transfer property into an "Inter Vivos" trust so long as the trust is identified in the Will and the "Inter Vivos" trust is valid.[536]

422. Do a "Inter Vivos" Trust and a Testamentary Trust Overlap?

A. ***No***, property that is bequeathed to a "Inter Vivos" trust is not subject to a Testamentary Trust and vice versa[537], unless otherwise provided in the will of the Testator/Testatrix.

B. Property bequeathed into a "Inter Vivos" trust must be administered and distributed in accordance with the "*Inter Vivos*" Trust Instrument and property bequeathed into a Testamentary Trust must be administered and distributed in accordance with the Will.[538]

F. ADMINISTERING "INTER VIVOS" TRUSTS.

423. Who Can Qualify As A Trustee Under A "Inter Vivos" Trust?

A. The ***qualifications for a Trustee*** are:

1. In the case of an individual, the Trustee must be must be 18 years of age or older and have the legal capacity to acquire, hold and transfer title to property..[539]

2. In the case of a corporation, partnership or other entity, it must be granted the power to act as a Trustee in Georgia.[540]

   General Note: Approval for an entity to act as a Trustee is obtained from the "Georgia Department of Banking & Finance".

424. How is a Trustee Appointed?

A. A Settlor may appoint a Trustee in a in the Trust Instrument or grant that power to others including the beneficiaries.[541]

B. If the beneficiaries are empowered to select a Trustee, they must do so by unanimous consent.[542]

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536 O.C.G.A. §53-12-101.
537 O.C.G.A. §53-12-101(b)(1).
538 O.C.G.A. §53-12-101(b)(2).
539 O.C.G.A. § 53-12-200.
540 *Id.*
541 O.C.G.A. § 53-12-201(a).

C. If the Beneficiaries are empowered to select a Trustee, but cannot do so by unanimous consent, the court up[on the petition of an interested person shall appoint a Trustee consistent with the intention of the Settlor and the best interests of the Beneficiaries.[543]

425. Can a Trust Instrument Appoint Co-Trustees?

A. ***Yes***, however co-trustees may only act through unanimous action[544] unless:

1. A co-trustee positions is vacant,[545] or;
2. A co-trustee is unable to ct due to inaccessibility, illness or other temporary incapacity.[546]

426. Is The Trustee required to Provide a Bond?

A. No, a bond is not required unless:

1. Required by the Trust Instrument[547], or;
2. Required by the court as necessary to protect the best interests of the Beneficiaries or creditors of the trust.[548]

427. Can a Trustee be Removed?

A. ***Yes***, under the following circumstances:

1. In accordance with the terms of the Trust Instrument;[549]
2. Upon petition by an interested person showing good cause,[550] or;
3. In the discretion of the court to protect the trust property or the interests of any Beneficiary.[551]

428. What are the Duties of a Trustee?

A. The Trustee of an "Inter Vivos" trust must perform the following duties:

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542 O.C.G.A. § 53-12-201(d).
543 O.C.G.A. § 53-12-201(e).
544 O.C.G.A. § 53-12-204(1).
545 O.C.G.A. § 53-12-204(2).
546 O.C.G.A. § 53-12-204(3).
547 O.C.G.A. § 53-12-203(a)(1).
548 O.C.G.A. § 53-12-203(a)(2).
549 O.C.G.A. § 53-12-221(a)(1).
550 O.C.G.A. § 53-12-221(a)(2).
551 O.C.G.A. § 53-12-221(a)(2).

1. Administer the trust in good faith in accordance with its provisions and purposes;[552]
2. Exercise the judgment and care of a prudent person acting in a like capacity and familiar with such matters, considering the purposes, provisions, distribution requirements and other circumstances of the trust;[553]
3. Inform the Beneficiaries of the creation of an irrevocable trust or the transfer of a revocable trust into an irrevocable trust within 60 days after such occurrence, unless the Trust Instrument indicates otherwise;[554]
4. Provide reports and accounts of the Trust Property at least annually, at the termination of the trust, and at the request of a beneficiary;[555]
5. Distribute net income derived from the trust on an annual basis;[556]
6. Avoid any conflicts of interest,[557] and;
7. Administer the trust impartially based upon what is fair and reasonable to all Beneficiaries unless the Trust Instrument unequivocally requires the Trustee to show partiality to one or more Beneficiaries.[558]

429. What Are The Statutory Powers granted to Trustees?

A. Trustees have broad statutory powers including the power to:[559]

1. Sell, exchange, partition or otherwise dispose of property of the Trust;
2. Invest and reinvest property of the Trust;
3. To continue the operation of any business enterprise of the Trust;
4. Form a corporation or other entity;
5. Transfer, assign, and convey to the entity all or part of the Trust Property;
6. Manage real property;
7. Lease personal property of the Trust;
8. Pay taxes, assessments and other expenses of the Trust;
9. Accept additional property into the Trust;

552 O.C.G.A. § 53-12-240(b).
553 O.C.G.A. § 53-12-241.
554 O.C.G.A. § 53-12-242.
555 O.C.G.A. § 53-12-243.
556 O.C.G.A. § 53-12-244.
557 O.C.G.A. § 53-12-246.
558 O.C.G.A. § 53-12-247
559 O.C.G.A. § 53-12-261.

10. Borrow funds to pay taxes and expenses of the Trust, and pledge or encumber a portion of the Trust to secure the loan;
11. Make loans on behalf of the Trust;
12. Vote shares of stock and exercise options held by the Trust;
13. Hold securities
14. Carry out any plan for the consolidation or merger, dissolution or liquidation, foreclosure, lease, or sale of the property or the incorporation or reincorporation, reorganization or readjustment of the capital or financial structure of any corporation, company, or association the securities of which may form any portion of the Trust;
15. Serve as a member of a shareholders' or bondholders' protective committee;
16. Adjust interest rates upon Trust obligations;
17. Foreclose upon obligations owed the Trust;
18. Insure the assets of the Trust;
19. Receive rents, profits and income of the Trust;
20. Bring, defend, mediate, arbitrate, or compromise claims involving the Trust;
21. Employ third parties to assist in administering the Trust;
22. Acquire, receive, hold, and retain principal of the Trust;
23. Hold, manage, invest, reinvest, distribute, and account for assets of the Trust to Beneficiaries of the Trust;
24. Set up proper and reasonable reserves for taxes and expenses of the Trust;
25. Make contracts on behalf of the Trust; and
26. Serve without filing returns or reports to any Court.

430. Can The Settlor Modify the Statutory Powers of a Trustee?

A. Yes, although the best and easiest way to define a Trustees powers is by incorporating the powers defined by statute[560], such powers may be edited, reduced or added to in accordance with the wishes of the Settlor.

[560] O.C.G.A. § 53-12-263.

431. What is the Liability of a Trustee Towards a Beneficiary?

A. A trustee is accountable to the beneficiaries for the Trust Property and may be held liable for any breach of trust.[561]

432. What Remedies are Available to a Beneficiary in the Event the Trustee Commits a Breach of Trust?

A. If a Trustee commits a breach of trust or threatens to commit a breach of trust, a Beneficiary shall have a cause of action seeking:

1. Damages;[562]
2. Compel the Trustee to perform its duties;[563]
3. Require an accounting;[564]
4. Enjoin the Trustee from committing a breach of trust;[565]
5. Compel the Trustee to redress a breach of trust by payment of money or otherwise;[566]
6. Appoint a temporary trustee or suspend the existing Trustee;[567]
7. Remove the Trustee,[568], or;
8. Reduce or deny compensation to the Trustee.[569]

561 O.C.G.A. § 53-12-300.
562 O.C.G.A. § 53-12-301(a)(1);
563 O.C.G.A. § 53-12-301(a)(2);
564 O.C.G.A. § 53-12-301(a)(3);
565 O.C.G.A. § 53-12-301(a)(4);
566 O.C.G.A. § 53-12-301(a)(5);
567 O.C.G.A. § 53-12-301(a)(6);
568 O.C.G.A. § 53-12-301(a)(7);
569 O.C.G.A. § 53-12-301(a)(8);

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