WILLS AND ADMINISTRATION OF ESTATES

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GENERAL

Definitions of a will are numerous and varied. The statutory definition is that "A will is the legal declaration of a person's intentions as to the disposition of his property after death."[1] Obviously, a will is not a contract since it is unilateral. However, a contract to make a will in behalf of another or to include in a will a particular devise or legacy is valid if founded on a valuable consideration.[2] *Bowles v. White*[3] reaffirms this well-recognized rule. The plaintiff in this case filed suit, as administrator, seeking to recover certain realty of the decedent. The defendant filed an answer and cross-action, the nature of which was to set up an oral contract between the defendant and the decedent wherein it was alleged that the decedent had agreed to leave certain property to the defendant in return for services rendered the decedent during her lifetime. In the superior court the defendant's answer and cross-action was stricken and the jury directed to find for the plaintiff. On appeal to the Supreme Court this judgment was reversed. The court held that the answer and cross-action stated a cause of action since oral contracts, wherein one of the parties agrees to make a will devising specific property to another as compensation for services rendered to the former during his lifetime, are valid and enforceable in a court of equity.

In Georgia very few restrictions are placed on the disposition of property by testamentary instrument. A testator may make any disposition of his property not inconsistent with the laws or policy of the state. This disposition may be made entirely to strangers to the exclusion of his wife and children.[4] A testamentary devise to any charitable, religious, educational or civil institution imposes one of the few limitations on the disposition of property by will.[5]

When dealing with charitable devises, of necessity, one must determine what subjects are considered charitable. If such a charitable devise is in the nature of a trust, the Code sets out the subjects which are proper matters of charity.[6] Recently, the Supreme Court was faced with the question of whether a will devising property in trust for "religious, educational, charitable and humanitarian" purposes created an estate exclusively for charity.[7] The main issue revolved around the use of the word "humanitarian." The heirs of the testator contended that a gift for humanitarian pur-

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1. GA. CODE § 113-101 (1933).
2. REDFERN, WILLS AND ADMINISTRATION OF ESTATES § 15 (Rev. ed. 1938).
3. 206 Ga. 433, 57 S.E.2d 547 (1950).
4. GA. CODE § 113-106 (1933).
5. GA. CODE ANN. § 113-107 (Supp. 1947).
6. GA. CODE § 108-203 (1933).
7. Pace v. Dukes, 205 Ga. 835, 55 S.E.2d 367 (1949).

poses included one for humane purposes, and a gift for humane purposes was not charitable within the meaning of the statutory definition. In rejecting this contention, the court held that a gift for "humanitarian" purposes was a charitable gift since the two words, humanitarian and humane, are not synonomous. This case demonstrates the need for careful draftmanship when preparing a will. Here, the litigation resulted from the use of one word which was, to a certain extent, ambiguous. Many times a testator's wishes can be defeated because of the use of language which is indefinite and ambiguous.

MENTAL CAPACITY AND UNDUE INFLUENCE

Any person may make a will in Georgia unless laboring under some legal disability.[8] One need not be an intellectual giant to possess the necessary capacity to make a will. At one time "a mere glimmering of reason" was sufficient mental capacity.[9] Generally, a testator possesses testamentary capacity if he has sufficient intellect to enable him to have a decided and rational desire as to the disposition of his property.[10] Testamentary capacity is determined by the condition of the testator's mind at the time of the execution of the will. Proof of mental incapacity before or after the execution of the will does not necessarily show incompetency at the time the will was actually made.[11]

Free and voluntary execution is one of the essential requirements of a valid will. Any fraudulent practice or undue influence which prevents the testator from expressing his own wishes voids the will.[12] Acts or circumstances which amount to undue influence in one case may not amount to undue influence in another. A very wide range of testimony is permissible on the issue of undue influence since the determination of this question varies with the facts and circumstances of each case.[13] In *Bowman v. Bowman*[14] a will was caveated on the grounds of undue influence. The will was admitted to probate and the caveatrix appealed to the superior court. The superior court directed a verdict against the caveatrix. On appeal to the Supreme Court, this judgment was reversed. The court ruled that this question of undue influence should have been put to the jury since, on the issue of undue influence, the rules of evidence take into account the peculiar circumstances surrounding this issue. As pointed out by the court, undue influence can seldom be shown except by circumstantial evidence. For this reason it is proper, on the issue of undue influence, to admit evidence tending to show the testator's dealings and associations with the beneficiaries; his habits, motives and feelings; his strength or weakness of character; his confidential family, social and business relations; the reasonableness or unreasonableness of the will; his mental and physical condition

8. GA. CODE § 113-201 (1933).
9. Potts v. House, 6 Ga. 324 (1849).
10. Manley v. Combs, 197 Ga. 768, 30 S.E.2d 485 (1944). See REDFERN, WILLS AND ADMINISTRATION OF ESTATES § 37 (Rev. ed. 1938), for a complete collection of authorities.
11. Bassett v. Hunter, 205 Ga. 417, 53 S.E.2d 909 (1949).
12. GA. CODE § 113-208 (1933).
13. Bowman v. Bowman, 205 Ga. 796, 55 S.E.2d 298 (1949).
14. *Ibid.*

at the time the will was made; his manner and conduct; and generally, every fact which will throw any light on the issue raised by the charge of undue influence.

Formalities of Execution

The formalities to be observed in the execution of a will are clearly prescribed by statute.[15] Since no particular form of words is necessary to constitute a will,[16] any writing may be construed to be a testamentary instrument. . Once it is determined that an instrument is testamentary in character, such instrument must comply with the formalities prescribed by statute to be valid. An interesting case involving this principle is that of *Guest v. Stone*.[17] In this case a serviceman deposited money in a bank. On the deposit slip a notation was made naming the defendant as beneficiary in case of the death of the depositor. After the death of the depositor, the administrator of the estate sued for the recovery of the deposit. The Supreme Court held this transaction to be testamentary in character. The deposit slip, having been signed only by the deceased, conveyed no interest to the named beneficiary since the prescribed formalities for the execution of a will had not been observed. The deposit was not construed to constitute a gift since the circumstances surrounding the deposit showed that this named beneficiary was to take an interest only in the event of the death of the depositor.

It is an elementary rule of evidence that the credibility of a witness is for the determination of the jury.[18] In *Middleton v. Waters*[19] probate of a will was caveated on the grounds of non-execution and forgery. Probate was allowed and the caveatrix appealed to the superior court. The three subscribing witnesses of the alleged will testified positively as to the due execution of the instrument. The caveatrix produced one witness who testified as to non-execution. The jury returned a verdict for the caveatrix. On a subsequent appeal, the Supreme Court affirmed the judgment of the superior court in denying a new trial. The court held that the issue of non-execution was properly submitted to the jury, and the jury having resolved that issue in favor of the caveatrix, denial of a new trial was not error.

Construction

In a very early case Chief Justice Marshall laid down the rule that "The intent of the testator is the cardinal rule in the construction of wills, and if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail . . . ."[20] This principle is set forth by statute[21]

15. Ga. Code § 113-301 (1933).
16. Ga. Code § 113-102 (1933).
17. 206 Ga. 239, 56 S.E.2d 247 (1949).
18. Ga. Code § 38-1805 (1933).
19. 205 Ga. 847, 55 S.E.2d 359 (1949).
20. Finlay v. King's Lessee, 3 Pet. 346, 7 L.Ed. 701 (1830).
21. Ga. Code § 113-806 (1933).

and by innumerable cases.[22] Each will is a law unto itself.[23] For that reason, precedents or adjudged cases are of little help in determining the intention of the testator.[24] Generally, in the construction of wills, courts are not limited to any particular item, sentence or clause. The court may look to the four corners of the will in an attempt to ascertain the intention of the testator.[25] The construction of an unambiguous will is for the court and not for the jury.[26] If the intention of the testator is clear, it is the duty of the court to so construe it, regardless of any opinion the court may have as to a different testamentary intention.[27] Naturally, where the terms of a will are explicit, definite and unambiguous, and can be applied in the court of ordinary, there is no necessity for a construction of its terms.[28]

In *Jenkins v. Shuften*[29] a will provided for the disposition of property to certain relatives of the testator provided the testator's widow did not dispose of it "during her lifetime." The Supreme Court was called upon to construe the meaning of the phrase "during her lifetime." The court ruled that under this phraseology, the widow did not have power to dispose of the property by will.

A provision in a will that "if any of my children dying without heirs the property they get of me shall be divided between the others" was construed to relate to the effective date of the will, the death of the testator.[30] The court reasoned that it was not the intent of the testator to create an estate that might subsequently be defeated by the death of such child without issue.

A will which bequeathed property to the testator's sister, and provided that any residue or property or proceeds thereof remaining in her possession at her death should go to the testator's wife, created a life estate with power of sale in the sister. Upon her death, all property or proceeds thereof in her possession, which she had taken under the will, had to be surrendered to the testator's executrix for disposition under the will.[31]

The case of *Johns v. Citizens & Southern Nat. Bank*[32] involves a class gift. The testamentary provision, which the court was called upon to construe, provided that "whatever amont [sic] may be over when the donation[s] are all made is to be equally divided among my brothers and sisters." The court held that this provision constituted a gift of the testator's residuary estate to a class consisting of his brothers and sisters living at his death. The descendants of a brother and sister predeceasing the testator were excluded because the lapse statute[33] is inapplicable in the case of a residuary gift to a class which is to be ascertained upon the occurrence of an indicated event.

22. REDFERN, WILLS AND ADMINISTRATION OF ESTATES § 133 (Rev. ed. 1938).
23. Jenkins v. Shuften, 206 Ga. 315, 57 S.E.2d 283 (1950).
24. Davant v. Shaw, 206 Ga. 843, 59 S.E.2d 500 (1950).
25. Stahl v. Russell, 206 Ga. 699, 58 S.E.2d 135 (1950).
26. Collier v. Citizens & Southern Nat. Bank, 206 Ga. 857, 59 S.E.2d 385 (1950).
27. Johns v. Citizens & Southern Nat. Bank, 206 Ga. 313, 57 S.E.2d 182 (1950); Davant v. Shaw, 206 Ga. 843, 59 S.E.2d 500 (1950).
28. Darnell v. Tate, 206 Ga. 576, 58 S.E.2d 160 (1950).
29. 206 Ga. 315, 57 S.E.2d 283 (1950).
30. Davant v. Shaw, 206 Ga. 843, 59 S.E.2d 500 (1950).
31. Stahl v. Russell, 206 Ga. 699, 58 S.E.2d 135 (1950).
32. 206 Ga. 313, 57 S.E.2d 182 (1950).
33. GA. CODE § 113-812 (1933).

Scranton-Lockawana Trust Co. v. Bruen[34] also involves a residuary gift. A will devised the residue to a named person and provided that if she should die childless the residue should go to a second named devisee. The second devisee survived the testatrix but predeceased the first named devisee. When the first devisee died without children, the court was called upon to determine the disposition of the residuary estate. The court ruled that the residue passed to the heirs of the second devisee because this provision created a base or qualified fee in the first devisee which was defeated by her dying without children.

COURT OF ORDINARY—PROBATE—YEAR'S SUPPORT

A will is an ambulatory instrument which is inoperative during the lifetime of the testator. The law does not recognize an instrument as a will until it has been proved before the court of ordinary. By statute,[35] the court of ordinary is given exclusive jurisdiction over the probate of wills. Once a court of ordinary has assumed jurisdiction and granted probate of a will, its judgment cannot be attacked collaterally.[36] However, if a judgment of a court of ordinary has been procured by fraud, the superior court, in the exercise of its equitable jurisdiction, may set aside such judgment upon proper allegations and proof.[37] Also, where the administrator or executor has obtained his discharge by fraud, such discharge may be set aside on motion and proof.[38]

Johnson v. Bogdis[39] represents a case wherein the plaintiffs filed an equitable petition seeking to set aside a year's support granted to the defendant. The petition alleged fraud in the procurement of the judgment granting the year's support. The alleged fraud consisted of representations made to the plaintiffs which induced them not to appear or contest the application for the year's support. The superior court set aside the judgment allowing the year's support. On appeal, the Supreme Court reversed this judgment, but only because the evidence was insufficient to show fraud. The court expressly recognized the rule that a judgment of the court of ordinary could be set aside by a court of equity in a direct proceeding for that purpose, on the ground that such judgment had been procured by fraud. The court also recognized the fact that one of the most frequently recurring forms of fraud is the making of some agreement or representation for the purpose of preventing an appearance or defense in an original action.

In *Warnock v. Warnock*[40] the plaintiffs, as legatees, filed a bill in equity seeking to have a judgment discharging the executor set aside on the grounds that the discharge had been obtained by fraud. The judgment discharging the executor had been obtained thirteen years prior to the

34. 206 Ga. 872, 59 S.E.2d 397 (1950).
35. GA. CODE § 113-603 (1933).
36. REDFERN, WILLS AND ADMINISTRATION OF ESTATES § 110 (Rev. ed. 1938); Wash v. Dickson, 147 Ga. 540, 94 S.E. 1009 (1918).
37. Johnson v. Bogdis, 295 Ga. 535, 54 S.E.2d 620 (1949).
38. GA. CODE § 113-2303 (1933).
39. 295 Ga. 535, 54 S.E.2d 620 (1949).
40. 206 Ga. 548, 57 S.E.2d 571 (1950).

filing of this action. The petition was dismissed on demurrer and the Supreme Court affirmed this judgment since the petition contained no specific allegations of actual fraud which prevented the plaintiffs from instituting the actions sooner. In such a case as this, beneficiaries sui juris must institute the action to set aside the discharge within three years from the date of the order granting the discharge. The statute of limitations will be tolled where actual fraud exists, but the complaining party must show that there has been reasonable diligence used in the discovery of such fraud.

Another case involving a year's support is that of *Herring v. Fain*.[41] In this case the decedent, prior to his death, had conveyed land by security deed. His widow and children thereafter executed another security deed including the original indebtedness. The court ruled that the widow waived her right to a year's support to the extent of the legal title conveyed; although she might be entitled to support from the equity of redemption, if any. The fact that title to the land from which the widow sought a year's support was collaterally involved did not deprive the court of ordinary of jurisdiction.

ADMINISTRATION

The Code provides that under a will no devise or legacy passes title until the executor has given his assent to such devise or legacy.[42] In *Thornton v. Hardin*[43] the testator devised a life estate in land to his widow, with remainder to their children. The widow was also the executrix of the estate. The court held that the widow was not entitled to a cancellation of certain deeds transferring an interest in timber on the land, given by one of the remaindermen, as clouds on her title as executrix. The widow, as executrix, having assented to the devise of the life estate, parted with all power and control over the land.

When an estate is unrepresented, the ordinary is given power to appoint a temporary administrator for the purpose of collecting and taking care of the effects of the decedent.[44] The powers of the temporary administrator are strictly limited. For example, a temporary administrator has no right or authority to maintain an action for the recovery of realty held adversely to the estate of his decedent. *Peyton v. Rylee*[45] re-establishes this rule of law. In the *Peyton* case the plaintiff brought an action seeking the cancellation of a deed on the grounds of fraud and prayed for the recovery of the land described in the deed. Plantiff recovered a verdict and the defendant filed a petition in error. While the petition in error was pending, the plaintiff died and a temporary administrator was appointed and made a party to the suit in her place. The writ of error was dismissed. On a subsequent trial the plaintiff recovered a verdict and the defendant excepted to the judgment refusing a new trial. On appeal, the court reversed the judgment because the temporary administrator had no right or authority

41. 81 Ga. App. 107, 58 S.E.2d 203 (1950).
42. GA. CODE § 113-801 (1933).
43. 205 Ga. 769, 55 S.E.2d 154 (1949).
44. GA. CODE § 113-1207 (1933).
45. 206 Ga. 520, 57 S.E.2d 565 (1950).

to maintain an action for the recovery of land held adversely to the estate he represented.

Sales by executors, if not otherwise provided for by the will, must be made at public sale.[46] In *Bonner v. Bell*[47] the will provided that the executrix should have full power to handle and dispose of the testator's estate without making any bond, and that the executrix be in no manner restricted in the handling of the estate. The executrix sold property at a private sale, whereupon the plaintiffs brought an action seeking to have the transactions declared void. The Supreme Court held that this provision in the will did not authorize the executrix to sell property of the estate at a private sale.

An interesting case from the standpoint of practice and pleading is that of *Evans v. Citizens & Southern Nat. Bank*.[48] In this case the plaintiffs filed a caveat in the court of ordinary of Coffee County to compel the executor of decedent's estate to account for the sale of certain stock. While this caveat was pending in the court of ordinary, and without dismissing the action, the plaintiffs filed a suit in the superior court seeking the cancellation of the sale of the stock. In the suit filed in the superior court the executor was designated a trustee. The superior court sustained demurrers to the petition and this judgment was affirmed on appeal. The filing of the caveat in the court of ordinary constituted an election of remedies and the plaintiffs were barred from subsequently filing a suit for cancellation of the sale while the caveat was still pending.

Among the cases dealing with the administration of estates, *Hamrick v. Hamrick*[49] is the most important case decided within the past year. The Code provides that equity has concurrent jurisdiction with the court of ordinary over the settlement of accounts of administrators.[50] This provision has produced a conflict in the Georgia cases dealing with the settlement of accounts. One line of decisions indicated that, irrespective of the existence of adequate remedies at law in the court of ordinary, a court of equity could assume jurisdiction of an action involving the settlement of accounts of administrators. The other line of decisions held that equity would not interfere with the administration of estates unless some party in interest could show that there was an immediate danger of loss or injury to him. The Supreme Court, in an opinion by Chief Justice Duckworth, reviews the cases dealing with this problem. From a reading of the opinion, it is evident that in the future equity will not interfere with the administration of estates unless it can affirmatively be shown that an adequate remedy does not exist in the court of ordinary and that there is a manifest danger of loss or destruction of assets. Since the courts of ordinary have constitutional jurisdiction over the administration of estates,[51] equity will not assume jurisdiction over the settlement of accounts of administrators unless the remedies available in the courts of ordinary are inadequate for the prevention of loss or wrong.

46. GA. CODE ANN. § 37-607 (Supp. 1947).
47. 206 Ga. 98, 55 S.E.2d 612 (1949).
48. 206 Ga. 441, 57 S.E.2d 541 (1950).
49. 206 Ga. 564, 58 S.E.2d 145 (1950).
50. GA. CODE § 113-2203 (1933).
51. GA. CONST. Art VI, § 6, ¶ 1, GA. CODE ANN. § 2-4101 (1948 Rev.).

CONCLUSION

A review of the cases dealing with wills and the administration of estates shows that the basic law of wills is well-established. The primary cause of litigation is the result of the use of language and phrases which are not clear and free from ambiguities. Very few cases necessitate litigation over the basic principles established for the disposition of property by testamentary instruments. In most cases, the court is faced with the problem of determining the intention of the testator. It is suggested that much of the litigation revolving around wills and administration of estates could be avoided if more care and planning were used in the drafting of wills.