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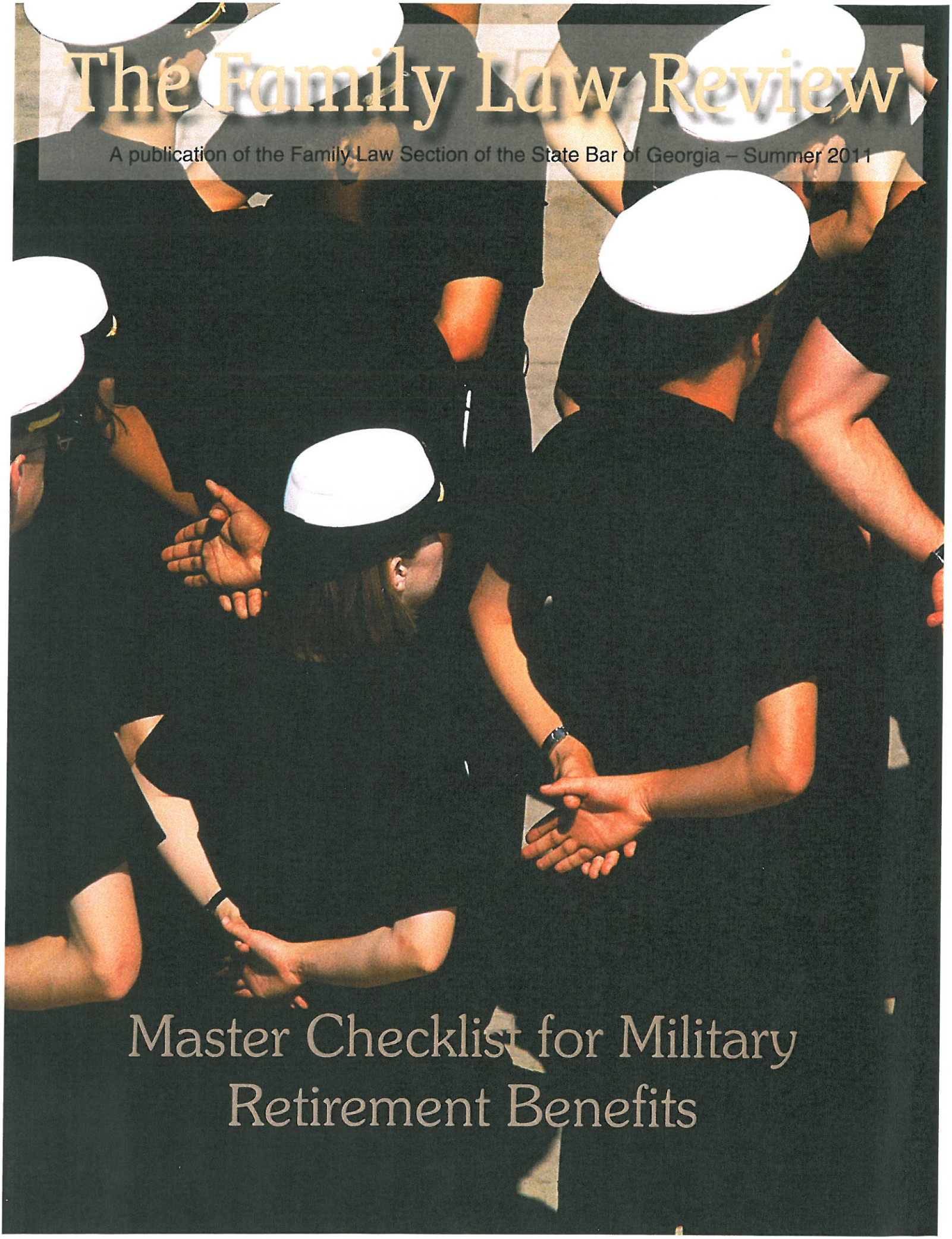


Master Checklist for Military Retirement Benefits

Til Death Do Us Part . . .Proceed with Caution

By Laura Kennedy Bonander

Georgia law does not adequately protect spouses in the case of the death of a spouse. In Georgia, it is perfectly legal to disinherit your spouse, even a long-term, stay-at-home spouse and your minor children without any warning to the unsuspecting spouse.[1] Georgia is the only state in the country where it is still legal to disinherit your spouse. The other 49 states agree that one spouse cannot completely disinherit another spouse and, if a deceased spouse has a will that attempts to do so, a surviving spouse may choose to bypass the will and take an "elective share" of the deceased spouse's estate. In Georgia a surviving spouse and minor children have very little protection if the deceased spouse has a valid will that disinherits them. The only protection in Georgia is something called year's support, which, as explained below, is wholly inadequate. As a matter of basic fairness to spouses, Georgia should adopt an elective share system as set out in Article II of the Uniform Probate Code, as amended in 2008.

Here is an example of how disinheritance in Georgia might unfold from the viewpoint of a woman named Sarah. Sarah met her husband Jack when she was in her early twenties. Jack and Sarah were married when Sarah was 25. Although Sarah worked early in their marriage, once she became pregnant, Jack and Sarah decided together that Sarah would stay home with the children. Three children and 20 years later, Jack dies. Sarah has not worked in 20 years and two of her three children are still minors. Unbeknownst to Sarah, Jack wrote a will in which he left his entire estate to his mistress. Sarah now has no income and no resources with which to move forward.

Jack and Sarah had some marital problems, but Sarah chose to stay in the marriage because she believed it was better for her children to be raised in a home with both parents. If Jack's will is valid, Sarah is out of luck. If Sarah had divorced Jack before he died, she would have received an equitable division of their marital property, child support and most likely alimony. If Jack died without a will, Sarah would be entitled to at least one-third of his estate and his children would have received the remainder of his estate. Only if you are the wife who has stuck by your husband through thick and thin, til death do us part, are you provided very little legal protection in the event of his death. Under Georgia law, it is these women and their children who face the most risk financially upon the deaths of their husbands. As a matter of public policy, this makes no sense.

I. Georgia Stands Alone.

A. Spouse Can Disinherit Spouse and Minor Children.

Most non-lawyers do not realize that in Georgia, a man or woman has the right to draft a will that leaves his or her spouse nothing.[2] In addition, a man or woman has the right to draft a will that leaves nothing to his or her minor children.[3] The statute states that a "testator, by will, may make any disposition of property that is not inconsistent with the laws or contrary to the public policy of the state and may give all the property to strangers, to the exclusion of the testator's spouse and descendants."[4] The only requirement for successfully disinheriting your spouse in Georgia is a valid will.

Under Georgia law, a will is valid if it is "in writing and . . . signed by the testator."[5] In addition, it must "be attested and subscribed in the presence of the testator by two or more competent witnesses."[6] Moreover, Georgia courts look for ways to uphold the validity of a will. For example, in O.C.G.A. § 53-4-57, there is a rule of construction that states that if "a will is illegal in part, the part that is legal may be sustained; but if the whole will so constitutes one testamentary scheme that the legal portion alone cannot give effect to the testator's intention, the whole will shall fail."[7] This code section demonstrates that courts may sustain only a portion of a will, if appropriate. There is also a rule of construction that provides that "intestacies are not favored in construing wills." [8] Although a will may also be challenged on the grounds that the testator lacked testamentary capacity, that the will was the product of undue influence or that the will was a product of fraud, anyone challenging the validity of a will has an uphill battle for the reasons discussed above.

B. Wills Can be Revoked At Any Time.

Turning our attention back to the sample case of Sarah and Jack, when Jack dies, Sarah is shocked when she learns of Jack's Will disinheriting her and their children. One reason she is so shocked is because Jack and Sarah had gone to a lawyer after the birth of their third child and had wills drafted. Sarah's will left everything to Jack and Jack's will left everything to Sarah.

This type of will is called a mirror will or a reciprocal will. Unfortunately for Sarah, a few years later when Jack fell in love with his mistress, he revoked his prior will and signed a new one that she knew nothing about. The new will clearly states that it revoked all prior wills. Jack had also found the original will that he had executed when he and Sarah visited the lawyer and he destroyed it. Sarah, however, had no idea that he had done that. Again, this is perfectly legal in Georgia.

Under Georgia law, a testator has the right to revoke his or her will at any time before death "so long as the testator retains testamentary capacity."[9] To expressly revoke a will, there must be an intent to revoke combined with a writing or action annulling the will.[10] Assuming that Jack's revocation is valid, Sarah is left with nothing.

Georgia is the only state in the entire country that allows a spouse to disinherit a spouse.[11] Prior to 1998, this issue was examined by the committee that was redrafting the Probate Code, but the committee decided to retain Georgia's lone status and maintain the inadequate provisions for year's support. [12] One of the reasons advanced for this decision was the notion that it is not really much of a problem, i.e., spouses are not disinheriting spouses with any great regularity.[13] The data cited for this was derived from court records prior to 1996.[14] As I have seen this issue arise in my practice, I wonder whether it is currently happening more frequently than it was in 1996.

Even if disinheritance only happens to one spouse, however, it is one spouse too many. Regardless of how often it happens, as a matter of sound public policy, the law should provide adequate financial protection for spouses when a spouse or parent dies. Every other state in the country that has looked at this issue has decided that such protection is appropriate and Georgia should do the same.

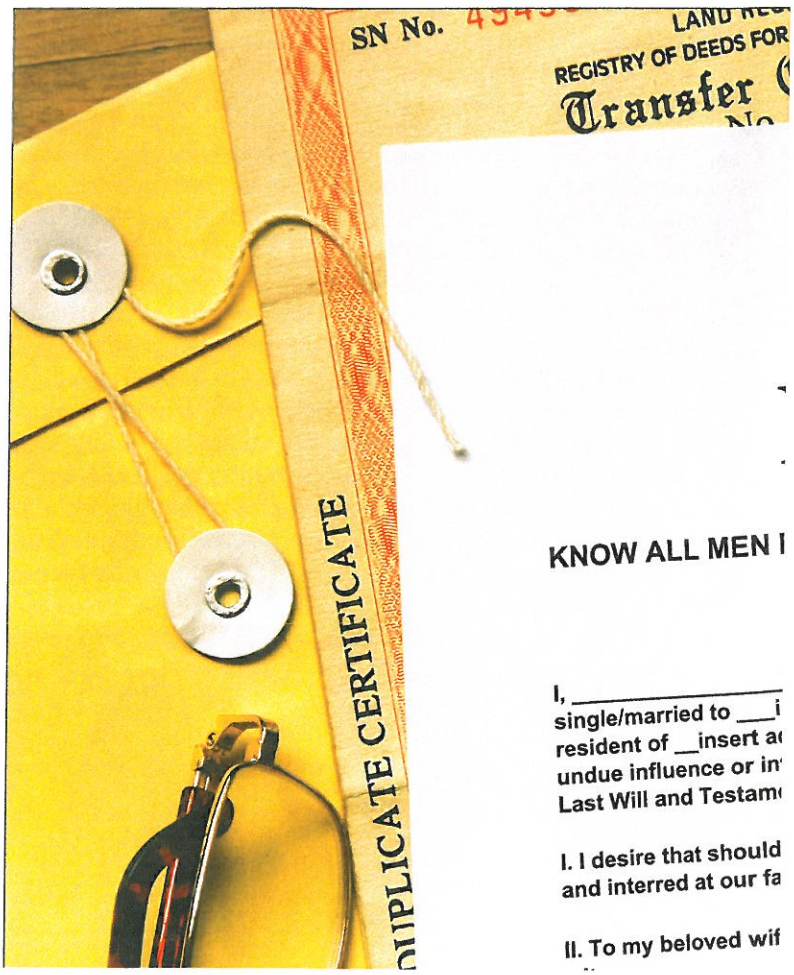
The justification for the right to disinherit your spouse and children that I have always heard is that Georgia believes in the individual's right to dispose of his property as he chooses. The right to dispose of one's property as one chooses, however, is already limited during the course of a marriage by a spouse's obligation of support. In addition, that right is limited during the individual's lifetime if the individual divorces. For the very same reasons, as a matter of sound public policy, an individual's right to dispose of his property at death should be limited in a similar manner.

II. Protections for a Spouse upon the Death of a Spouse Who Writes a Will are Few and Inadequate.

A. Petition for Year's Support.

One of the few protections under Georgia law for a spouse and minor children of a decedent is the statute that allows for the filing of a petition for a year's support. The statute provides that the "surviving spouse and minor children of a testate or intestate decedent are entitled to year's support in the form of property for their support and maintenance for the period of 12 months from the date of the decedent's death."[15] The courts have been clear that the surviving spouse has the burden of proving the amount necessary for a year's support.[16] The amount "necessary" for a year's support "must be reasonably related to the amount needed by the surviving spouse for a period of 12 months after the decedent's death to maintain the standard of living enjoyed prior to the death."[17] The cases have clearly stated that the award is not designed to "support the spouse for many years to come."[18]

Under current law, it is possible to file a petition seeking the entire estate for year's support and if no one objects, the Court will grant it.[19] If, however, someone objects, perhaps a creditor of the estate or children from a prior marriage, then the petitioner has the burden to prove that the amount sought as year's support is necessary to maintain the standard of living that the spouse had during the prior 12 months, taking into consideration any other means of support, the solvency of the estate and any other factors the court considers appropriate.[20] If you are a stay-at-home spouse and your main source of financial support has just died and left you with nothing, a year's support is going to be wholly inadequate. The year's support remedy is inadequate even if the surviving spouse works, but earns significantly less than the deceased spouse. In addition, a year's support is likely to be inadequate in many typical modern marriages where both spouses work and make financial decisions based on the presumption of two incomes. When one income has suddenly and unexpectedly disappeared and, in the case of disinheritance, is not replaced with any assets, a year's support is not only inadequate, it is unconscionable.



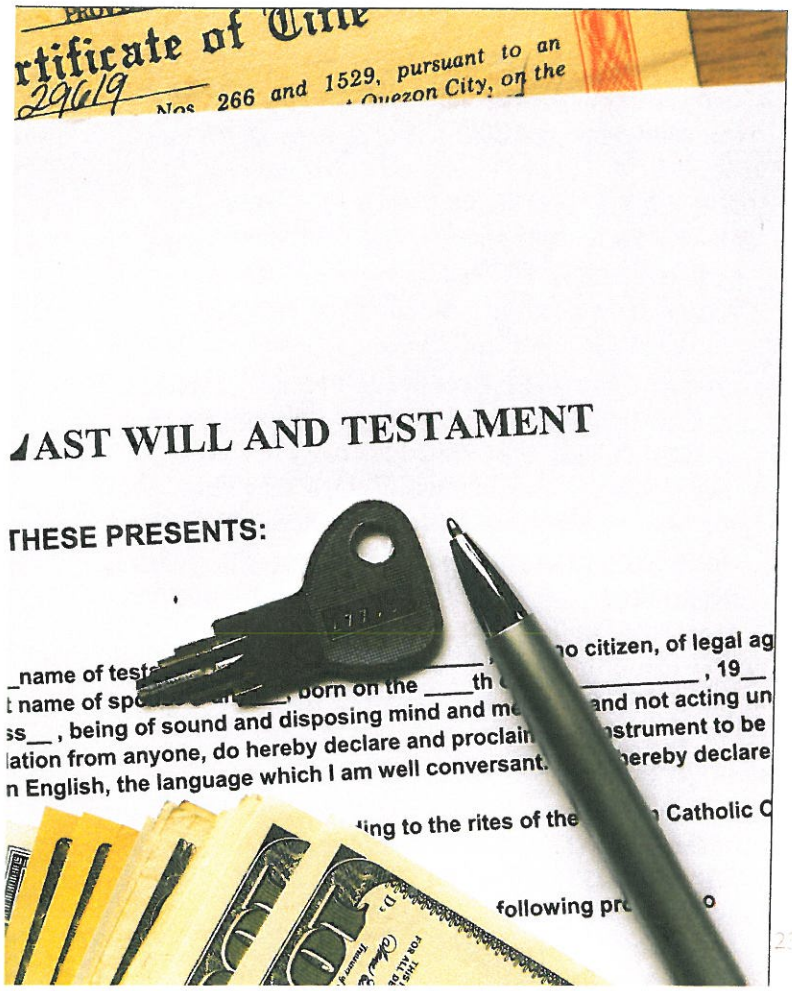
B. Contract to Make a Will.

One other possible protection for a spouse is something called a contract to make a will. A contract to make a will is a contractual promise that you agree to leave your estate to a specific person, for example to your spouse. Wills executed after January 1, 1998 are analyzed under the 1998 Probate Code.[21] Under the 1998 Code, a "joint will is one signed by two or more testators that deals with the distributions of the property of each testator."[22] The 1998 Code further provides that a "joint will may be probated as each testator's will."[23] In contrast to a joint will, mutual wills are "separate wills of two or more testators that make reciprocal dispositions of each testator's property."[24]

Under current law, a contract "that obligates an individual to make a will or a testamentary disposition, not to revoke a will or a testamentary disposition . . . **shall be express and shall be in a writing that is signed by the obligor**."[25] So if you are a spouse looking to protect yourself in the event of your spouse's death, one possibility is for your spouse to execute a will that contains a promise that it will not be revoked. It is not necessary that the contract be contained in the will itself, but the contract document must make clear what will the spouse is promising not to revoke.

III. Protections for Spouses are Greater in Other Contexts.

In almost every other situation, the law provides greater protections for spouses and minor children. As mentioned above, in the context of divorce, Georgia law provides for



an equitable division of the marital assets.[26] In addition, a spouse who is not the primary breadwinner is likely to receive alimony.[27] If there are children of the marriage, then both spouses have an obligation of support and one or the other may be required to pay child support.[28] Similarly, when one spouse dies without a will, Georgia law provides that the surviving spouse receives the entire estate if the deceased spouse had no children.[29] If the deceased spouse had children, then those children are entitled to share in the estate.[30] When there are children and a spouse, the spouse receives no less than one-third of the estate and the remaining estate is split between the children.[31]

There is also a federal law that protects a surviving spouse in the context of a deceased spouse's 401(k) account. Federal law requires written spousal consent if a spouse wants to leave his or her 401(k) to someone other than his or her spouse.[32] Other assets that pass outside of probate that may be titled in both spouses names may pass some property to the surviving spouse. For example, these assets could include property held jointly, bank accounts or stocks. If the marital home or other real property passes to the surviving spouse, however, it will come with the burden of paying the mortgage.[33]

IV. Proposal for Change.

It is fundamentally unfair to allow a spouse to completely disinherit another spouse. Disinheritance would be difficult for any spouse; however, it is most egregious for stay-at-home spouses and spouses who earn significantly less than their mate. Public policy should protect spouses and minor children in all contexts, not just in the context of divorce or intestacy. The same policy arguments that provide for equitable distribution in the case of divorce or in cases of intestacy provide support for changing the law to protect spouses from being disinherited.[34]

Georgia should adopt the elective share provisions as set out in Article II of the Uniform Probate Code, as amended in 2008 ("UPC") because those provisions are based on the theory that marriage is a partnership and on the theory that each spouse has an obligation of support.[35]A detailed examination of the UPC provisions is beyond the scope of this article; however, it is my opinion that its elective share provisions are the most comprehensive, thorough and well-reasoned approach to protecting spouses from disinheritance.[36] Of the 49 states that have enacted some type of elective share law, 29 of them have based their statutes on some version of the UPC. Of these 29 states, 19 of them have fully adopted the UPC.[37] An additional ten states have adopted the free standing Article II of the UPC, which contains the provisions governing elective share.[38]

Under the UPC, a court making an elective share determination has to consider the probate and nonprobate assets of both spouses, transfers by both spouses to others during a spouse's lifetime and the decedent's nonprobate transfers to the surviving spouse.[39] The collective of these assets is referred to as the augmented estate.[40] Moreover, the UPC provides that a surviving spouse is to receive 50 percent of the value of the marital property portion of

the augmented estate.[41] The value of the marital property portion of the augmented estate is determined by using a sliding scale based on the length of the marriage that starts at 3 percent for marriages of less than one year and reaches a maximum of 100 percent of the marital property portion for marriages of fifteen years or longer.[42] For example, if a surviving spouse has been married for 15 years or more, the value of the marital property portion of the augmented estate would be 100 percent and the surviving spouse would be entitled to 50 percent of that value as an elective share, minus any amounts already received by the spouse through nonprobate assets or lifetime transfers.[43]

The UPC also provides protection for minor children through a homestead allowance and a family allowance that takes priority over all other claims and that are in addition to the elective share.[44] Because there are situations where both spouses agree that one or both of them are going to leave all of their property to someone else (such as late in life second marriages where each spouse has children from a prior marriage), the UPC provides that a spouse may waive his or her entitlement to an elective share.[45]

Until Georgia comes in line with the rest of the states, all spouses face the risk of being disinherited and not knowing about it until it is too late. Once these spouses find out, they will not be in a position to mitigate the serious financial hardship that they will face. Turning back to Sarah now that we understand the risk of disinheritance, what steps could she have taken to protect herself? There are several options, but no good choices.

When Sarah and Jack started having marital troubles, she could have divorced him rather than trying to work through their problems. Had she done that, she would have received an equitable distribution of marital property, alimony and child support. This option, however, runs counter to the public policy of encouraging families to stay together. Another option that Sarah had was to suggest that the family move to another state that has more favorable laws. For most families, this is not a realistic option. Finally, Sarah could have asked Jack to sign a contract wherein he and she agreed not to revoke the mirror wills that they signed. Couples, however, should not have to pay an attorney to draw up a contract for something that should come as a benefit of marriage. Until Georgia comes in line with the rest of the country, spouses like Sarah should not assume that Georgia law protects them. It does not.

(Endnotes)

1 *See* O.C.G.A. § 53-4-1.
2 *Id.*
3 *Id.*
4 *Id.*
5 *See* O.C.G.A. § 53-4-20(a).
6 *See* O.C.G.A. § 53-4-20(b).
7 *See* O.C.G.A. § 53-4-57.
8 *See Redfearn*, WILLS AND ADMINISTRATION IN GEORGIA § 7:6, p. 315 (7th Ed. Vol. 1 2008).
9 *See Redfearn*, WILLS AND ADMINISTRATION IN GEORGIA § 5:12, p. 183 (7th Ed. Vol. 1 2008); O.C.G.A. § 53-4-40.
10 *See* O.C.G.A. § 53-4-41 & § 53-4-42; *see generally*, O.C.G.A. § 53-4-40 *et seq*.
11 *See* Jeffrey N. Pennell, *Minimizing the Surviving Spouse's Elective Share*, 2002 NAELA Inst. 9-1 (2002).
12 *See* Mary F. Radford and F. Skip Sugarman, *Georgia's New Probate Code*, 13 Ga. St. U. L. Rev. 605, 652-668 (June 1997).
13 *Id.*
14 *Id.*
15 *See* O.C.G.A. § 53-3-1 (c).
16 *See* Taylor v. Taylor, 288 Ga. App. 334, 336, 654 S.E.2d 146, 149 (2007).
17 *Id.* at 337.
18 *Id.*
19 *See* O.C.G.A. § 53-3-7(a).
20 *See* O.C.G.A. § 53-3-7(b) & (c); Taylor, 288 Ga. App. at 337.
21 *See* O.C.G.A. § 53-1-1.
22 O.C.G.A. § 53-4-31(a).
23 *Id.*
24 O.C.G.A. § 53-4-31(b).
25 O.C.G.A. § 53-4-30 (emphasis added).
26 *See* Stokes v. Stokes, 246 Ga. 765, 771, 273 S.E.2d 169, 173 (1980).
27 *See* O.C.G.A. § 19-6-1.
28 *See generally* O.C.G.A. § 19-7-2 & § 19-6-15.
29 *See* O.C.G.A. § 53-2-1(c)(1).
30 *Id.*
31 *Id.*
32 *See* 29 U.S.C. § 1055.
33 *See* Manders v. King, 284 Ga. 338, 667 S.E.2d 59 (2008).
34 *See* Uniform Probate Code, article II, pt. 2, general comment (amended 2008).
35 *Id.*
36 *See* Jeffrey N. Pennell, *Minimizing the Surviving Spouse's Elective Share*, 2002 NAELA Inst. 9-1 (2002) (noting that portions of the elective share approach as set out in a prior version of the UPC are inspired and progressive).
37 *See* Uniform Law Commissioners, *Summary, Uniform Probate Code, 2008 Amendments at* http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-upcamend08.asp (last visited February 4, 2011).
38 *See* Uniform Law Commissioners, *A Few Facts About the Uniform Intestacy, Wills and Donative Transfers Act, Uniform Probate Code, Article II* at http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uswdta.asp (last visited February 4, 2011).
39 *See* Uniform Probate Code §§ 2-201-2-207.
40 *Id.* at § 2-203.
41 *Id.* at § 2-202(a).
42 *Id.* at § 2-203.
43 *Id.*
44 *Id.* at § 2-402 & § 2-404.
45 *Id.* at § 2-213.