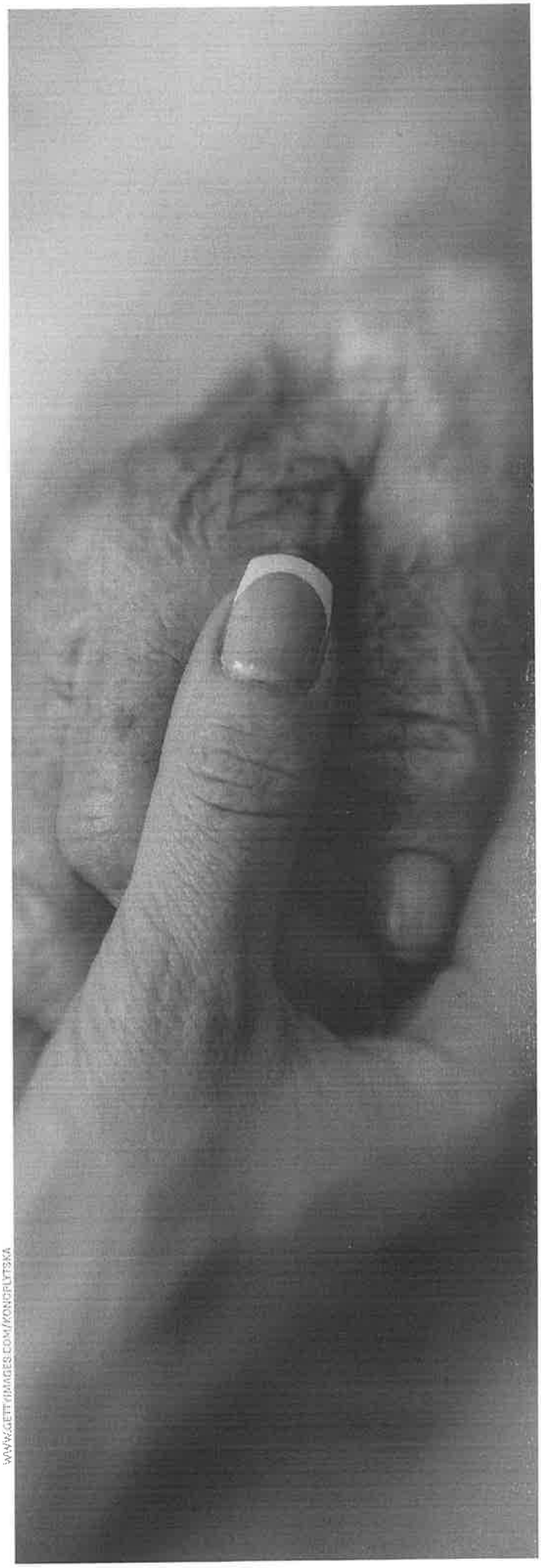
Guardianship and Conservatorship 101

This article provides a primer on the subject of guardianship and conservatorship under Georgia law, including what happens before and after a guardian and/or conservator is appointed.

BY KRISTIN POLAND

Recent pop culture events have shined a not-so-flattering light on the subject of guardianships and conservatorships of adults. The film "I Care a Lot" premiered on Netflix at a time when, due to the COVID-19 pandemic, many of us spent our days at home consuming huge amounts of streaming service content. It tells the story of an unscrupulous woman who used guardianship proceedings as a way to accumulate the assets of those over whom she was given authority. The #FreeBritney movement put the real-world example of Britney Spears' conservatorship in the forefront of the news cycle.

For those who practice in this field, we know that the Thanksgiving and Christmas holidays often bring about a large increase in the number of guardianship and/or conservatorship cases filed with the courts. Holiday stress can lead to mental health issues that need to be addressed. Adult children who visit with aging parents for the holidays often realize that mom and dad can no longer care for themselves adequately. We often see adult children find out when they arrive for a holiday visit that utility bills have gone unpaid and their parents' electricity or water services have been shut off. It is not uncommon to return for a visit to discover that someone in whom a vulnerable adult has placed trust is perpetrating financial or physical abuse upon that adult. In one particularly memorable case, the



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adult children found upon their arrival that their father had died in the home, and their mother's dementia had progressed to the point that she did not realize what had happened. These cases demonstrate that cognitive issues that may be masked from a distance are far more obvious when visiting in person.

But how much do people who do not regularly work in the probate courts understand about guardianships and conservatorships? This article provides a primer on the subject under Georgia law.

Guardianship and Conservatorship in General

Under Georgia law, a guardian is appointed to oversee the health and safety of another; a conservator is appointed to oversee the management of the property of another. This concept has its roots in the English common law doctrine of parens patriae, where the king was ultimately responsible for caring for those among his subjects who were unable to care for themselves. This concept was codified as early as 1324 in the statute De Praerogativa.[1] In Georgia, early law provided that courts could "appoint guardians for the following persons, viz.: Idiots, lunatics, and insane persons, and deaf and dumb persons when incapable of managing their estates, habitual drunkards, and persons imbecile from old age or other cause, and incapable of managing their estates."[2] Under Georgia's 1933 Code, "persons who are mentally ill, mentally retarded or mentally incompetent to the extent they are incapable of managing their estates" were subject to the appointment of a guardian.[3] In these earlier versions of the law, the term "guardian" was used to describe a person who would oversee both the person and the property of another.

Under current Georgia law, "the court may appoint a guardian for an adult only if the court finds the adult lacks sufficient capacity to make or communicate significant responsible decisions concerning his or her health or safety."[4] Similarly, "the court may appoint a conservator for an adult only if the court finds the adult lacks sufficient capacity to make or communicate significant responsible decisions concerning the management of his or her property."[5] Guardianship and conservatorship may be sought together where appropriate, or a petition may be brought for one or the other alone. Where guardianship and conservatorship are both sought, it is not necessary to seek the appointment of the same individual to fill both roles.

The granting of a guardianship and/or conservatorship has a far-reaching impact on the lives of the individuals involved, most especially the adult over whom a guardianship and/or conservatorship is granted, referred to as a ward. Under a plenary guardianship, the ward has important rights removed, including the power to contract marriage; to make, modify or terminate other contracts; to consent to medical treatment; to establish a residence or dwelling place; to change his or her domicile; to revoke a revocable trust established by the ward at an earlier date; and to bring or defend any action at law or equity, except as related to the guardianship.[6] A plenary conservatorship removes from the ward the power to make, modify or terminate contracts (except the power to contract marriage); to buy, sell or otherwise dispose of or encumber property; to enter into or conduct other business or commercial transactions; to revoke a revocable trust established by the ward at an earlier date; and to bring or defend any action at law or equity, except as related to the conservatorship.[7] Because the result of a successful petition for guardianship and/or conservatorship means the removal of important civil and legal rights from an adult, such actions should always be viewed as adversarial to that adult.

Jurisdiction and Venue

In guardianship and conservatorship cases, subject matter jurisdiction lies in the probate court, which has "original, exclusive, and general jurisdiction of ... the appointment and removal of ... guardians of incapacitated adults, and conservators of incapacitated adults and persons who are incompetent because of mental illness or intellectual disability."[8]

Jurisdiction is governed by the Uniform Adult Guardianship and Conservatorship Proceedings Jurisdiction Act (UAGCPJA), codified at O.C.G.A. §§ 29-11-1 et seq. UAGCPJA "provides the exclusive jurisdictional basis for a court of this state to appoint a guardian or issue a conservatorship order for an adult."[9] Further,

> Article 2 of the UAGCPJA creates a three-tiered approach to jurisdictional issues between states, and under that approach, 'the state court that may have jurisdiction would be, in order of priority: 1) the court in the respondent's home state; 2) the court of a state with which the respondent has a significant connection; or 3) a third state that is neither the home state nor a significant-connection state.' These tiers are established in four paragraphs of O.C.G.A. § 29-11-12, which specify several circumstances under which "[a] court of this state has jurisdiction to appoint a guardian or issue a conservatorship order for a respondent.[10]

Importantly, under UAGCPJA, in cases where "unjustifiable conduct" led to jurisdiction over the proposed ward, the court may decline to exercise its jurisdiction, exercise jurisdiction for the limited purpose of ensuring the protection of the proposed ward or continue to exercise jurisdiction after considering the acquiescence of those entitled to notice of the proceedings, the appropriateness of the forum and the existence of another state with jurisdiction over the proposed ward.[11] UAGCPJA does not define "unjustifiable conduct."[12] Presumably, a classic case of "granny snatching," whereby an adult with diminished capacity is removed

from her usual place of abode and existing support system for nefarious purposes (usually involving financial exploitation) would qualify.[13] However, it would appear likely that the courts may be asked to explore the boundaries of the definition of "unjustifiable conduct" in the future.

Once jurisdiction over the proposed ward is established in Georgia under UAGCPJA, proper venue for an action for guardianship or conservatorship lies in the county in which the proposed ward is domiciled or is found, but, where it appears that a proposed ward was removed to a county solely for purposes of forum shopping, a county in which the proposed ward is found shall not have the authority to hear a petition for guardianship or conservatorship.[14] While those statutes specifically state that the court in those circumstances "shall not take jurisdiction" (emphasis added), the Court of Appeals has clarified that "O.C.G.A. §§ 29-4-10 (a) and 29-5-10 (a) pertain to the question of venue, not jurisdiction."[15]

Procedures for Appointment

A petition for appointment of a guardian and/or conservator may be filed by any interested person, including the proposed ward.[16] An "interested person is broadly defined in Title 29 as "any person who has an interest in the welfare of a ... ward, or proposed ward, or in the management of that individual's assets, and may include a governmental agency paying or planning to pay benefits to that individual."[17] The statute does not further define "an interest," leading to a rather circular definition of an interested person. It would seem safe to assume that immediate family members are interested. So, too, would be a social worker assigned to a case through Adult Protective Services. However, where the line might be drawn by the courts is unclear as to whether a person is too remotely connected to a proposed ward to bring a petition under Title 29.

Although a petition for appointment of a guardian and/or conservator can be brought by any interested person, one interested person cannot do so alone. Any such petition must be "sworn to by two or more petitioners" or, if there is only one petitioner, the petition shall be supported by an affidavit of a physician licensed to practice in the state of Georgia, a psychologist licensed to practice in the state of Georgia or a licensed clinical social worker or, "if the proposed ward is a patient in any federal medical facility in which such a physician, psychologist, or licensed clinical social worker is not available, a physician, psychologist, or licensed clinical social worker authorized to practice in that facility."[18] To ensure that such an affidavit is based on the current capacity and condition of the proposed ward, the affidavit must be based on the personal knowledge of the affiant and must be based on an examination that occurred within 15 days prior to the filing of the petition.[19]

Once a petition is filed, the court must make a determination as to whether the petition raises probable cause to believe that the ward is in need of a guardian and/or conservator.[20] Therefore, a petition must include sufficient facts as to the alleged incapacity of the proposed ward to allow the court to make such a determination. In practice, petitioners should avoid conclusory statements along the lines of "the proposed ward lacks capacity" and instead give enough underlying facts to allow the court to reach that conclusion. Petitioners should include whether the proposed ward has any diag-

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noses and examples where the proposed ward needs assistance with normal activities of daily living.

A petition that does not satisfy the requirement of raising probable cause must be dismissed by the court prior to any further proceedings.[21] On the other hand, if probable cause is found, the court sets in motion a series of actions designed to ensure that the proposed ward receives due process for the protection of his or her rights during the proceedings. The proposed ward must be personally served with notice of the petition, which must inform the proposed ward of their right to attend any hearing and that, if the petition is successful, the proposed ward may lose important civil and legal rights. The proposed ward must also be advised that he or she can retain independent counsel. If no such counsel is retained, the court must appoint counsel for the proposed ward.[22] In any case, the proposed ward should be represented by an attorney throughout the proceedings. The court must also schedule an evaluation of the proposed ward to be conducted by a physician licensed in Georgia, a psychologist licensed in Georgia or a licensed clinical social worker, who shall be appointed for such purpose by the court, and must notify the proposed ward of the time and place of such evaluation, again by personal service. The proposed ward must attend such an evaluation, but may remain silent and may have counsel present at the evaluation.[23]

In addition to personal service of notice of proceedings for guardianship and/or conservatorship upon the proposed ward, notice must also be served upon other interested individuals (who are not also a petitioner). These individuals requiring notice include the spouse of the proposed ward and all children of the proposed ward, or, if there are no such persons, at least two adults who are, in order of priority, descendants of the proposed ward, parents and siblings of the proposed ward and friends of the proposed ward, as well as anyone nominated to serve as guardian and/or conservator by the proposed ward or the spouse, adult child or parent of the proposed ward.[24]

Importantly, the statutes enumerating the individuals entitled to notice only require such notice to those individuals "whose whereabouts are known." Although a court can, and likely should, require a showing of diligence on the part of a petitioner to locate such individuals, a failure to notify interested persons whose addresses are unknown does not estab-

lish a failure to comply with the statutory notice requirements.[25]

Any of the parties or interested persons to a proceeding for guardianship and/or conservatorship may request that the court appoint a guardian ad litem to investigate and advise the court as to the best interests of the proposed ward. Alternatively, the court may appoint a guardian ad litem on its own motion.[26] Additionally, an interested person may seek to intervene in the proceedings pursuant to O.C.G.A. § 9-11-24; however, the right to intervene is not absolute and a motion to intervene must make a satisfactory showing that intervention is appropriate.[27] The denial of a motion to intervene is appealable.[28]

After the court-ordered evaluation of the proposed ward has taken place and a report of such evaluation is filed with the court, the court must again review the pleadings and the evaluation report in totality to make a second determination as to whether probable cause still exists to believe the proposed ward needs a guardian and/or conservator. If the answer is no, the court must dismiss the petition without further proceedings. If probable cause continues to exist, a hearing must be scheduled and notice of the hearing must be served upon all parties and interested persons. The hearing cannot occur less than 10 days after notice is mailed to all required recipients and must be recorded for preservation of the record in the event of appeal.[29] Both the petitioner and the proposed ward are entitled to present evidence to the court, and the normal rules of evidence apply to such hearings. The petitioner bears the burden of proving by clear and convincing evidence that a guardianship and/or conservatorship is needed.[30] No adult can be presumed to be in need of a guardian and/or conservator. This holds true even where another court or proceeding has made a finding that an adult is criminally insane, incompetent to stand trial or in need of involuntary mental health treatment under Title 37.[31]

Any guardianship or conservatorship ordered should allow for maximum self-reliance and independence of the adult ward, and only after a determination by the court that less restrictive alternatives to the guardianship and/or conservatorship are unavailable or inappropriate.[32] Thus, even if an adult lacks sufficient capacity as outlined in O.C.G.A. §§ 29-4-1 and 29-5-1, the inquiry does not end there. Instead, the court should also determine that alternatives such as health care directives or powers of attorney, which do not impact the rights of the adult in question, cannot be used.

Protection of Rights of Ward and Duties of Guardians and Conservators

If a proposed ward is found to need a guardian and/or conservator, he or she may nominate an individual to serve in such role(s).[33] The court should also consider the order of preference of appointment enumerated in O.C.G.A. §§ 29-4-3 and 29-5-3.[34] In no case shall a guardian or conservator be appointed for an adult unless the court finds that such an appointment is in the best interests of that adult, and "for good cause shown ... the court may pass over a person having a preference and appoint a person having a lower preference or no preference."[35]

In its judicial inquiry, the court determines what powers normally removed in a plenary guardianship and/or conservatorship should be retained by the ward.[36] For example, the court may allow a ward to retain the right to consent to medical care while removing the right to contract marriage, etc. Additionally, certain rights of the ward are not impacted by the appointment of a guardian and/or conservator, including the right to vote and the right to make a will.[37]

One point of potential friction between a guardian and a ward involves the right to consent to medical treatment. A guardian may "give any consents or approvals that may be necessary for medical or other professional care, counsel, treatment, or service for the ward."[38] However, the appointment of a guardian does not actually remove from the ward the right to refuse such treatment that has received the consent or approval of the guardian. In such cases, the ward's refusal of treatment prevails. This type of impasse is seen most often in cases involving mental health treatment of a ward. In such cases, a guardian has no recourse but to seek relief under Title 37, which addresses involuntary mental health treatment for individuals in need of such care.

All wards have the statutory right to a guardian and/or conservator who will act in their best interest and be reasonably accessible, to communicate freely and privately with others (except where otherwise ordered by a court of competent jurisdiction, as in, for example, and order for protection) and to enjoy the least restrictive form of assistance.[39] Guardians and conservators have the obligation to "act at all times as a fiduciary in the ward's best interest."[40]

In order to ensure the protection of the ward's rights and the performance of the guardian and/or conservator's fiduciary duties, all guardians and conservators are subject to court oversight. The guardian must file reports within 60 days after appointment and annually within 60 days after the date of anniversary of the guardian's appointment. Such reports must address a description of the ward's condition and needs, all addresses of the ward and the living arrangements of the ward, a description of any expenditure of funds the guardian received on behalf of the ward and whether any alteration in the guardianship is recommended. In addition to such regular reporting requirements, the guardian must immediately inform the court when the ward's condition changes such that modification or termination of the guardianship should be considered, and also when the guardian becomes aware of any conflict of interest between the guardian and ward.[41]

Conservators similarly are required to file reports within 60 days after appointment and annually within 60 days after the date of anniversary of the conservator's appointment. Such reports include an inventory of the ward's property and a plan for administering such property.[42] Beginning one year from the conservator's appointment, the conservator also must file a verified return containing a statement of the receipts and expenditures of the ward's assets. Any interested person may request that the court also produce all original receipts, bank statements, and other documents in support of the return. Alternatively, the court may require the production of such supporting documentation on its own motion.[43] Conservators must also at all times maintain a bond at least equal to the value of the ward's estate, payable to the court for the benefit of the ward, to protect against any waste or mismanagement of the assets of the ward by the conservator.[44]

Courts are required to carefully review all required reports filed by guardians and conservators. The review of such reports represents a substantial amount of the work of a probate court. Failure to make the required reports to the court or information contained in the required reports or elsewhere that appears to show irregularity will trigger additional proceedings initiated by the court or other interested persons. As discussed, guardians and conservators have a fiduciary duty to their ward. The motion of the ward, any interested person or the court itself can result in an inquiry into whether a ward is unjustly denied a right or privilege.[45] A breach of the fiduciary duty of a guardian and/or conservator, or even a threat of breach of fiduciary duty, can result in an award of damages to the ward, the compelling of performance, and/or redress of a breach by payment of money.[46]

Conclusion

Seeking a guardianship and/or conservatorship over another adult should always be considered a very serious step that impacts the legal rights and responsibilities of everyone involved. There exist a number of safeguards for the rights of adults for whom guardianship and/or conservatorship are sought. Even where a petition is successful, the courts remain heavily involved in overseeing that a ward is protected from abuse and exploitation. ●

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Endnotes

1. Mary F. Radford, Georgia Guardianship and Conservatorship §1:1 (2015-2016 ed.).
2. Ga. Code 1910 § 3089.
3. Ga. Code 1933 § 49-601.
4. O.C.G.A. § 29-4-1.
5. O.C.G.A. § 29-5-1.
6. O.C.G.A. § 29-4-21.
7. O.C.G.A. § 29-5-21.
8. O.C.G.A. § 15-9-30 (a)(5).
9. O.C.G.A. § 15-11-11.
10. *In re Estate of Kevin Lee Hanson*, 357 Ga. App. 199, 848 S.E. 2d 204 (2020), *citing* Mary Radford, *Ga. Guardianship & Conservatorship*, §1:30 (2019).
11. O.C.G.A. § 29-11-16.
12. For a discussion of "unjustifiable conduct" in the context of child custody under the UCCJEA, *see* Delgado v. Combs, 314 Ga. App. 419, 724 S.E. 2d 436 (2012).
13. Uniform Law Commission, Uniform Adult Guardianship and Conservatorship Proceedings Jurisdiction Act, comment to § 207 (2007).
14. O.C.G.A. §§ 29-4-10 (a) and 29-5-10 (a).
15. *In re Estate of Kevin Lee Hanson*, 357 Ga. App. 199, 848 S.E. 2d 204 (2020).
16. O.C.G.A. §§ 29-4-10 (a) and 29-5-10 (a).
17. O.C.G.A. § 29-1-1.
18. O.C.G.A. §§ 29-4-14 (d)(1) and 29-5-14 (d)(1).
19. O.C.G.A. §§ 29-4-10 (c)(2) and 29-5-10 (d)(2).
20. O.C.G.A. §§ 29-4-11 (a) and 29-5-11 (a).
21. O.C.G.A. §§ 29-4-11(b) and 29-5-11 (b).
22. O.C.G.A. §§ 29-4-11 (c) and 29-5-11 (c).
23. O.C.G.A. §§ 29-4-11 (c)(1)(C), 29-4-11 (d), 29-5-11 (c)(1)(C) and 29-5-11 (d).
24. O.C.G.A. §§ 29-4-11 (c)(3) and 29-5-11 (c)(3).
25. Johnson v. Jones, 214 Ga. App. 386, 448 S.E. 2d 1 (1994) (decided under former O.C.G.A. § 29-5-6).
26. O.C.G.A. §§ 29-4-11 (c)(4) and 29-5-11 (c)(4).
27. White v. Heard, 225 Ga. App. 351, 484 S.E. 2d 12 (1997).
28. *In re Estate of Kevin Lee Hanson*, 357 Ga. App. 199, 848 S.E. 2d 204 (2020).
29. *In re Phillips*, No. A02A2368, 2002 Ga. App. LEXIS 1311 (2002).
30. O.C.G.A. §§ 29-4-12 and 29-5-12.
31. O.C.G.A. §§ 29-4-1 (c), 29-4-1 (e), 29-5-1 (c) and 29-5-1(e).
32. O.C.G.A. §§ 29-4-1 (f) and 29-5-1 (f).
33. O.C.G.A. §§ 29-4-12 (d)(6) and 29-5-12 (d)(6).
34. Such list of preference includes "the individual last nominated by the adult [in writing] ... ; the spouse of the adult ... ; an adult child of the adult ... ; a parent of the adult ... ; a guardian appointed during the minority of the adult; a guardian previously appointed in Georgia or another state; a friend, relative, or any other individual; any other person ... found suitable and appropriate who is willing to accept the appointment; and the county guardian [or conservator]" and if there is no county guardian, "the court may appoint the Department of Human Services as guardian."
35. *In re Moses*, 273 Ga. App. 501, 615 S.E. 2d 573 (2005).
36. O.C.G.A. §§ 29-4-12 (d)(5) and 29-5-12 (d)(5).
37. O.C.G.A. § 29-4-20. *See also* Pope v. Fields, 273 Ga. 6, 536 S.E. 2d 740 (2000).
38. O.C.G.A. § 29-4-23 (a)(2).
39. O.C.G.A. §§ 29-4-20 and 29-5-20.
40. O.C.G.A. §§ 29-4-22 (a) and 29-5-22 (a).
41. O.C.G.A. § 29-4-22 (b).
42. O.C.G.A. § 29-5-30.
43. O.C.G.A. § 29-5-60.
44. O.C.G.A. §§ 29-5-40 and 29-5-41.
45. O.C.G.A. §§ 29-4-40 and 29-5-70.
46. O.C.G.A. §§ 29-4-53 and 29-5-93.