Requisites, Instrumentation, and Will Provisions (GA)

A Practical Guidance® Practice Note by Morgan Wood Bembry, Wood & Bembry LLC

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This practice note discusses the requirements for creating a valid will in Georgia. It explains the statutory requirements for making a will, including testamentary capacity, freedom of volition, and due execution. The note also addresses instrumentation of wills and codicils in Georgia. Finally, the note covers no contest clauses, dispositions to minors, and disinheritance. During the COVID-19 pandemic, Georgia has instituted temporary measures allowing remote witnessing and notarization of some estate planning documents. See Executive Order 04.09.20.01: Remote Notarization and Witnessing and Remote Notarization Chart.

For information on the purposes of a will, see Purposes and Uses of a Will (GA). For information on revoking, reviving, amending, or interpreting a will, see Revocation, Revival, Amendments, and Will Contests (GA).

Statutory Requirements

Testamentary Capacity

A person may make a will in Georgia if he or she is 14 years of age or older and has capacity. Ga. Code Ann. § 53-4-10. Testamentary capacity is the necessary capacity to have a "decided and rational desire" to dispose of one's property after death. See Sullivan v. Sullivan, 539 S.E.2d 120, 122 (Ga. 2000). In general, cognitive impairment, dementia, and similar afflictions do not automatically render a person incapable of ever making a will, though a person may need to wait to execute the will until he or she has a lucid interval. Ga. Code Ann. § 53-4-11. See also Meadows v. Beam, 807 S.E.2d 339, 341–43 (Ga. 2017); Strong v. Holden, 697 S.E.2d 189, 191 (Ga. 2010).

A person's testamentary capacity is assessed as of the time the will was executed. Evidence of the testator's condition before or after the will's execution, though, may be admissible in court to demonstrate capacity or lack of capacity. Ellis v. Britt, 182 S.E. 596, 598 (Ga. 1935). In a determination of capacity, the court will look at whether all of the following criteria have been met:

- The testator understood that he or she was signing a document that would control the disposition of his or her property after death.
- The testator was capable of remembering what property was subject to disposition.
- The testator was capable of remembering the identity of the testator's relatives and closest friends (the natural objects of the testator's bounty).
- The testator had sufficient intellect to have a rational and decided desire as to the distribution of his or her property.

See Amerson v. Pahl, 734 S.E.2d 399, 400 (Ga. 2012); Slaughter v. Heath, 57 S.E. 69, 71 (Ga. 1907).

Testamentary capacity does not require the testator to know precisely what property could be distributed under the will but only to have a general understanding of the nature and extent of the property. See Webb v. Reeves, 791 S.E.2d 35, 37 (Ga. 2016). Further, it is not required that the testator perfectly recite the names and ages of family members, but that the testator be able to remember generally those closest to him or her. See Patterson-Fowlkes v. Chancey, 732 S.E.2d 252, 254 (Ga. 2012).

The initial burden of proving testamentary capacity falls to the propounder of the will—that is, the person petitioning to probate the will. This burden can be met with a will's self-proving affidavit or with the witnesses' written interrogatories. Singelman v. Singelmann, 548 S.E.2d 343, 345 (Ga. 2001). The caveator—the person disputing that the testator had capacity—then has the burden of showing that a genuine issue of material fact remains as to the testator's capacity. Strong v. Holden, 697 S.E.2d 189, 191 (Ga. 2010). Georgia courts have long been hesitant to find lack of testamentary capacity and to deprive a person of the valuable right to make a will. See Meadows v. Beam, 807 S.E.2d 339, 342–43 (Ga., 2017); Griffin v. Barrett, 187 S.E. 828, 834 (Ga., 1936). It is important to note that a lower standard of capacity is required to execute a will than is required to execute a contract. See Ga. Code Ann. § 53-4-11(b). See also SunTrust Bank, Middle Georgia v. Harper, 551 S.E.2d 419, 425–26 (Ga. App. 2001).

Freedom of Volition

The testator must also be able to freely and voluntarily sign his or her will. If anything destroys the testator's freedom in choosing the contents of the testator's will and whether to sign the will, such as fraudulent plays upon the testator's fears, affections, or sympathies; misrepresentation; duress; or undue influence, then the testator's will is invalid. Ga. Code Ann. § 53-4-12.

A fraudulent misrepresentation that deceives the testator and that the testator relies upon in making or signing a will can be sufficient to invalidate the will. See Slade v. Slade, 118 S.E. 645, 650 (Ga. 1923).

The undue influence of another person (i.e., outside influence on the testator that causes the testator to follow the wishes of the influencer instead of the wishes of the testator in the making of the will) may also destroy the testator's freedom of volition. See Harper v. Harper, 554 S.E.2d 454, 455 (Ga. 2001). A rebuttable presumption of undue influence arises if an influencer who is not the natural object of the testator's bounty had a confidential relationship with the testator and the influencer obtains a substantial benefit under the will. Hudson v. Abercrombie, 338 S.E.2d 667, 668 (Ga. 1986). The presumption also arises if the influencer and the testator had a confidential relationship, with the influencer occupying a dominant position and the beneficiary being of weak mentality. A confidential relationship is one in which one party is situated as to exercise a controlling influence over the wishes, conduct, and interest of the other person. White v. Regions Bank, 561 S.E.2d 806, 808 (Ga. 2002). To invalidate the will, the influencer must attempt to influence the testator with specific regard to the testator's will. See Lipscomb v. Young, 672 S.E.2d 649, 650 (Ga. 2009). A mere opportunity to influence the testator is insufficient to validate the will. Quarterman v. Quarterman, 493 S.E.2d 146, 147 (Ga. 1997).

Due Execution

To be valid, a will must meet the following execution requirements:

- The will must be in writing.
- The will must be signed by the testator or on behalf of the testator while in the testator's presence and at the testator's express direction.
- The testator must either sign the will or acknowledge his or her signature on the will in the presence of two or more competent witnesses. The witnesses must sign the will themselves—not direct someone else to sign for them—in the testator's presence.

Ga. Code Ann. § 53-4-20. See also Cornelius v. Crosby, 252 S.E.2d 455, 457 (Ga. 1979); 5 Southeast Transaction Guide § 82.03.

A testator must have knowledge of the will's contents for the will to be valid. Knowledge of the contents will be presumed if the testator can read and has signed the will. Ga. Code Ann. § 53-4-21. A codicil to the will also must conform with the statutory requirements for execution. Ga. Code Ann. § 53-4-20(c).

In accordance with Ga. Code Ann. § 53–5–31, a will executed outside of Georgia is admissible to probate in Georgia if it is in writing and signed by the testator and the will is otherwise executed and attested to in accordance with any of the following:

- Georgia law
- The law of the jurisdiction where it was executed, at the time of execution
- The law of the jurisdiction where the testator was domiciled either at the time of execution or at the time of death

Instrumentation

Formal Written Wills

Signature

In Georgia, a will must be signed either by the testator or another individual in the testator's presence and at the express instruction of the testator. Ga. Code Ann. § 53-4-20(a). The testator is not required to sign in the presence of the witnesses, but if the testator does not sign in the presence of the witnesses, the testator must acknowledge his

or her signature to the witnesses. Miles v. Bryant, 589 S.E.2d 86, 87 (Ga. 2003). The requirements regarding form of the signature are not strict: any signature, name (even if not the testator's legal name), or mark intended by the testator to authenticate the will is sufficient. See Mitchell v. Mitchell, 264 S.E.2d 222, 223 (Ga. 1980). See also Brown v. Brown, 592 S.E.2d 854, 855 (Ga. 2004).

It is not a requirement that the testator's signature appears at the end of the will, but a signature that appears elsewhere in the document requires proof of testator's intent to provide his or her signature. See Miles v. Bryant, 589 S.E.2d 86, 88 (Ga. 2003).

Attesting Witnesses

Georgia law requires two or more individuals over the age of 14 to sign the will as witnesses. Witnesses must be competent at the time of execution, and later incompetence does not preclude probate. Ga. Code Ann. § 53-4-22. Each witness must attest and sign the will in the presence of the testator, from a place where the testator is able to see the witness signing in the testator's line of vision. See McCormick v. Jeffers, 637 S.E.2d 666, 669 (Ga. 2006). Unlike other states, there is no requirement that the testator declare to the witnesses that instrument at hand is a will. Furthermore, witnesses need not sign in the presence of each other. See Parker v. Melican, 684 S.E.2d 654, 656 (Ga., 2009).

If a witness is also the beneficiary of a testamentary gift under the will, the testamentary gift to the witness will be void unless the will is witnessed by at least two other individuals who are not beneficiaries under the will. That is, a witness may count as a subscribing witness to other provisions of the will but does not count as a subscribing witness to any bequest to himself or herself. Ga. Code Ann. § 53-4-23(a). A testamentary gift to a witness's spouse is not similarly voided; the fact that a witness's spouse is a beneficiary under the will is only considered pursuant to the credibility of the witness. Ga. Code Ann. § 53-4-23(b).

Additional Considerations for Execution

There are other common practices for execution that may not directly affect a will's validity but that may nevertheless make it easier to probate the will after the testator's death.

Date of Execution

While it is not a formal, statutory requirement, dating a will may help avoid confusion after the testator's death, especially if the testator has executed more than one will in her or his lifetime.

Place of Execution

Indicating where the will was executed could assist a court in determining the applicable law in the event that questions arise concerning the validity or construction of the will.

Attestation Clause

The attestation clause is placed after the testator's signature and above the signatures of the attesting witnesses. In essence, an attestation clause states all of the facts essential or pertinent to the will's validity: (1) that the testator declared the instrument to be his or her will, (2) that the testator signed the will in the presence of the witnesses, (3) that the testator requested the witnesses to attest to the testator's signature, and (4) that the witnesses signed as witnesses and did so in the testator's presence. See Underwood v. Thurman, 36 S.E. 788, 790–91 (Ga. 1900). It should be noted that the Georgia law does not require an attestation clause. Cornelius v. Crosby, 252 S.E.2d 455, 457 (Ga. 1979). However, counsel should be aware that the presence of an attestation clause stating the essential facts of the execution, in addition to the actual signatures of the testator and the witnesses, gives rise to a presumption that the will was executed as required by law. Underwood v. Thurman, 36 S.E. 788, 790–91 (Ga. 1900).

Self-Proving Affidavit

Wills are often probated many years after execution. As a result, witnesses' signatures are often impossible to read, witnesses are sometimes hard to locate, and memories tend to fade. To address all of these issues, it is common (and wise) practice to attach self-proving affidavits to wills. The self-proving affidavit is usually executed immediately after the will but can be executed at any subsequent date while the testator and witnesses are still living. It provides, in affidavit form, the testator and attesting witnesses' testimony regarding execution of the will, saving the survivors of the testator the trouble of locating the witnesses before probating the will. See Ga. Code Ann. § 53-4-24(a); Ga. Code Ann. § 53-4-24(c). A statutory self-proving affidavit form is provided at Ga. Code Ann. § 53-4-24(b).

Be aware that a self-proving affidavit requires a minimum of three persons in addition to the testator—two witnesses plus a notary public. The notary public may not serve as both notary and witness or notary and testator. See Ga. Code Ann. § 45-17-8(c).

Joint or Mutual Wills

A joint will signed by two or more testators and disposing of the property of each testator may be probated as each

testator's will. Ga. Code Ann. § 53-4-31(a). Mutual wills are wills by multiple testators that make reciprocal devises of each testator's property. Ga. Code Ann. § 53-4-31(b). See Davis v. Parris, 710 S.E.2d 757, 758–61 (Ga. 2011); Hodges v. Callaway, 621 S.E.2d 428, 430–32 (Ga. 2005). Executing a joint or mutual will does not signify that any testator promises not to revoke or amend the will. Ga. Code Ann. § 53-4-32. Rather, such a promise, or a promise to make a will or a certain bequest or not to make a will, must be memorialized in a written agreement. Ga. Code Ann. § 53-4-30. In the absence of a written agreement, each testator is free to revoke a joint or mutual will at any time before the testator's death, and the revocation of one testator's joint or mutual will does not revoke the joint or mutual will of any other testator. Ga. Code Ann. § 53-4-33.

Holographic Wills

To be valid in Georgia, a handwritten will requires witnesses and compliance with statutory requirements for wills. Wills that are handwritten and signed by the testator but not properly witnessed are not valid. Ga. Code Ann. § 53-4-20.

Oral (Nuncupative) Wills

A nuncupative will is an oral will declared by a testator during the testator's last illness before two or more witnesses and later reduced to writing. In the past, Georgia allowed such wills to be admitted to probate under certain circumstances. Counsel must be aware that the Revised Probate Code of 1998 added the requirement that a will be in writing, and Georgia now no longer allows nuncupative wills. Ga. Code Ann. § 53-4-20(a).

Codicils

A codicil is an amendment to or a republication of a will. Ga. Code Ann. § 53-1-2(4). The same formalities that apply to a will also apply to a codicil. Ga. Code Ann. § 53-4-20(c). A codicil should both specifically reference the will being amended and/or republished by the codicil, and should clearly state that the unchanged provisions of the will are being reaffirmed by the codicil. See Honeycutt v. Honeycutt, 663 S.E.2d 232, 235 (Ga. 2008). The republication by codicil of an earlier will can cure any issues of testamentary capacity or execution errors, as the due execution of a codicil making clear reference to an earlier will amounts to a ratification and republication of the terms of the earlier will. Foster v. Tanner, 144 S.E.2d 775, 776 (Ga. 1965).

Separate Writings

A writing that independently exists when a will is executed may be incorporated by reference into the will, so long as the language of the will expresses this intent and sufficiently identifies the writing. Ga. Code Ann. § 53-4-4(a), eff. Jan. 1, 2021.

A testator may use a separate writing to dispose of items of tangible personal property not otherwise specifically bequeathed in the will, other than money, so long as the writing is signed and dated by the testator, describes the items and beneficiaries with reasonable certainty, and is referenced in the will. This writing does not have to exist when the will is executed and does not have to have significance independent from its effect on the dispositions of the testator's tangible personal property. Should multiple writings be in conflict as to the disposition of a particular item, the later-dated writing will be construed to revoke the earlier inconsistent provisions. Ga. Code Ann. § 53-4-5, eff. Jan. 1, 2021.

Basic Will Provisions

Beneficiaries

A testator may make testamentary gifts to anyone the testator chooses—even to strangers, and even to the exclusion of the testator's spouse or descendants—so long as the gift is not inconsistent with the laws or public policy of the state. Ga. Code Ann. § 53-4-1. The beneficiaries may be specifically named in the will, described as a class, or determined by a condition placed upon their future actions. See Folsom v. Rowell, 640 S.E.2d 5, 6–9 (Ga. 2007); Bailey v. Johnson, 268 S.E.2d 147, 150 (Ga. 1980). A class gift to the testator's children, even if the will identifies the testator's existing children, is presumed to include future-born children unless the will expresses a contrary intent. Ga. Code Ann. § 53-4-48(b).

A person who is adopted is counted as a child or relative of the testator just as a biological child or relative would be and is so included in class gifts, unless the testator's will expresses a contrary intent. See Ga. Code Ann. § 53-1-8.

Rights of Persons Not Named in Will

In some cases, circumstances that arise in the testator's life after the testator executes the will could result in persons who are not named in the will having a right to claim a portion of the testator's estate. If a testator marries or has or adopts a child after executing a will and the will makes no provision in contemplation of that event, the new spouse or child is entitled to his or her intestate share of the testator's estate. See Ga. Code Ann. § 53-4-48(c). This includes a posthumous child born within 10 months of the testator's

death. Ga. Code Ann. § 53-4-48(a). The court looks for clear language contemplating a future spouse or children. See Hobbs v. Winfield, 805 S.E.2d 74, 77–78 (Ga. 2017). See also Evans v. Palmour, 553 S.E.2d 585, 587 (Ga. 2001). A valid prenuptial agreement between the testator and the spouse, however, could restrict the spouse's ability to claim this share. In re Estate of Boyd, 798 S.E.2d 330, 333 (Ga. App. 2017). A child generally must be legally, not just virtually, adopted after the testator's will is executed to have a claim to a share of the testator's estate (though the same may not be true in cases of intestacy). Johnson v. Rogers, 774 S.E.2d 647, 650 (Ga. 2015).

Beneficiaries Who May Lack Rights

There are circumstances that would prevent a surviving beneficiary named or included by class in a will from receiving that bequest when the will is probated, such as:

- If a testator names his or her spouse as a beneficiary in his or her will but later divorces that spouse, or the marriage is annulled, and the will does not contemplate such event, the former spouse is treated as having predeceased the testator. (If the couple remarries and the testator has still not revoked or amended the will, the bequest would be considered revived.) Ga. Code Ann. § 53-4-49.
- A testamentary gift to a witness to the will is void unless there are at least two other subscribing witnesses to the will who are disinterested. Ga. Code Ann. § 53-4-23(a).
- Even if included in the testator's will, a person who feloniously and intentionally kills or conspires to kill or procures the killing of a testator will be treated as having predeceased the testator. Ga. Code Ann. § 53-1-5.

Beneficiaries Who Predecease Testator

Beneficiaries included in a will often do not survive the testator or do not survive the testator for very long. In that case, the descendants of the deceased beneficiary who survive the testator will ordinarily share in the testamentary gift, unless the testator directs otherwise. See Ga. Code Ann. § 53-4-64(a). This is true for class gifts as well. Ga. Code Ann. § 53-4-64(b). If, however, a beneficiary is merely treated as having predeceased the testator either because the beneficiary and the testator divorced or had their marriage annulled, or because the beneficiary feloniously and intentionally caused the death of the testator, both described below, then the testamentary gift would only vest in the beneficiary's descendants who are also descendants of the testator. Ga. Code Ann. § 53-4-64(c). If a testamentary gift lapses because the predeceased beneficiary had no surviving descendants, the gift becomes part of the residuary of the testator's estate and passes in accordance with the residuary. Ga. Code Ann. § 53-4-65. A will frequently specifies an amount of time by which a beneficiary must survive the testator to be treated as having survived. As such, this rule may apply to some individuals who do survive the testator. See McParland v. McParland, 211 S.E.2d 748, 749 (Ga. 1975).

Because of the likelihood of some beneficiaries predeceasing the testator, it is important that you discuss different scenarios with your client to discern what their wishes would be if certain beneficiaries predeceased them. The testamentary gift may be, in the testator's mind, only for a specific beneficiary to enjoy, and the testator may prefer that it go to someone other than the beneficiary's family.

Dispositions to Minors

Because a minor lacks the capacity to manage property ownership, arrangements will have to be made for the control and administration of any property that a will transfers to a minor.

Conservatorships

A testamentary gift of personal property that does not exceed $15,000.00 in value may be transferred to the parent of a person who has not yet turned 18 years of age, but otherwise, a conservator will have to be appointed by the probate court to receive the testamentary gift for the minor. Ga. Code Ann. § 29-1-1(11); Ga. Code Ann. § 29-3-1. A conservatorship requires substantial reporting to the court to ensure that the conservator is meeting the minor's actual needs and considering the minor's best interests. Ga. Code Ann. § 29-3-30.

Trusts

When property of substantial value is set aside for the benefit of a minor, the testator may opt to transfer the property into a trust for the minor's benefit. The trust instrument may be either living or testamentary. Counsel should always consider a trust as an alternative to a conservatorship. Most minors will need some form of financial support as well as assistance with property management, and a well-designed trust can satisfy both of these important needs with much more flexibility than a conservatorship. Even when a trust is used, however, a conservator should be nominated to manage distributions made from the trust for the benefit of the minor. For a detailed discussion of trusts, see Characteristics and Uses of Trusts (GA), Requirements and Restrictions on Trust Purposes and Administration (GA), and Revocation, Amendment, and Termination of Trusts (GA).

Georgia Transfers to Minors Act

Bequests to minors can also be made under the Georgia Transfers to Minors Act (GTMA). Ga. Code Ann. § 44-5-110 et seq. The GTMA enables a transfer of property to be made for the use and benefit of a minor without requiring a conservatorship and without the additional administration and expense of a trust. For purposes of the GTMA, a minor is generally any person who is under 21 years of age. Ga. Code Ann. § 44-5-111. If a will permits or directs the executor to transfer property to a minor under the GTMA, the executor would transfer the property to the custodian who the testator has designated in the will or, if none, to a person of the executor's selection (including the executor). Ga. Code Ann. § 44-5-115. See also Ga. Code Ann. § 44-5-119. See also 6 Southeast Transaction Guide § 100.90. Even if the will does not specifically authorize the executor to transfer the property subject to the GTMA (or if there is no will at all), the executor may still opt to transfer the property to an adult (including the executor) or trust company as custodian for the benefit of the minor under the GTMA. In this case, the executor must believe that the transfer to be in the minor's best interest, the transfer must not prohibited by or inconsistent with the terms of the will, and the court must authorize any transfer if all GTMA transfers to the minor exceed $10,000.00 in the aggregate. Ga. Code Ann. § 44-5-116.

While holding the property for the minor, the custodian is charged with using the custodial property as the custodian believes is advisable for the minor's support, maintenance, education, and general use. In so using the custodial property, the custodian may deliver the property to the minor himself or herself or spend or apply the property for the minor's benefit. No court approval is required. Ga. Code Ann. § 44-5-124(a). The court may, however, intervene and order the custodian to use the custodial property in a manner that the court considers to be advisable, upon petition of an interested person or a minor who is 14 years old or older. Ga. Code Ann. § 44-5-124(b).

While any custodial property is indefeasibly vested in the minor once a transfer to the custodian is made, the custodian is not required to transfer the custodial property to the minor until the minor turns 21 years of age if the will authorized or directed the GTMA transfer, or 18 years of age, if the will did not authorize the GTMA transfer. See Ga. Code Ann. § 44-5-121(b); Ga. Code Ann. § 44-5-130.

Disinheritance

A person's heirs are the individuals who would share in a person's estate if the person dies without a will. See Ga. Code Ann. § 53-2-1(c). If a person would not want certain heirs to share in his or her estate, executing a valid will disinheriting those heirs is the way to prevent any undesired distribution of property when the person passes away. The purpose of a will provision disinheriting heirs is to state the testator's intention not to provide for persons who would otherwise be entitled to inherit all or part of the testator's property. See Ga. Code Ann. § 53-4-1. A provision disinheriting an heir does not have to name the heir specifically, so long as the testator clearly expresses the intent to disinherit that person. Hood v. Todd, 695 S.E.2d 31, 33 (Ga. 2010). See also Banner v. Vandeford, 748 S.E.2d 927, 928–29 (Ga. 2013).

As discussed above, if a testator marries or has or adopts a child after executing a will and the will makes no provision in contemplation of that event, the new spouse or child is entitled to his or her intestate share of the testator's estate. See Ga. Code Ann. § 53-4-48(c). A future spouse or child can only be disinherited by a clear reference to that marriage or birth and using clear and unmistakable terms to exclude such future spouse or child. See Hobbs v. Winfield, 805 S.E.2d 74, 77 (Ga. 2017).

A testator may have different reasons for excluding an heir under his or her will. For example, the testator may feel that the particular heir has considerable wealth and is focused on providing for less financially stable heirs. Another reason may be that the testator has provided for the excluded heir by other means (i.e., through lifetime gifting, through use of a non-testamentary trust, or through a beneficiary designation for a bank account, insurance policy, or retirement account). Of course, the testator may want to exclude the heir for other personal reasons. It is not the court's job to assess whether the disinheritance is wise or just, so long as the disposition is not illegal and is clearly expressed. Banner v. Vandeford, 748 S.E.2d 927, 929 (Ga. 2013).

Year's Support for Surviving Spouse and Minor Children

Georgia law specifically permits a testator to exclude his or her spouse and descendants from his or her will. Ga. Code Ann. § 53-4-1. The state instead gives a surviving spouse and surviving minor children some protection through "year's support." Regardless of whether a decedent had a will, the decedent's surviving spouse and minor children are entitled to an award from the estate of sufficient property to provide for their support and maintenance for one year after the decedent's death. Ga. Code Ann. § 53-3-1(c). There is no minimum or maximum amount of a year's support award, as the amount needed to support the survivors depends on the needs of the particular family and their standard of living. Year's support is considered a necessary expense of administration and is one of the highest priority obligations of the estate. See Ga. Code Ann. § 53-3-1(b); Ga. Code Ann. § 53-7-40.

A surviving spouse or minor child must file the petition for year's support within two years of the date of the decedent's death. Ga. Code Ann. § 53-3-5. A petition for year's support, however, is barred upon a spouse's death or remarriage, or a child's death or attainment of age of 18. Ga. Code Ann. § 53-3-2. If no objection is filed, the court is required to enter an order setting aside the property requested in the petition as year's support. Ga. Code Ann. § 53-3-7(a). A year's support award could consume the entirety of the estate if no interested party files a timely objection. The petition can, therefore, be used as a tool to transfer all of a decedent's property to the surviving spouse and minor children without probate being necessary. If an interested person objects to the amount or nature of the award, though, the court will consider the other support available to the individual, including the principal of any separate estate and the individual's earning capacity, the solvency of the estate, and other relevant criteria in determining the amount of the year's support award. Ga. Code Ann. § 53-3-7(c).

In some cases, a testator's will may include a provision that any testamentary gifts made to the testator's spouse are in lieu of year's support. In that event, the surviving spouse must choose either an award of year's support or the testamentary gift left to him or her but not both. Ga. Code Ann. § 53-3-3. (Note that the statute specifies "spouse" and does not include minor children.) Likewise, a valid prenuptial agreement between the testator and the surviving spouse could restrict the surviving spouse's ability to claim year's support. See In re Estate of Boyd, 798 S.E.2d 330, 333 (Ga. App. 2017); Hiers v. Estate of Hiers, 628 S.E.2d 653, 656–57 (Ga. App. 2006).

No Contest Clauses

Disinheritance is sometimes confused with no contest clauses. Unlike disinheritance, a no contest clause (sometimes referred to as an in terrorem, forfeiture, or penalty clause) attempts to protect the will from attack. It accomplishes this result by providing that an unsuccessful contesting party—for example, a sibling who is receiving a smaller share than another sibling—will forfeit any benefits provided in the will to that party. As a practical matter, a no contest clause is useful only against parties named as beneficiaries under the will, as a party not named as a beneficiary in the will stands to lose nothing by contesting it. In addition, a no contest clause will have no effect if the court agrees with the contesting party and the will, or some portion of it, is invalidated or not carried out.

In Georgia, no contest clauses are enforceable, but such clauses are strictly construed by the courts because they result in forfeitures. Callaway v. Willard, 321 Ga. App. 349, 739 S.E.2d 533 (2013). A no contest clause must specify what happens to any property that is forfeited by an unsuccessful contesting party. Ga. Code Ann. § 53-4-68(b).

Furthermore, any such clause that is impossible, illegal, or inconsistent with or contrary to public policy is not enforceable. Ga. Code Ann. § 53-4-68. A no-contest clause is not enforceable against an interested person who is bringing an action for interpretation or enforcement of a will, bringing an action for an accounting and removal of a misbehaving executor, or entering into a settlement agreement. Ga. Code Ann. § 53-4-68(c), eff. Jan. 1, 2021; see also Sinclair v. Sinclair, 670 S.E.2d 59, 61 (Ga. 2008).

For a no contest clause to use in a will, see No Contest Clause (GA).

Executor Nomination and Grant of Powers

A well-drafted will should include a provision nominating an executor and, ideally, back-up executor nominations. See Ga. Code Ann. § 53-6-10; Ga. Code Ann. § 53-1-2(7). Many wills also incorporate by reference a list of powers that the testator grants to the executor to give the executor greater authority to administer the estate and manage the estate's property without court involvement. See Ga. Code Ann. § 53-12-261; Ga. Code Ann. § 53-12-263(a); Ga. Code Ann. § 53-12-263(e). These powers include the authority to serve without filing an estate inventory with the court or giving bond.

For further discussion, see Purposes and Uses of a Will (GA) and Revocation, Revival, Amendments, and Will Contests (GA). For will forms, see Will for Single Individual (Basic) (GA) and Will for Married Individual (Basic) (GA).

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Morgan Wood Bembry is an attorney at Wood & Bembry LLC, a father-daughter law firm in Lawrenceville, Georgia.

Wills, trusts, and estate planning drew Morgan's attention before her career even began, as the practice could give her the opportunity to use her analytical and writing skills to help people on a very personal level. Now, Morgan serves clients needing assistance with both estate planning and estate administration. She works with clients young and old to develop their first estate plans or interpret and rework wills or trusts that they have had in place for years. Morgan also assists survivors who are navigating the probate process or administering a trust for a loved one, doing what she can to make a difficult time a little bit easier.

Morgan's practice also focuses on advising business owners and entrepreneurs, guiding them through the legal issues that arise in the everyday life of a business. Working with her father, William B. Wood, since early 2013 has enabled her to gain the benefit of his years of experience and build her knowledge of business and transactional law. Intellectual property experience from her time at a boutique IP firm in Atlanta proved to be a valuable addition to the practice, allowing Wood & Bembry to add trademark and copyright protection work to the core business services the firm offers to its clients.

Morgan was selected to the 2016, 2017, 2018, and 2019 Georgia Rising Stars lists. Wood & Bembry LLC was voted a top firm in the Business Law Advisors category of Best of Gwinnett in 2016, 2017, and 2018. Morgan is a member of the Georgia Association for Women Lawyers, serving on its Foundation Board from 2013 to 2019 and as Foundation Board President for 2017-2018.

Born and raised a Bulldog, Morgan received her J.D. from the University of Georgia School of Law, where she graduated *cum laude* in 2011 and served as managing editor of the Georgia Law Review. During law school, Morgan interned with the Athens-Clarke County Probate Court and with the Georgia Governor›s Office of Consumer Affairs. Prior to law school, Morgan worked in marketing and communications for a large Atlanta law firm. She earned her A.B.J., *cum laude*, with honors, from the University of Georgia, majoring in public relations.