

ROOTED AND GROUNDED:

A Georgia Legal Handbook For Small Farmers and Their Land



GEORGIA APPLESEED™

Center for Law & Justice



The Georgia Heirs Property Law Center

2015

Mission of Georgia Appleseed: To increase justice in Georgia through law and policy reform.

Georgia Appleseed Center for Law & Justice is a non-partisan, non-profit organization devoted to law that serves the public interest. Using the skills of hundreds of volunteers, mainly lawyers and other professionals, Georgia Appleseed focuses on achieving changes to laws and policies that unfairly impact children, poor people and other marginalized people in our state. Georgia Appleseed is an independent affiliate of the national Appleseed network.

The Heirs Property Project has been an integral part of the Georgia Appleseed mission since the project's inception in 2008. The project originated through a Cousins Public Interest Fellowship at the University of Georgia School of Law. From there, it has grown into a statewide collaborative effort to improve justice for owners of heirs property.

This handbook was drafted as part of a collaborative project with Ben Hill County and McIntosh SEED, funded by the USDA Rural Business Enterprise Grant Program. This handbook and related activities under the grant align with Georgia Appleseed's efforts to open the Georgia Heirs Property Law Center (the "Center"). The Center is an independent legal clinic focused on the needs of low and moderate income owners of heirs property and on the communities impacted by vacant heirs property.

For more information, visit www.gaappleseed.org/heir

This publication is not intended to be a comprehensive statement of the law, and does not constitute the provision of legal advice. Georgia and federal laws change frequently and could affect the information in this publication. If you have any specific questions with regard to any matter in this publication, you are encouraged to consult an attorney.

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INTRODUCTION

The legal issues facing farmers today are many, varied and often complex. Not only is the farmer dealing with those issues that real property owners typically face, but a farm is a business, and the farmer needs to understand the issues impacting his or her business. To add another layer of complexity, the farm is often family-owned and may be a family's home.

This handbook is an introduction to actions you can adopt to protect your business, property and family for future generations. The information is structured to help you plan for your most important business and personal decisions but is not a substitute for expert advice. We encourage every farmer to seek professional help to ensure thorough coverage of every area pertinent to the security of his or her business and family.

The purpose of this publication is to provide a legal overview on the following topics:

- What to consider when entering into contracts and agreements.
- What happens to your business and family when you do not have a Last Will and Testament or “Will”.
- What happens to your business and family when you do have a Will.
- What outside interests can impact the security and ownership of your property.

The issues in this handbook are not all-encompassing. Specifically, areas that are not addressed in this publication are the laws governing sales (Article 2 of the Uniform Commercial Code), environmental and pesticide regulation, worker protection and regulation of the employer-employee relationship. Although these areas are critically important, their complexity requires that each be addressed separately. Thus, they are beyond the scope of this publication.



ROOTED AND GROUNDED: A LEGAL HANDBOOK FOR SMALL FARMERS AND THEIR LAND

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GETTING IT IN ON PAPER: AGREEMENTS AND CONTRACTS

It cannot be overstated – *Get it in Writing*. There are certain types of agreements that are not even enforceable unless they are in writing. In Georgia, these types agreement that must be in writing include, but are not limited to, the following:

- Any contract for sale of land, or any interest in, or concerning land.
- A promise to guarantee the debt or obligations of another.
- Any agreement made upon consideration of marriage.
- Any agreement that is not to be performed within one year from the making thereof.
- Any commitment to lend money.

In addition to legal enforceability, some advantages to obtaining a written agreement include the following:

- More thought is usually given to written agreements. The responsibilities and rights of each party are outlined and more attention is given to details.
- It gives both the parties an opportunity to consider what will happen under special circumstances.
- Both parties tend to study a document carefully before signing.
- It serves as documentation for tax and other purposes.

READ BEFORE YOU SIGN

As important as getting your agreement in writing, is understanding what the agreement you are signing says. If presented with a contract, **READ IT, ASK QUESTIONS AND, IF YOU NEED TO, GET LEGAL ADVICE**. As a starting point, a contract should reflect the parties' basic business intent regarding the following topics:

- Products being sold or purchased
- Quantity
- Price
- Time for performance



- Penalty for failing to timely perform
- Whether any warranties are being made with respect to the product
- Any exclusivity requirement
- Parties ability to fix or cure any default

While the remaining “legal” of “boiler-plate” provisions of a contract can be very important, it is difficult to resolve a contract dispute if the basic terms do not reflect the intent of the parties.

LEASES FOR REAL PROPERTY

- Any leases of real property must be in writing (not oral agreements) and signed by both parties to be legally effective. A lease, like any other contract, should be tailored to meet the needs of both parties involved in the agreement. The terms and complexity of the lease may vary depending on the type of real property being leased. For example, a lease for land suitable for farming may be very different from a lease of a warehouse for crop storage. Some of the items that should be included in the lease agreement are as follows:
- A description of the property, including the legal description of the land where the leased property is located and the site plans or diagrams of the portions of property or buildings leased.
- The length of the initial rental term and any options to renew or to terminate prior to the expiration of the term.
- The base rent and any additional rent (such as utilities, insurance and taxes) and how rent is to be calculated and paid during the initial term and any renewal term. For example, if the tenant elects to extend the initial term, the rent may be adjusted upward.
- An outline of property rights for each party, including a description of permitted uses by the tenant and any reservations of rights by the landlord.
- Limitations on subletting the property by the tenant and limitations on a tenant’s ability to assign its interest in the lease.
- Land use practices to be used, such as conservation, rotations, land clearing, and fertilizing and liming practices.
- Arrangements for landlord remedies if tenant defaults, including compensation for damages caused by the tenant, eviction rights, re-entry and self-help provisions, lease termination rights, lien rights, etc.



- Specific provisions regarding any special obligations, such as the landlord providing services to the tenant.
- Specific responsibilities for repair and maintenance of properties. Typically, a landlord is obligated to make structural repairs (foundation, roof) and the tenant is responsible for other repairs, but parties can divide responsibilities in any way they choose.
- Responsibility for the maintenance of insurance, as well as provisions governing insurance payments for casualty events and other damage to the property.
- Responsibility for the payment of taxes assessed on the property.
- Responsibility for the provision and payment of utilities, including water.
- Provisions for handling of government payments in the event that the land is taken for public purpose.
- Provisions to protect each party in the case of death, mental or physical incapacity, foreclosure, bankruptcy, the assignment of rights to other persons, and property transfer by the landlord.
- Provisions for liabilities with respect to environmentally hazardous substances. Typically, each party should be responsible for any hazardous substances that it introduces to the property and should indemnify the other party for any damages the other party incurs.
- Provisions governing the priority of liens or other mortgages on the property. Lenders will often require a first lien position on a property.
- An established procedure for settling differences not covered by the lease can be useful and is recommended.

In the event that the parties are negotiating a long-term lease (or a lease with several renewal options), it would be advisable for the proposed tenant to request that a “memorandum of lease” be filed in the applicable county’s real property records. By filing a memorandum of lease, the parties put everyone (“the world”) on notice that the land is subject to a lease. This helps protect the tenant in the event the property is sold. Absent a contrary provision in the lease, if a buyer purchases the property and a memorandum of lease is on record, the buyer takes subject to the lease. By contrast, if a buyer purchases the property and a memorandum of lease is not of record and the buyer does not have knowledge of the lease, the buyer takes the property free and clear of the lease and is not obligated to lease the property to the tenant. For a memorandum of lease to be recorded, it must (i) contain the lease term (and any renewal options), (ii) contain the legal description, (iii) be signed by the parties, and (iv) properly witnessed and notarized. There may also be a fee for filing the memorandum of lease. A tenant would be well advised to seek to obtain an agreement from the landlord’s lender that the lender



shall not disturb the tenant's rights to use the property so long as the tenant is not in default under the lease. This is often accomplished by virtue of obtaining a separate agreement called a subordination, non-disturbance and attornment agreement or an "SNDA".

A note with respect to insurance: Depending on the nature of lease, the landlord should consider asking the Tenant to maintain insurance, including general liability insurance, and making certain the landlord is named as an additional insured.

CASH RENTAL LEASES

A cash rental lease agreement is an agreement between a landowner and an operator/tenant in which the landowner leases the land to the operator/tenant, who will then pay the landowner a specified amount of money for the rights to farm the land. Under a cash rental lease agreement, the landlord receives a dollar amount for the rent of the land and typically does not share in any of the production expenses. While the dollar amount of rent may be fixed, it may also be variable. For example, there could be a base rental of \$50 per acre per year plus a percentage of the income from production.

The first, but most difficult, issue that arises in cash rental lease agreements is determining a fair rental rate. There are a number of different methods for determining fair rental, including determining comparable leasing rates for comparable land and models that take into account land ownership costs, returns to landlord's equity and the expected net returns. There are a number of white papers available on the internet that discuss the pros and cons of each approach and give some examples:

- <http://www.caes.uga.edu/extension/screven/anr/documents/CashRentalRatesforGeorgiaFarmland20132014.pdf>
- <http://ageconsearch.umn.edu/bitstream/34614/1/sp04fl01.pdf>
- <http://www.lsuagcenter.com/en/communications/publications/Publications+Catalog/Money+and+Business/Determining-Cash-Rental-Rates-for-Agricultural-Land-.htm>
- <http://www.extension.iastate.edu/agdm/wholefarm/html/c2-20.html>

CROP SHARE LEASES

A crop share lease is an arrangement between the landowner and the operator/tenant in which the output (crops) is divided between the landowner and tenant. The basic premise is for each party to receive income from the crop (in lieu of or in addition to cash rental payments) in proportion to what each party contributes to production.

Advantages of crop share leases include the following:

- Because there is less cash being paid as rent, less operating capital of the tenant will be tied up in the lease.



- Risk due to low yields or low prices will be shared by both parties, and conversely, both parties benefit in the event of high yields or higher prices.
- Can allow for tax-related benefits when the landowner is recognized as providing “material participation.”ⁱ

Disadvantages of crop share leases include the following:

- Need for a higher degree of cooperation between the landowner and tenant than is customary in traditional leases.
- Accounting for shared expenses must be maintained.
- Increased paperwork and record-keeping associated with participation in government programs and crop insurance is required.

Before entering into a crop share lease, the parties should carefully consider the following:

- The allocation of the various costs associated with production, including imputed cost of the land, crop machinery, equipment, labor, management, seed, fertilizer, herbicides, insecticides, crop insurance, fuel and oil, irrigation pumping expense, drying and handling.
- The allocation of revenue, including income production, crop production, government payments, crop residue, hunting leases and mineral or wind leases.

There are a number of approaches the parties can take to assist in determining the allocations, and there are several good on-line resources that include not only discuss the various approaches, but also provide worksheets to help the parties think through the economic terms. Some resources also include sample crop share leases.

- <http://www.aglease101.org/DocLib/docs/NCFMEC-02.pdf>
- <http://www.coopext.colostate.edu/abm/abmcroplease.pdf>

For the party to the crop share lease that does not own the underlying real property, it is important to put “the world on notice” that such party has an interest in the crop. This is done by filing a Uniform Commercial Code financing statement in the appropriate filing office.ⁱⁱ Please see the discussion on “Security Interests” in this publication.

LIENS AND SECURITY INTERESTS

A lien or security interest in real or personal property is an interest or right granted by the owner of the property (the “Debtor”) to another person (“Creditor”) to secure an obligation, such as a loan or performance under a contract. When discussing real property, this security interest is commonly referred to as “security title,” and the agreement used to grant such security title is



referred to as a “deed to secure debt.” A deed to secure debt is the equivalent of a “mortgage” or a “deed of trust,” both of which are used in states outside of Georgia. When discussing vehicles or other movable machinery, this security interest is commonly referred to a “lien on title.” When discussing other items of personal property, it is commonly just referred to as a “lien” or “security interest.”

Over time, laws have been enacted which establish the requirements of (i) a valid and enforceable lien or security interest, (ii) how a Creditor “perfects” the lien or security interest – meaning when it can enforce the lien or security interest against third parties – in various types of property, and (iii) the priority of competing lien or securities interests. A valid and enforceable lien or security interest gives the Creditor the right to take and sell the collateral if the Debtor does not fulfill its obligations. While not overly complex, this area of the law can have many traps for the unwary, so if you have questions you should reach out to an attorney.

A strong word of caution: Many “form” supply and lease agreements contain language granting a lien or security interest in property and some of that language may exceed the scope of the goods supplied or leased. If you have a question, talk to an attorney.

Below are some examples for which the laws relating to liens or security interests will matter to you:

- You, as the Debtor, are borrowing money from a Creditor and the Creditor requires a lien or security interest in some or all of your property.
- You are entering into a supply arrangement and the supplier (Creditor in this example) wants to make certain it gets paid on time and takes a lien or security interest in the goods supplied and their proceeds (which includes cash).
- You are loaning money to a third party or are supplying goods to a third party and you want to be certain that you have a valid and perfected, first-priority lien or security interest.
- You are acquiring real or personal property from a third-person – you will want to make certain the property you are acquiring is not subject to the lien or security interest in favor of that person’s Creditor.
- You and a third-person will be entering into an arrangement where a potential Creditor may not know what belongs to you and what belongs to the third-person (or that you have a shared interest). For example:
 - You and a third-person have entered into a crop share lease and the crops are to be grown on the third-person’s property.
 - You and a third-person have entered into an arrangement in which livestock embryos that you own are to be implanted into cattle owned by the third-party.



There are a number of exceptions to the laws relating to liens and security interests. Some general principles are set forth below:

A. Real Property and Fixtures

- In order to perfect a lien or security interest in real property or fixtures, the Creditor must file the deed to secure debt (real property) or Uniform Commercial Code or “UCC” financing statement (fixtures) in the real property records in the County which the real property or fixtures are located.
 - If the Creditor properly files, its interest in the property is prior to any person taking a lien or security interest in the real property after the date it files its lien.
 - If you are purchasing real property, you must look in the real property records to make certain that the real property is not subject to a lien or security interest in favor of a Creditor.
 - Note: In Georgia, a Creditor may perfect its interest in fixtures by properly filing a deed to secure debt, a UCC fixture filing, or both.

B. Goods; Animals; Farm Goods

Georgia has adopted the UCC as part of the Official Code of Georgia Annotated (“OCGA”). Article 9 of the UCC provides for the creation or attachment, perfection, priority and enforcement of security interests in most personal property collateral, including, without limitation, accounts, fixtures, goods (such as inventory and equipment) and general intangibles (such as copyrights, patents and trademarks).

The OCGA defines “Goods” to mean all things that are movable when a security interest attaches and includes animals, unborn young of animals, crops and timber.

- A security interest in goods is perfected upon the filing of a UCC-1 financing statement or by taking possession.
- Specifically, under Georgia law, a perfected security interest in growing crops for new value, given to enable the debtor to produce the crops and given not more than three (3) months before the crops become growing crops by planting or otherwise, takes priority over a prior perfected security interest or agricultural lien if the prior interest or lien secures obligations incurred more than six (6) months before the crops become growing crops, even if the person giving new value has knowledge of such prior interest or lien.
- In Georgia, timber to be cut must be distinguished from the timber that has already been cut. To obtain an enforceable security interest in timber that is to be cut, the security agreement must contain a description of the land where timber to be cut is located. Further, for timber to be cut, filing to perfect must be in the office where a



lien on real property would be filed; in Georgia – that is with the Clerk of Superior Court in the county where timber to be cut is located.

- In order to perfect a security interest in personal property, the Creditor must either have possession of the real property or file a UCC financing statement as follows:
 - If the Debtor is a corporation, partnership or limited liability company: in the appropriate filing office in the jurisdiction of the Debtor’s formation.
 - If the Debtor is an individual: in the county records of the Debtor’s residence.

OWNERSHIP OF REAL PROPERTY IN GEORGIA

In Georgia, there are a few ways in which a person can hold title to real property:

- Sole ownership:
 - Property is owned entirely by one person.
 - Granting deed may contain the following language:
 - “John Doe, a single man,” or
 - “John Doe, as his separate property.”
 - The sole owner has the right to sell and encumber his/her property without the consent of any other person.
- Tenants in Common: A form of co-ownership where property is owned by two or more persons at the same time, with each party owning a direct, undivided interest in the property.
 - Georgia law defaults to tenant-in-common ownership and any property conveyed to two or more persons “jointly” will result in a tenancy in common. Although it is not necessary, to avoid any doubt, if a tenancy-in-common is desired it can be created by placing words in the deed such as “John and Mary as tenants in common.”
 - Each tenant in common has the right to possess the property and to receive its proportionate share of rents and profits, but each tenant in common is also responsible for his or her share of expenses such as mortgage, taxes, and insurance. A co-tenant cannot grant an easement over the land or to lease the property without the consent of the other co-tenants, but a co-tenant may sell its interest through a “right of partition” (see below).



- Each tenant in common owns a “right of partition,” which will result in either a division of the property according to tenant in common ownership interest or a forced sale of the property, with the proceeds of sale being divided according to ownership interest.
- Upon death, if the deceased does not have a Will, his interest passes to his or her heirs who then become new tenants in common with the other tenants in common. If the deceased has a Will, his interest will pass under the terms of his Will and whomever he bequeaths his interest to becomes the new tenant in common with the other tenants in common.
- For example, assume that John and Mary own their house as tenants in common, and both John and Mary have children from previous marriages. In the event that John dies without a Will, John’s children would inherit some or all of his interest in the real property and would be tenants in common with Mary. **This can create major problems in selling, farming or financing the property. As a practical matter, Mary would have difficulty selling or mortgaging the house without John’s children’s consent (and sharing the proceeds).** Contrast to the joint tenancy form of ownership below.
- Joint Tenancy: A form of co-ownership where property is owned by two or more persons at the same time in equal shares. Each joint owner has an undivided right to possess the whole property and a proportionate right of equal ownership interest as well as a joint obligation to maintain the property. When one joint tenant dies, his/her interest automatically passes on to the surviving joint tenant(s).
 - Since the default in Georgia is for tenancy in common, to create a joint tenancy very specific words must appear in the deed, such as “Bill and Mary, as joint tenants with right of survivorship” or “Bill and Mary, as joint tenants and not as tenants in common” or “Bill and Mary, jointly with survivorship.”
 - Neither joint tenant can transfer or encumber the property without the joinder of the other party. However, either party may sever its joint tenancy by recording an instrument which results in the lifetime transfer of all of his/her interest which would convert the joint tenancy to a tenant in common interest.
 - For example, assume that John and Mary own their house as joint tenants, with rights of survivorship, and both John and Mary have children from previous marriages. In the event that John dies without a Will, John’s interest in the property automatically conveys to Mary and John’s estate ceases to have any interest in the property. Also please note that the automatic conveyance to Mary will keep the asset out of John’s estate and therefore will not have to go through the estate and probate process. This saves time, saves money, and preserves the land for other family members.



It is important that if you are conveying property to another or are acquiring property, you take into consideration the forms of ownership. Also, how property is titled should be taken into consideration in connection with preparing your Will and any other estate planning.

MINERAL RIGHTS

Mineral rights are the property rights to exploit a particular area for the minerals located there. Mineral rights may be separate from property ownership or leasing rights. If you are approached about a mineral lease, you should contact a lawyer with experience in Georgia mineral rights issues. It is a complex area of the law, and there are many traps for the unwary. Many landowners have simply signed documents presented to them by the oil, gas or mineral extractor to find out after the fact that (i) they have sold all of their rights in the minerals and are not retaining any royalty interest, (ii) the mineral rights owner has no obligation to exploit or market the minerals, and (iii) the mineral rights owner has no obligation to maintain the drill sites, equipment or clean up hazardous conditions. These are just a few of the issues that can arise.

The following information is not an attempt to cover your rights under the law. It is a simple introduction to mineral rights. Some basics:

- Minerals include coal, sand, gravel, kaolin, shale, granite, marble, talc, clay, gold, oil and gas.
- Mineral interests are subject to ad valorem taxes (that is, taxed according to value).
- Minerals in place or unmined are considered real estate and elements of the land. Ownership of land in the absence of severance of title to minerals constitutes full ownership of minerals.
- Minerals extracted from the earth for commercial use are considered personal property and no longer a part of the land.
- Generally, a mineral deed conveys the mineral interest (usually in its entirety) and for all time.
- Generally, a lease is a temporary conveyance and conditioned on the payments of royalties.
- A lease of land, without reference to minerals or mineral rights, will not include the minerals unless the lease so specifies or unless an intent to do so is implied. The intent is determined on a case by case basis by considering all the circumstances of the case.
- When the lease is greater than five years the lease is presumed to convey an interest in the land. Some mineral leases only address the mining interest and no right to use



of the land included. However, entry and surface use in the process of removing the minerals is implied.

- Mineral leases or deeds need to contain express provisions addressing access, exploration and extraction rights and limitations.
- Mineral interests pass to the takers of real property under intestate succession laws.
- As with other interests in land, mineral rights may be acquired by adverse possession.

KEEPING IT IN THE FAMILY: SIMPLE WILLS IN GEORGIA

A Will is a legal document which expresses your wishes for the distribution of your property upon your death. Many people may tell their families how their land should be distributed upon their death, but **the only way to make certain that those who live after you get what you want to leave them is to make a Will.** If you do not have a Will, your property will be distributed in accordance with the intestate succession rules, which are discussed elsewhere.

ELIGIBILITY TO MAKE A WILL

In Georgia, any person over the age of 14 may make a Will unless he or she does not have the mental capacity to do so. Mental capacity is determined at the time of the making of the Will and on a case by case basis.

With very limited exceptions, all Wills must be:

- In writing and signed by the person making the Will (the “testator”) or someone whom the testator directs to sign for him in the presence of the testator, and
- Signed by two or more competent witnesses in the presence of the testator.

It is best not to ask people who are to receive under the Will to be witnesses to the Will. Unless there are more than two witnesses to a Will, a witness who is to receive under the Will, will receive nothing. Witnesses do not need to know what is in the Will or to read it. The testator must have the intent to make a Will and know the extent of his or her properties (what they own), known as the estate.

A Will executed in another state may be admitted to probate in Georgia upon proof that it is valid under the laws of Georgia.

Georgia does not recognize the validity of a holographic Will (a Will purportedly handwritten by the testator but not witnessed by the two requisite witnesses) or verbal Will.

A Will can be changed as often as the testator desires. If the testator changes part of the Will, it is known as a partial revocation. If no Will is made after a total revocation, the testator



will die without a Will (intestate). A Will can also be revoked by physical acts such as making certain marks on the Will, tearing it up or partially burning it. Whether these acts revoke a Will depends on the intent of the testator and is decided by the court on a case by case basis. The marriage of a testator, divorce or the birth of a child after making a Will serves to revoke the Will unless the Will has a provision specifically providing for such future circumstances.

WHAT TO INCLUDE IN A WILL

The following is practical advice about making a simple Will:

- Make a list of all your property.
- Consider the current ownership status of your property.
 - For example, if you own property with your spouse as a “joint tenant, with right of survivorship,” upon your death, your interest in the property will go directly to your spouse and will not go through your estate. You may want to make provisions for the disposition of the property in the event that you and your spouse both die at the same time or within 90 days of each other, but to state in your Will that you are leaving the property to your son when in fact the property is going to your wife as a matter of law, may cause undue tension among the beneficiaries of your estate.
 - Similarly, you need to know if there are named beneficiaries on your cash or retirement accounts and if those named beneficiaries have rights of survivorship (“payable on death”) If your named beneficiaries have rights of survivorship, then those amounts will go directly to the beneficiaries or survivors as named, and will not go through your estate.
- Make a list of those persons to whom you would like to leave property.
- Consider what may happen between the making of the Will and your death.
 - For example, are you likely to have another child? If your son divorces his current wife, do you want any property to go to her? To their son? Do you want to leave your current spouse that house if you are divorced or legally separated?
 - If it is likely you will have another child and do not want your Will invalidated, you should expressly include a provision in your Will that states that the birth of another child will not invalidate your Will. The same applies in the event of divorce or marriage of the testator.
- Put your Will in writing.
- Sign your Will in the presence of two witnesses (neither of whom are receiving anything from you in the Will) and a notary.



- Have your signatures and those of your witnesses notarized.

This information addresses the making of a simple Will. If you have a significant estate or have any concerns or questions, you should consult an attorney. You should review your Will, your life insurance policies and your cash and retirement accounts once a year to be sure that they continue to serve your objectives since circumstances change over time.

DIVORCE AND PRENUPTIAL AGREEMENTS

In a divorce the marital property of the parties is divided either by agreement or by a judge in a process is called equitable distribution. How property is divided, including real property, depends on a number of factors including when the property was acquired (before or after the marriage) and how it was acquired (by purchase or inheritance). The rules are complicated and beyond the scope of this booklet. A couple seeking to agree to how property will be divided in the event of a divorce can, prior to marriage, enter into a prenuptial agreement.

To be enforceable in Georgia, a prenuptial agreement must be

- In writing,
- Not obtained through fraud, duress or mistake, or through misrepresentation or nondisclosure of material facts,
- Not unconscionable, and
- The facts and circumstances between the prenuptial agreement and the divorce cannot have changed so much that its enforcement unfair and unreasonable.

In Georgia marriage contracts should be recorded with the Clerk of the appropriate Superior Court. This provides notice to creditors and others of the existence of the agreement. If you are considering a prenuptial agreement, both parties should seek the advice of counsel to help ensure subsequent enforcement.

ADMINISTRATION OF A FAMILY MEMBER'S ESTATE

At one time or another, most of us will have to deal with the administration of the estate of a family member or friend. When someone dies, there are very often other matters related to probate proceedings (for example, tax returns, benefit claims, creditor notices, debtor demands, etc.), which will need to be handled. While the administration of an estate may be done without any attorney, having someone experienced and knowledgeable in the areas of probate or estate law can greatly assist you in determining which proceeding is the most appropriate for your particular situation and can discuss fully with you the benefits, if any, in considering alternative proceedings.

If you proceed without an attorney (pro se), it will be your responsibility to



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- Determine or select the proceeding appropriate to your situation.
- Properly complete all forms (forms are generally available on the applicable County Probate Court’s website).
- Make arrangements for personal service on all persons upon whom personal service is required.
- Assure the publication of any notices not performed by the court.
- Prepare for and present your case.

These are all important tasks that are best not left to chance. You are again encouraged to consult first with an attorney before making the decision about proceeding without an attorney..

There are a number of different proceedings which may be filed in the Probate court following the death of a Georgia resident or a non-resident owning property in the State of Georgia. Proceedings are filed in the Probate Court of the county of the decedent’s residence in Georgia or in the county where property of a non-resident is located. For each proceeding described, there is a standard form, which the Court will provide to any petitioner. The procedures will vary depending on whether or not the decedent had a Will.

WHEN SOMEONE DIES WITHOUT A WILL

- No Administration Necessary Proceeding:
 - If all debts of the decedent have been paid (or if all creditors consent or fail to object after notice), if there is no other need for formal administration, and if the heirs have all agreed on how the estate will be divided, this proceeding may be filed. All heirs must sign an agreement disposing of the entire estate; guardians of minor or incapacitated adult heirs may execute the agreement. Creditors who have not consented in writing must be given legal notice of the filing.
- Permanent Administration Proceeding:
 - This procedure requires notice to all heirs. A surviving spouse or sole heir is entitled to serve as “Administrator,” unless disqualified; otherwise, the person selected by a majority of the heirs is entitled to serve, unless disqualified. Administrators must post bond and file inventories and returns, unless all heirs consent to a waiver of those requirements. If all heirs consent, the Administrator may be given additional powers and authority. Guardians of minor or incapacitated adult heirs may acknowledge service, consent to selection and consent to waive requirements, provided the guardian is not the petitioner.
- Temporary Administration Proceeding:



- Notice to the heirs is not required, but a majority of the heirs may select the Temporary Administrator. Powers are limited to collecting and preserving the assets of the decedent, and the Court may appoint a Temporary Administrator upon any showing of necessity or appropriateness. No expenditures or disbursements may be made without a special court order. Temporary Administrators must post bond and file inventories and returns. Guardians of minor or incapacitated adult heirs may consent to selection, provided the guardian is not the petitioner.

A person who dies without having a will, dies “intestate.” When this happens, the real and personal property is distributed to heirs according to the descent and distribution laws of the State of Georgia as summarized below.

The “heirs at law” are as follows:

- If you are married *without children*, your spouse will inherit your entire estate.
- If you are married *with children*, your spouse and children will share equally your estate with the spouse entitled to no less than one-third of your estate. So, if you have one child with your spouse, they each will receive fifty percent (50%) of your estate. If you have four children and a spouse, your spouse will receive one-third (1/3rd) of your estate and the four children will share equally the remaining two-thirds (2/3rd).
- If you are not married but have children, the children will inherit your estate, shared equally between them. Please note that if a child of yours is deceased but has living children (your grandchildren), those living children will inherit your deceased child’s share. This is called distribution “per stirpes.”
- If you do not have a spouse and do not have children, then your parents will inherit.
- If you do not have a spouse and do not have children and your parents are deceased, then your siblings will share equally your estate, per stirpes.
- If you do not have a spouse, children or siblings and your parents are deceased, then your grandparents will share your estate equally.
- If you do not have a spouse, children or siblings and your parents and grandparents are deceased, then your uncles and aunts will be entitled to your estate.
- If no relatives can be found to inherit your property, it will go into the state’s coffers. This is called “escheat.”

An adopted child is considered the legal child of his adopted parents and may inherit from them and their relatives as a natural child would. An adopted child cannot inherit from his natural parents unless provisions are made for the same in the parents’ Wills.



An illegitimate child may inherit from and through his mother, from and through the other children of his mother, and from and through any other maternal kin. An illegitimate child may not inherit from or through his father or paternal kin unless the child has been made legitimate under the law. Children conceived through artificial insemination are presumed to be legitimate, and therefore, can inherit.

WHEN SOMEONE DIES WITH A WILL

- Solemn Form Probate Proceeding:
 - This procedure requires notice to all heirs and becomes binding upon all parties immediately upon entry of the final order. All heirs must be duly served or must acknowledge service.
 - The notice requires anyone having a legal cause to object to or contest the alleged Will to file the objection or contest before a certain deadline.
 - The original Will must be filed with the petition, and proof of the proper execution of the will must be provided by either a self-proving affidavit, Interrogatories or Proof of Witness.
 - The Court will appoint a guardian-ad-litem for each minor or incapacitated heir.
- Common Form Probate Proceeding:
 - This procedure may be done without notice to heirs but does not become binding for four years after the appointment of the Executor.
 - The original Will must be filed with the petition, and proof of the proper execution of the Will must be provided by either a self-proving affidavit, Interrogatories or Proof of Witness.
 - Heirs and others may file an objection or contest at any time up to four years after common form probate.
- Probate of Will in Solemn Form/Letters of Administration:
 - If there is a Will but the named Executor is either unable or unwilling to serve, an Administrator C.T.A (meaning, Administrator with Will annexed) must be appointed.
 - Any nominated Executor still living must sign a declination, or there must be testimony that the Executor is unable to serve.
 - A majority of the beneficiaries may select the Administrator C.T.A.



- The Court will appoint a guardian-ad-litem for each minor or incapacitated heir.

Regardless of whether or not there is a Will, the estate may be petitioned to do the following:

- A Year's Support for Surviving Spouse and Minor Children
 - This proceeding may be filed only by a surviving spouse or for minor children of the decedent.
 - The petition asks that specified property be awarded to the spouse and/or children.
 - Notice must be given to all "interested persons."
 - Property awarded as year's support is free of all unsecured debts of the estate and takes precedence over any disposition by Will.
 - The lien of certain ad valorem taxes on real estate is divested by the award of the property as year's support
- Enter into Safe Deposit Box
 - This proceeding is usually filed when the Will is thought to be in a safe deposit box. It permits the bank to open and examine the contents of the box in the presence of the petitioner. If a Will is found, the bank must deliver it directly to the Probate Court. Insurance policies may be delivered directly to the named beneficiaries. The petitioner may receive only burial instructions and any deed to a burial plot. Other property must remain in the box until an Executor or Administrator is appointed.

UNEXPECTED ACTIONS AGAINST YOUR PROPERTY

CLAIMS OF PROPERTY OWNERSHIP: ADVERSE POSSESSION

Although most land that is acquired is purchased or received as an outright gift or through inheritance, landownership through adverse possession and prescriptive title is recognized under Georgia law.

Adverse possession is the result of a person who is originally not the true owner of the property acquiring valid title to the property through possession. Such action requires all of the following elements of adverse possession to be met:

- The adverse possessor has held himself or herself out as the owner of the property. If the adverse possessor does not recognize himself or herself as the sole possessor, then neither can the courts.



- The adverse possessor has maintained this claim of ownership against the real owner as well as the whole world.
- The adverse possessor has maintained this semblance of ownership without interruption for a period of seven years under “color of title” or twenty years of outright possession.
 - “Color of title” has been defined as a writing which holds itself out or appears to pass title but does not in fact, for any number of reasons – including that the person purporting to grant title did not own the title.
 - For example, Mary thinks she owns, but does not actually own, certain real property. She conveys the property to Bill, who takes possession of the real property, pays taxes on the property, etc. If Bill does this for seven years without objection from the real owner of the property, Bill may have obtained the property by adverse possession.
 - Another example, Bill believing he owns the property, settles on the property and starts acting like the owner. He tells everyone he owns the property, pays taxes on the property, etc., for twenty years without objection from the real owner of the property. Bill may have obtained the property by adverse possession.
 - The adverse possession must be ongoing and uninterrupted. The claim of ownership cannot, at any time, be abandoned.
- The claim of ownership must not have originated in fraud, and must be public, continuous, uninterrupted, peaceable, exclusive and not merely permissive.
 - Title to property by adverse possession cannot be obtained if the adverse possessor has permission to use the property under a written or verbal lease or license.
 - An adverse possessor cannot obtain title through adverse possession if he/she has committed an actual fraud against the true owner.

One can never obtain adverse possession to

- wild lands
- public lands
- registered lands
- cemeteries or burial places



Furthermore, an owner of property obtained as an heir cannot claim adverse possession as against other heirs of the same property simply by living on the property. As you can see, the elements for establishing adverse possession are very fact specific, and if you are concerned that someone may be trying to obtain rights in real property owned by you or that you may have obtained property by adverse possession, you should consult an attorney for a more careful analysis. As a practical matter, if you are concerned that someone may be trying to obtain rights in real property owned by you, you should take steps to assert your ownership and control of the real property.

CONDITIONS FOR RIGHT OF WAY: PRESCRIPTIVE EASEMENTS AND EASEMENTS BY NECESSITY

An easement gives its holder the right to use (but not necessarily own) the property of another for a specific purpose. Easements can be created in Georgia four different ways: by express grant; by prescription; by necessity; and by compulsory purchase and sale pursuant to a court order.

Prescriptive easements are implied easements granted after the dominant estate has used the property in a hostile, continuous and open manner for a statutorily prescribed number of years. While similar to adverse possession, prescriptive easements differ by not requiring exclusivity.

Under Georgia law, a prescriptive easement may be established if the following elements are established:

- the prescriber must give some notice, actual or constructive, to the land owner, that he or she intends to prescribe against the owner;
- that uninterrupted use of the crossing continued for the seven years or more without any steps having been taken to prevent such use;
- the path cannot vary;
- that the width of the crossing did not exceed twenty feet;
- that the width did not deviate from the number of feet originally appropriated; and
- that the adverse possessor kept the crossing open and in repair for seven uninterrupted years

Prescriptive easements may also arise without an individual ever going on the land, in the instance of the long use of pipes or drains.

Under Georgia law, to be entitled to obtain an easement or private road over the lands of another by necessity, the easement seeker must show that the way sought by him is absolutely indispensable as a means for reaching his property – and not just a matter of convenience. A



landowner will not be entitled to an easement by way of necessity if he/she voluntarily landlocked themselves; that is to say, they created the problem by not properly reserving an easement in the granting deed.

EMINENT DOMAIN AND CONDEMNATION

Each year, many rural families lose their land to the State, its political subdivisions or other authorized entities for use in projects for the public benefit. Eminent domain is the taking of private land temporarily or permanently for a “public use.” The condemnation of land for the creation or functioning of public utilities, the opening of roads, and the providing of channels of trade or travel are specifically included within this definition for public use; however, public benefits derived from economic development do not fall within the legal definition of public use. The State has the authority to condemn. However, political subdivisions, counties, cities, highway departments, telephone and telegraph companies, housing authorities, etc., can be delegated the power of eminent domain.

Before a governmental entity (or authorized entity) can exercise the power of eminent domain and condemn your property, Georgia law requires that the government make a reasonable effort to negotiate the purchase of your property. However, if an agreement cannot be reached through good-faith negotiations, the governmental entity (hereinafter referred to as condemnor) has the power to condemn your property. Condemnation proceedings can occur before assessors, a special master or a court, each of which has the ability to determine the value of the property or any interest being taken and the damages incurred by the owner (offset by any potential benefits of the taking enjoyed by the owner).

By law, you are to be given a Landowners Notice of Rights in order to provide you with a general understanding of your rights during the negotiation process and possible condemnation proceedings to acquire your property.

Prior to Initiating Condemnation Proceedings

Prior to voting to file a condemnation action to acquire your property, unless waived by you in writing, the condemnor must carry out the pre-condemnation procedures listed below.

- Personally serve you with notice at least 15 days before any meeting in which the condemnor considers or votes on a resolution to exercise its power of eminent domain concerning your property. If the condemnor’s attempt to personally serve you fails, the condemnor may notify you by mail.
- If possible, post a sign on a right of way adjacent to your property at least 15 days before the meeting stating the time, date, and place of the meeting (such meeting must begin after 6:00 p.m.).



- Publish a notice of the condemnation meeting in the local newspaper that carries legal notices. However, this notice must appear in a section of the paper other than where the legal notices are printed.

Condemnation Proceedings

If a resolution is passed to condemn your property at the public meeting discussed above, the condemnor must wait at least 30 days from the passage of the resolution before filing a petition of condemnation in the superior court of the county in which your property is located.

The condemnation proceedings vary slightly when heard by assessors, a special master or the court. Accordingly, it is important to refer to the Landowners Notice of Rights for deadlines and further information on the condemnation process. Generally, however, you will have between 10 and 60 days from when you receive notice of the condemnation until the meeting or hearing to assess the market value of your property.

Note that at any point before title to property rights in your property vests in the condemnor you may file a motion with the superior court asking the court to determine whether the planned use of your property is for a public use and/or whether the condemnor has the legal authority to exercise the power of eminent domain. A sample of this kind of motion is attached to the Statement of Rights. These questions will not be considered unless you file a motion requesting the court to review them. In such proceedings before the court, the condemnor has the burden of proving that the proposed property will be for a public use and that the condemnor has the legal authority to condemn your property.

Compensation

The Georgia Constitution requires that you be appropriately compensated if your property is condemned. Private property may not be taken from you without just and adequate compensation being paid to you first. This means that you are entitled to receive the fair market value of your property if it is condemned. Additionally, if you are displaced from your property, you may be entitled to relocation costs, and/or to actual direct losses as a result of moving a business or a farm operation currently on your property.

If only part of your land is condemned, you may also be entitled to recover for any reduction in the market value of the remaining property if the condemnation causes the value to go down. These are called consequential damages.

Rights to Appeal

If you are not satisfied with the amount of the award for your property, you may file an appeal asking the court for a jury trial. You are entitled to a jury trial only for issues related to the amount of compensation awarded by the assessors, with the same right to move for a new trial and file an appeal as in other cases at law. Note however, that the entering of an appeal will not hinder or delay in any way the condemnor's right to use the condemned property or interest, provided that the condemnor pays or tenders to the owner the amount of the award and, in case



of the refusal of the owner to accept the award, deposits the amount awarded with the clerk of the superior court for the benefit of the owner.

If the amount awarded by the special assessors is less than that found by the verdict of the jury, the condemnor will be bound to pay the additional amount in order to retain the property. However, if the jury's verdict is that the amount of the special assessors' award was too high, then the award would be reduced accordingly, which means that if you have already accepted the award, the condemnor would be entitled to a judgment against you for the difference.

TAX LIENS AND SALES

All taxing authorities have the right to put a lien on property for the failure to pay taxes. In fact, in most states tax liens are automatically imposed on land for unpaid taxes. When a landowner does not pay taxes when due, the taxes are considered delinquent. Penalties and interest charges are then added to the amount owing. After a period of delinquency and the following of statutory procedures the state or county may initiate a tax sale.

Taxes collected on real property constitute a major source of income for county governments. Property can be purchased at a tax sale by the highest bidder. The purchaser acquires a defeasible title, subject to the right of redemption. This means that the landowner is afforded an opportunity to get the land back if the landowner pays the amount paid for the property at the tax sale, plus any taxes paid on the property by the purchaser after the sale of the property, plus a redemption premium of 20% of the prior total amount for the first year or fraction of a year, and 10% for each year or fraction of the year thereafter. It is important to note that a tax deed does not entitle the purchaser to possession until the right of redemption has been barred, but the purchaser's interest is immediately subject to taxation unless exempt.

The landowner has the right to redemption for up to one year, after which redemption may be cut off by service of mandatory notices, or by prescription through the lapse of seven years. However, even after the equity of redemption has been barred, title in the purchased land is still often times questionable, meaning it may be difficult for the acquirer of the land to sell or obtain financing secured by the property.

If notice is given to the landowner prior to the tax sale as well as at the end of the redemption period, consistent with the statute, the landowner loses all right to redemption. A tax sale can be invalidated if the necessary notice requirements are not met or if the tax is not due or has already been paid. Any dispute over a tax sale must be initiated within seven years.

Should your land become the subject of a tax sale, consult an attorney immediately to insure that your rights to your land are not restricted, limited or otherwise abridged. Also, if you are considering buying land pursuant to a tax sale, consult an attorney so that you can more fully understand and evaluate the risk that the property being acquired can be redeemed by the original owner. It may not be an unreasonable risk if the land does not require any significant capital improvements, but you would want to be cautious before improving it.



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- ⁱ The tax implications of crop share leases are outside the scope of this discussion. It is recommended that landowner and tenant seek the advice of a local accountant or other tax advisor knowledgeable in the topic.
- ⁱⁱ Please note that filing the financing statement will only put “the world on notice” with respect to the tenant’s interest in the crops. To put the world on notice regarding its interest in the real property one must file a memorandum of lease. Please see the “Leases for Real Property” section for more detail.

This publication was prepared as a public service by the Georgia Appleseed Center for Law and Justice (“Georgia Appleseed”) and The Georgia Heirs Property Law Center, Inc. (“The Center”).

This publication is not intended to be a comprehensive statement of the law and does not constitute the provision of legal advice. Georgia and Federal laws change frequently and could affect the information in this publication.

If you have any specific questions with regard to any matter in this publication, you are encouraged to consult an attorney. If you do not believe that you can afford an attorney, you may be able to obtain legal assistance through Georgia Legal Services. To determine your eligibility contact your local office or, to obtain the telephone number of the office nearest to you, call 1-800-745-5717.

