

**YEAR’S SUPPORT LAW IN GEORGIA:
ON USING, “ABUSING,” AND REFUSING A STATUTORY RIGHT.**

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1. Overview.

The Georgia Petition for Year’s Support allows the surviving spouse or minor child of a decedent to receive property from the estate as a matter of right and before payment of most debts. Because of this right, Georgians cannot totally disinherit spouses or minor children.¹ Use of year’s support is often advisable in small, uncomplicated estates where there is no will. In certain circumstances, it can also be used strategically in insolvent estates or as an end-run around the administration process to completely distribute estate property. This paper both discusses generic use of year’s support and also highlights what we will term “abuse” of the right. Though not abuse at all in the legal or ethical sense, the techniques estate attorneys employ

¹ But see *infra*, section 5.2.

with respect to year's support often seem so far from what the statutory scheme intends, they may seem to torture or "abuse" its original intent. Finally, this paper discusses how attorneys may "refuse" year's support to the surviving spouse and minor children when drafting estate plans in order to add clarity and certainty to estates and to avoid costly litigation.

2. History of year's support.

2.1. Origins and purpose.

The State of Georgia allows a surviving spouse or minor child to receive property from an estate as a matter of right, based solely upon the petitioner's status.² This doctrine is a creature of statute, not common law. Almost from its inception,³ and certainly throughout its history, the law was given a favored status by the courts on grounds of public policy – that of preventing surviving families from being left destitute.⁴ Unlike other statutory rules altering the common law, it has been called a "favored child of the law."⁵

2.2. Recent history.

From its passing in the early Nineteenth Century, our year's support law saw more than 100 years of very little change.⁶ Major changes in the last half century include repeal of the use of court-appointed appraisers and the addition of widowers to the class of those who may petition. The original statute did not allow the beneficiaries to themselves claim the amount to which they were entitled, calling rather for "commissioners" (or, in later versions of the law, "appraisers") to ascertain value and set apart the necessary property from the estate of the

² O.C.G.A. § 53-3-1; Gentry v. Black, 256 Ga. 569, 570 (1987).

³ Cole v. Elfe, 23 Ga. 235, 236-37 (1857) ("These statutes are abiding memorials of the wisdom and humanity of the Legislature. We know of no condition in life more pitiable than to turn into the streets, . . . the widow and offspring of one, upon whom they have relied for their daily bread[.] . . . To fritter away these Acts, we should be faithless to our high vocation").

⁴ Gross v. Shankle, 97 Ga. App. 631, 634 (1958).

⁵ Id.

⁶ Hunnicut v. Hunnicutt, 180 Ga. App. 798, 798 (1986).

decedent.⁷ The modern statute has no provision for appraisers and initially leaves the question of the amount needed to the petitioner. Furthermore, as originally codified in Acts of 1838 and 1850, year's support applied only to a surviving widow.⁸ As our nation's supreme court came to take a more expansive reading of the Equal Protection Clause to the Fourteenth Amendment, the Georgia Code was changed such that surviving husbands were likewise allowed the right to year's support.⁹

3. Using the petition for year's support.

3.1. Establishing status of the petitioner.

3.1.1. Spouses. In order to petition for year's support, a surviving spouse need only establish his or her status as such.¹⁰ Despite the law's public policy origins, there is no need to prove that the surviving spouse was economically dependent upon the decedent,¹¹ nor does it matter that the husband and wife were living separately before the time of death, even for years.¹² Moreover, common-law marriages count, which in Georgia must have been entered into prior to January 1, 1997.¹³ However, the remarriage or subsequent death of the surviving spouse will bar a claim to year's support,¹⁴ making the claim different in nature from an inheritance, which of course survives the heir's own death.

3.1.2. Minor children. Like spouses, children under age 18 claim year's support by virtue of their status, but such claims are barred by (1) marriage, (2) death, or (3) attaining age

⁷ Cole v. Elfe, 23 Ga. 235, 235 (1857); De Jarnette v. De Jarnette, 176 Ga. 204 (1933).

⁸ Cole, at 236.

⁹ Gentry v. Black, 178 Ga. App. 284, 286 (1986) (rev'd on other grounds, 256 Ga. 569 (1987)).

¹⁰ Taylor v. Taylor, 288 Ga. App. 334, 336 (2007).

¹¹ Gentry v. Black, 256 Ga. 569, 570 (1987).

¹² Knowles v. Knowles, 125 Ga. App. 642, 648 (1972).

¹³ See In re Estate of LeGrand, 259 Ga. App. 67 (2002); O.C.G.A. § 19-3-1.1.

¹⁴ O.C.G.A. § 53-3-2(a). Plainly construing the statute, however, a remarriage or death *after* the petition is filed but before the award of year's support would not invalidate the award.

18 prior to the time the petition is filed.¹⁵ Adopted children qualify,¹⁶ and there is precedent for the notion that a “virtually adopted” child may receive a set aside in year’s support.¹⁷ When both parents of the minor child are deceased, a guardian may petition on the minor child’s behalf.¹⁸

3.1.3. In the petition. As a practical matter, most probate courts do not require marriage or birth certificates indicating relation to the decedent to accompany a petition for year’s support. If a guardian is applying for a minor, and the guardianship was not granted in the county of the decedent’s domicile, a certified copy of the guardianship order should accompany the petition. There is no *requirement* that all minor children and the surviving spouse of the decedent join in the petition, and indeed a spouse or child may take year’s support to the exclusion of the other persons so entitled, provided service is properly effectuated. It is required, however, that a petition be filed within twenty-four months of the decedent’s death.¹⁹

3.2. Dealing with debt.

3.2.1. Priority of debts. An order for year’s support has priority over all debts of the estate save purchase money mortgages on real or personal property and certain crop liens.²⁰ The clear implication of the statute is that non-purchase-money mortgages, such as second mortgages on homes, are *inferior* to an award of year’s support. Indeed, year’s support is given first priority elsewhere in the probate code, ahead of other necessary expenses of administration

¹⁵ O.C.G.A. § 53-3-2(b).

¹⁶ Thornton v. Anderson, 207 Ga. 714, 717 (1951).

¹⁷ Pierce v. Harrison, 199 Ga. 197, 201 (1945); For a discussion of “virtual adoption,” see Chambers v. Chambers, 260 Ga. 610, 611 (1990) (“To establish a cause of action for virtual or equitable adoption in Georgia, one must make “some showing of an agreement between the natural and adoptive parents, performance by the natural parents . . . in giving up custody, performance by the child by living in the home of the adoptive parents, partial performance by the foster parents in taking the child into the home and treating [it] as their child, and . . . the intestacy of the foster parent”).

¹⁸ O.C.G.A. § 53-3-5(a).

¹⁹ O.C.G.A. § 53-3-5(c)(2).

²⁰ O.C.G.A. § 53-3-1(b); O.C.G.A. §§ 53-3-16 – 53-3-18.

and taxes owed to the federal government.²¹

3.2.2. Notice to creditors. Year's support cannot be preferred to a debt unless the creditor is given proper notice of the petition.²² The statute provides that the petitioner shall make reasonable efforts to ascertain the whereabouts of interested parties and, failing such location, allows for publication of service. However, the Georgia Supreme Court has said that publication is *insufficient* as a matter of due process to divest creditors of their rights when there is no personal representative of the estate.²³ Service by mail, however, is deemed constitutionally sufficient.²⁴ Care should therefore be taken to serve *all* creditors with a claim of any kind or nature when so required by the statute.²⁵ This includes the State of Georgia when tax liens exist against the estate, homeowners' associations owed assessments, utility companies, and – notably – the property tax commissioner for the county in which all real property is located.²⁶

3.2.3. Property tax liens. Property taxes are dealt with specially in the year's support statute, and it seems plain the legislature intends to give relief for real property taxes in as many cases as possible. All tax liens on property set apart, which accrued for years prior to the decedent's death, are divested when real property is awarded in year's support.²⁷ Additionally, the law provides for the event that property taxes have already been paid in the year of death, allowing for the divestment of taxes in the succeeding year.²⁸

²¹ O.C.G.A. § 53-7-40. But see Davis v. Birdsong, 275 F.2d 113 (5th Cir. 1960) (Federal law does not exempt by reference state-created year's support exemptions.)

²² Scott v. Grant, 227 Ga. App. 1, 3 (1997) (Year's support award voidable by creditor not receiving proper notice).

²³ Allan v. Allan, 236 Ga. 199, 207 (1976).

²⁴ Id.

²⁵ See O.C.G.A. § 53-3-6(c)(1).

²⁶ O.C.G.A. § 53-3-4.

²⁷ Id.

²⁸ Id. Using this option to the petitioner's advantage is discussed in Section 4.3, *infra*.

3.3. Service of notice

3.3.1. Service, generally. The statute requires service of notice either upon the personal representative of the estate, if one there be, and if not then upon all interested persons.²⁹ In represented estates, only the personal representative need be served because of his or her fiduciary duty to protect the interests of other heirs and/or creditors. In unrepresented estates, a party with an “interest” is any party who would otherwise have a claim against the estate, including an intestate heir, a beneficiary under the will (whether or not probated), and any creditor of the estate.³⁰ The petitioner effects service first by stating the names and addresses of parties to be served in Exhibit “B,” attached to Uniform Probate Court Form 10. Then, the probate court is required to mail the notice to the listed persons.³¹ In practice, it is advisable to prepare for the probate court’s use addressed, stamped envelopes and present them together with the petition at the time of filing.

3.3.2. Issues with service. The court is required to issue citation and notice by publication for four consecutive weeks in the legal organ of the county.³² The attentive reader will discern some due process issues with the foregoing service scheme. If, for example, there is a personal representative of the estate, who is also the surviving spouse, then he or she might file a petition without any requirement of notice to creditors. The legislature has dealt with this problem by requiring that a personal representative applying for year’s support serve notice in the same manner as though there had been no representative – that is, by mailing notice to all interested parties.³³

²⁹ O.C.G.A. § 53-3-6.

³⁰ O.C.G.A. § 53-3-6(a).

³¹ O.C.G.A. § 53-3-6(c)(2).

³² O.C.G.A. § 53-3-6(b).

³³ O.C.G.A. § 53-3-6(c)(3).

An opportunity for collusion would exist, however, where a personal representative and petitioner for year's support are different individuals but have a shared interest in avoidance of debt, as when the personal representative is a child of the deceased and the petitioner the surviving spouse. The child/executor may not mind if the spouse (his parent) petitions for a large share in year's support in order to avoid debt, since the child expects to inherit from the parent / surviving spouse. Accordingly, the child/executor has almost no incentive to object to the petition and thereby protect creditors. Notice by publication is all that creditors would "receive." The issue of such collusion between executor and petitioner has been dealt with by Georgia's appellate courts, which have generally found the activity constitutes fraud when carried out to the detriment of other interested parties.³⁴

3.4. Setting aside property.

3.4.1. Real property, generally. Real property to be set aside as year's support should be described in Exhibit "A" to the form petition with as much specificity as in a deed.³⁵ The statute provides that real property in other counties (i.e., other than that of the decedent's domicile) may be described simply by stating "also lands in _____ Count(ies),"³⁶ though this is generally poor practice and is not recommended. The better practice is to describe all real property completely. The petitioner should provide the probate court with a PT-61 for each

³⁴ See, e.g., Ringer v. Lockhart, 237 Ga. 166, 166 (1976) (Son's complaint alleging that confidential relationship existed between stepmother and son, and that award was obtained by fraud on part of stepmother, stated cause of action and precluded judgment on pleadings). The practitioner is entitled to wonder why the year's support statute is not simply amended to require service upon all interested parties even when there is a personal representative of the estate. The present scheme arguably exposes unwitting, lay executors and inexperienced attorneys to claims for fraud when a simple statutory amendment would head off the issue.

³⁵ O.C.G.A. § 53-3-11(a)(3).

³⁶ Id.

parcel of real property to be awarded.³⁷

3.4.2. Title to real property. Within thirty days of the granting of year's support, the probate court is obliged to file a certificate in the deed records of each county where real property set aside is located, which certificate shall contain the legal description provided by the petitioner.³⁸ This certificate becomes the petitioner's "deed" to the property set aside. Clerks of deed records generally know how to record and index certificates of year's support, as they are somewhat common, but as with all exotic deed filings, the attorney should follow up in the deed records to ensure proper recording and indexing, with the decedent listed as the grantor and the petitioner(s) as the grantee(s) of the property.³⁹

3.4.2.1. *Minor children's shares.* It is crucial to note that special rules surround the granting of real property to minor-child petitioners for year's support. In the first instance, minor children of different spouses of the decedent are to be awarded separate parcels of real property.⁴⁰ Furthermore, the court may award even a blood-related spouse and minor children separate parcels if it deems it appropriate to do so.⁴¹ If this outcome is desired, the best (though not certain) way to see it come about is to state the grounds therefor in the petition itself. Also of importance is the fact that minor children's shares of awarded property cannot be subsequently sold without court approval.⁴² Finally, the oddity of Georgia's year's support doctrine and its roots in our agrarian past produce some strange rules for property mutually set aside for the surviving spouse and children, such as those spelled out in this year's Supreme

³⁷ Ga. R Prob. Ct. Std. Form 10.

³⁸ O.C.G.A. § 53-3-11(a).

³⁹ See O.C.G.A. § 53-3-11(c).

⁴⁰ O.C.G.A. § 53-3-8(a).

⁴¹ O.C.G.A. § 53-3-8(b).

⁴² O.C.G.A. § 53-3-19. See also O.C.G.A. § 53-3-20 for the procedure for obtaining such approval. Naturally, no approval is required if the children should reach the age of majority and join in the conveyance.

Court decision in Cabrel v. Lum.⁴³

3.4.2.2. *Prior sales or encumbrances.* Good faith purchasers of property of the decedent are generally protected from the award of year's support. Thus, property cannot be set aside that has already been conveyed by a personal representative of the estate.⁴⁴ Likewise, property over which there is a recorded option to purchase or a contract to sell is set aside *subject to* the rights of the party entitled to exercise the option or enforce the contract.⁴⁵ Generally, furthermore, property set aside is still subject to the conveyances and encumbrances of the petitioner(s) themselves.⁴⁶

3.4.3. Personal property. A petition for year's support is, at best, a blunt instrument for dealing with personal property. As between family members, at least one of whom has actual possession of the personal property, the award is generally easy to apply in order to get the property in the petitioner's hands. When, furthermore, there is a personal representative of an estate, the representative is directly responsible as a matter of fiduciary duty to distribute property set apart. Difficulty arises, however, when personal property such as cash in the hands of third parties, depository accounts, brokered accounts, or private and government securities are awarded. Out-of-state financial institutions are inexperienced and bureaucratic in dealing with awards of year's support, government bodies are worse, and even Georgia banks and brokerages seldom distribute funds without at least sending the petitioner through in-house counsel.

⁴³ 289 Ga. 233 (2011). Among other things, the Court in Cabrel noted that property mutually set aside for the spouse and children is not subject to an action for partition by the children (Id. at 234-35) and that the surviving spouse was not liable to the children for reasonable rent of the property after they marry or attain the age of majority.

⁴⁴ O.C.G.A. § 53-3-13.

⁴⁵ O.C.G.A. § 53-3-14. Neither statute nor case law addresses the possibility that a petitioner for year's support may ask *for* the inchoate right of the option holder or the promisee of the contract in the petition. Such rights, if they are anything, are interests in the estate of the decedent, and presuming proper notice were given, they could *themselves* be set aside as year's support.

⁴⁶ O.C.G.A. § 53-3-15.

Furthermore, owing to privacy concerns, even finding out how much the decedent had on deposit with an institution is difficult when the institution has no court-appointed representative with whom to deal. Again, the presence of an executor or administrator greatly eases matters. If, despite all this, the petitioner desires to move forward using year's support to obtain personal property in the hands of third parties, it is advisable to state the exact nature of the property awarded in as much detail as possible in schedule "A" to Probate Court Form 10. Stating merely "all personal property of the decedent, of any kind or nature and wherever situate," or words to that effect can make dealings with third parties even more difficult.

3.5. Litigation of the support amount.

3.5.1. General considerations. The amount requested in year's support is never an issue except when an interested party files a timely caveat to the petition.⁴⁷ Many petitioners, as a practical matter, take advantage of this fact to quickly dispose of an intestate estate via year's support award and perhaps write off some smaller debts of the estate at the same time.⁴⁸ For this reason, if a caveat is filed by a party with only a small claim to the estate, the first order of business for the petitioner is to *settle* with that caveator in order to have its objection withdrawn. If settlement is not possible, however, then the petition will be heard by the probate court. At such hearing, the burden is on the petitioner to show the amount to which he or she is entitled.⁴⁹ The statute plainly lays out the considerations for the court in making such determination, as follows:

The court shall set apart an amount sufficient to maintain the standard of living that the surviving spouse and each minor child had prior to the death of the decedent, taking into consideration the following:

⁴⁷ O.C.G.A. § 53-3-7(a).

⁴⁸ See section 4.2., *infra*.

⁴⁹ O.C.G.A. § 53-3-7(c); Holland v. Holland, 267 Ga. App. 251, 255 (2004).

(1) The support available to the individual for whom the property is to be set apart from sources other than year's support, including but not limited to the principal of any separate estate and the income and earning capacity of that individual;

(2) The solvency of the estate; and

(3) Such other relevant criteria as the court deems equitable and proper.⁵⁰

3.5.2. Proving the needed support amount.

3.5.2.1. *Determining the accustomed standard of living.* The petitioner's burden in a year's support hearing is to show the amount required to sustain his or her accustomed standard of living for the twelve months after the death of the spouse or parent.⁵¹ Showing this involves proving the petitioner's customary level of income from all sources and *not* merely from the support provided by the decedent. Even where the petitioner received *no* support from the decedent during life, there would theoretically be a right to year's support.⁵²

3.5.2.2. *Accounting for expenditures.* On the expense side of the equation, the petitioner will want to show expenditures which will be or have been incurred in the year following the decedent's death.⁵³ The expenditures to which the petitioner was accustomed are only relevant to the extent that they show this.⁵⁴ The petitioner will also be required to show (typically on cross-examination) other sources of income by which these expenses may be met as well as the extent of his or her personal assets.⁵⁵

⁵⁰ O.C.G.A. § 53-3-7(c).

⁵¹ Anderson v. Westmoreland, 286 Ga. App. 561, 562 (2007).

⁵² Gentry v. Black, 256 Ga. 569, 570 (1987).

⁵³ The year following the death is the relevant year and *not* the year following the filing of the petition or there hearing thereupon. See generally Holland v. Holland, 267 Ga. App. 251 (2004); Anderson v. Westmoreland, 286 Ga. App. 561, 563 (2007).

⁵⁴ Id.

⁵⁵ O.C.G.A. § 53-3-7(c); Holland v. Holland, 267 Ga. App. 251, 255 (2004).

3.5.2.3. *The solvency of the estate.* The task of proving in court income available to and expenses incurred by the petitioner is fairly straight-forward, if tedious. By contrast, case law gives scant guidance as to what is meant by the “solvency” of the estate and how that question plays a role in determination of the support amount. In Driskell v. Crisler, the Court of Appeals noted with approval the fact that the trial court took solvency into account and approved an award that amounted to about a third of a \$587,000 estate.⁵⁶ The lesson from this case may be that a lower court decision is subject to being overturned where solvency is not considered *at all*. By contrast, in Allgood v. Allgood and several other cases, our appellate courts initially make mention of the need to consider solvency and proceed to leave the issue relatively unaddressed in the opinion that follows.⁵⁷ At best, we can derive from the statute the legislature’s preference that estates not be left insolvent after the granting of a year’s support award.

3.5.3. Contesting the needed support amount. The caveator to the year’s support petition enjoys the position of making the petitioner prove his or her case. Apart from this, the caveator is often best served by showing on cross-examination the various forms of income presently available to the petitioner. Proceeds from life insurance policies, though not part of the decedent’s estate, are certainly relevant, as are any assets of the petitioner.⁵⁸ The caveator may wish to explore whether any idle property, such as real estate, can be liquidated or is *capable* of producing income, since the relevant inquiry is the support *available* to the petitioner. Finally, both petitioner and caveator should make what use can be made of O.C.G.A. § 53-3-7(c)(3), which states that the court should consider “[s]uch other relevant criteria as the court deems equitable and proper.” Case law is scant on the point, but this provision may be an open door for

⁵⁶ 237 Ga. App. 408, 413 (1999).

⁵⁷ 263 Ga. App. 177 (2003); See also Richards v. Wadsworth 230 Ga. App. 421 (1998); Taylor v. Taylor, 288 Ga. App. 334 (2007).

⁵⁸ See *supra*, note 51.

discussion of issues not properly considered elsewhere, such as the decedent's relationship and affections for the petitioner, or lack thereof.

4. "Abusing" year's support.

Some license is taken with the title to this section. It does not intend to deal with unethical, illegal, or unscrupulous use of the law. Rather, it recognizes that Georgia's year's support statute is frequently used by practitioners in ways that probably deviate from the legislature's original intent.

4.1. Distributing an intestate estate.

"[Year's support] is not intended to . . . provide a method for distributing the estate."⁵⁹ Despite the truth of this statement by the Court of Appeals, distribution of an entire estate is probably the most frequent use of year's support in Georgia.⁶⁰ Experience even shows that probate court personnel in some counties point a decedent's family in this direction,⁶¹ and attorneys have become adept at the practice. Indeed, there is no compelling reason *not* to ask for the entire estate as part of a petition for year's support, unless the petitioner foresees a caveat being filed. Care should be taken to perfect service upon all interested parties, as lack of proper service in year's support cases is cause for overturning an award on due process grounds.⁶² Furthermore, when a personal representative can be appointed, it is frequently advisable to do so in conjunction with the petition so that there be some fiduciary to deal with third parties holding property.⁶³ Even where there is no will, a temporary administrator with the power solely to

⁵⁹ Taylor v. Taylor, 288 Ga. App. 334, 337 (2007).

⁶⁰ See, in this context, O.C.G.A. § 53-6-38 ("If the estate does not exceed in value the sum set aside to the spouse and children . . . as year's support, no administration shall be necessary.")

⁶¹ Indeed, in at least one rural Georgia county, this author is aware that the probate judge outright recommends year's support as a way of distributing an entire estate.

⁶² Allan v. Allan, 236 Ga. 199, 207 (1976).

⁶³ See section 3.4.3, *supra*.

collect and preserve estate assets can be used.⁶⁴ Extreme care should be taken, however, to be sure that there is no possibility of an allegation of collusion or fraud arising from the petitioner's dealings with this fiduciary,⁶⁵ and service should be made upon interested parties in all events.

4.2. Discharging credit card debt.

After distributing an intestate estate, the most popular use of a year's support petition is to deal with relatively small amounts of unsecured debt. For a number of reasons, large national lenders such as credit card companies are either not sufficiently responsive or not adequately informed as to Georgia law to file the proper caveat to a year's support petition. The experience of many attorneys is that, when an individual credit card debt is in an amount less than \$10,000, lenders very seldom file a caveat to the petition. This provides the petitioner the opportunity to ask for the entire estate in year's support and, assuming no caveat is filed, discharge perhaps multiple, small consumer debts, the sum total of which can be quite large.

When listing credit card (or any) debt on a petition, care must be taken to properly direct service to the lender. As stated above, if there is a personal representative of the estate, it is imperative that there be no suspicion of collusion between the year's support petitioner and that fiduciary, or the executor (and perhaps the petitioner) may be liable for fraud.⁶⁶ Perhaps the best way to eliminate any such suspicion is simply to serve with notice the creditor whose debt is to be avoided.

4.3. Avoidance of property taxes.

As discussed in section 3.2.3, supra, the year's support statute specifically

⁶⁴ In this context, the lower requirements for service of notice of a petition for appointment of a temporary administrator (as opposed to the heightened notice requirements of regular intestate administration) are useful.

⁶⁵ See section 3.3.2, supra.

⁶⁶ Section 3.3.2, supra.

provides for the “divestment” of real property taxes and tax liens. For many petitioners, the resulting savings can more than pay the attorney fee for handling a year’s support matter. This is doubly true because county property tax commissioners rarely contest year’s support petitions as long as the tax divestment appears *prima facie* valid and warranted.⁶⁷

4.3.1. Timing of tax election. Depending upon the time of mailing of the county property tax bill, a year’s support petition may be filed in such a way as to relieve the petitioner of two years’ property taxes. This is best illustrated by example. Suppose a decedent passes away in July of 2011, and the county mails the property tax bill in October of that year. The double-savings may be achieved by the petitioner’s willfully failing to pay the property tax for the year 2011 and electing choice # 3 in the petition, question 8, which prays for relief of “[r]eal property taxes accrued in the year following the filing of this petition, if this petition is filed in the year of the decedent’s death.”⁶⁸ The result should be that the tax lien for the year 2011 *and* the tax assessment for 2012 are both divested by the order for year’s support.⁶⁹ Given a petition for year’s support can be filed within 24 months of the decedent’s death, potentially further savings could be reaped by allowing even more taxes to accrue, but the problem arises of dealing with a property tax foreclosure and sale, which is beyond the purview of the present paper.

4.3.2. Commonly held and jointly held real property. Real property titled, as is frequently the case, jointly between two spouses with rights of survivorship would seemingly not be a candidate for tax divestment. It is, after all, not even a candidate for year’s support, since the

⁶⁷ The tax commissioner may take a greater interest in the petition where large tracts of land are included therein.

⁶⁸ Ga. R Prob. Ct. Std. Form 10.

⁶⁹ Practitioners may find that, where the tax commissioner takes a contrary view, however out-of-keeping with the statute, the better course is not to “fight city hall” on the question. It is often advisable to call the tax commissioner’s office in advance of petitioning and ask about the local interpretation of the law.

automatic survivorship clause governing such property takes it outside the decedent's estate. But a solution to this problem can be found in the surviving spouse's right to renounce the survivorship interest. Pursuant to O.C.G.A. § 53-1-20(b), "[a]ny person . . . who succeeds to property *by contract* or by operation of law may renounce the property." Succession to property by survivorship clause in a deed is succession "by contract." The method, then, for a successor to jointly held property with rights of survivorship to obtain a tax divestment is to execute and file a renunciation in the county deed records⁷⁰ and then petition for year's support, naming the same real property as part of the estate to be set aside.

Once a survivorship interest in real property is renounced, just as in the case of tenancy-in-common of real property, the petitioner is left petitioning for a one-half, undivided interest in the real estate as year's support but asking for a tax divestment for the whole. Fortunately, this works. Upon a awarding of year's support, "all taxes and liens for taxes . . . against the real property set apart . . . shall be divested *as if the entire title were included* in the year's support."⁷¹ The recipient of a one-half undivided interest in year's support can have taxes divested in the same way she would if she were the recipient of the whole, of the "entire title."

5. Refusing year's support.

Sometimes, an estate planning client will desire to deny certain of his or her heirs the right to claim property from the estate in year's support. This may be for reasons as simple as the desire to have a unified, unassailable estate plan or as unfortunate as having children with whom the estate planning client no longer communicates. In any event, there is much misunderstanding about the ability to refuse year's support to one's heirs.

⁷⁰ See O.C.G.A. § 53-1-20(d). Pursuant to O.C.G.A. § 53-1-20(d)(1), the successor to the property either has nine months in which to make this renunciation or, if he or she is a minor, has until the day he or she reaches the age twenty-one.

⁷¹ O.C.G.A. § 53-3-4.

5.1. Year's support cannot be defeated by will.

The prominence and frequency with which we see the following standard provision in wills has led to its misuse: “provisions in this will for the benefit of my spouse and children are intended to be in lieu of year’s support.” Too frequently, novice practitioners acquire some will forms that contain such clauses and assume that by including this language in testamentary documents, they will close off the spouse or child’s right to year’s support altogether.

Of course, this does not work. The above provision is intended to force the spouse or child to *elect* between taking under the will and choosing year’s support as provided in O.C.G.A. § 53-3-3. Naturally, a spouse may still claim year’s support by simply not accepting the devise under the will and then electing to petition for the set-aside, defeating any desire the testator may have had to deny him or her that right.

Admittedly, in certain estates, it is useful to provide for the “in lieu of” language. But this election requirement can be problematic for three reasons. The first is that, as stated, it tends to give lay testators seeking to partially or wholly disinherit a spouse or child the impression that their estate plans cannot be “undone” via year’s support.⁷² The second is that adding the provision to the will can close off the opportunities available to the surviving spouse to avoid debts and property taxes. The third is that the “in lieu of” clause may not actually matter. In Johnson v. City of Blackshear, the widow of a testator both took property pursuant to a provision in his will, which had the requisite “in lieu of” language *and* later petitioned for year’s

⁷² There is always the countervailing consideration that lay beneficiaries of the estate will unwittingly make their election against year’s support by taking, without first consulting with counsel, the bequest left to them under the will. But see Johnson v. City of Blackshear, note 73 *infra*, for a discussion of why this might not matter.

support.⁷³ A holder of a lien upon property of the estate sought to set aside the award on the grounds that, by receiving property under the will, the widow had elected against claiming year's support.⁷⁴ The court held that the lien holder had the right to assert this issue in a caveat to the petition but that he "may not assert it collaterally against the year's support after it has been granted."⁷⁵ The holding in Johnson therefore weakens to an extent O.C.G.A. § 53-3-3 and its provision for the election.

5.2. Year's support cannot be awarded over non-probate property.

Testators seeking to refuse year's support to their relatives must do so by taking property out of the probate estate. When property is not in the estate of the testator, it cannot be awarded as year's support.⁷⁶ Some devices frequently employed to achieve this (though by no means an exhaustive list) are revocable inter-vivos trusts, insurance, gifts, and survivorship language in deeds and contracts. A description of the exact use of these estate planning methods is beyond the scope of this paper, but each serves the purpose of depriving the probate court of jurisdiction over the relevant property. The revocable inter-vivos (or "living") trust, in particular, is highly favored in Georgia's sister states to the north and west because of the difficulty and expense of probate in those jurisdictions. By contrast, most Georgians write will because our probate process is relatively inexpensive and understandable. It would be ironic if uncertainty surrounding year's support – particularly in complex and mixed families – becomes one reason why Georgians in the future consider living trusts over our present tried-and-true preference: the will.

⁷³ 196 Ga. 652, 652 (1943).

⁷⁴ Id.

⁷⁵ Id.

⁷⁶ See, e.g., O.C.G.A. § 53-3-5(a) (A petitioner "may file a petition for year's support in the probate court having jurisdiction over the decedent's *estate*."