TRUSTS, WILLS, AND ADMINISTRATION OF ESTATES

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Two recent events affecting trusts, wills, and administration of estates are of interest to every Georgia lawyer. The first is the publication in the fall of 1965 of a new, three-volume, edition of *Redfearn, Wills and Administration of Estates in Georgia.*[1] This work, first published in 1923, has been widely used by lawyers, judges, and trust men. A revised edition, which appeared in 1938, has been regularly supplemented down to the present time, but the many developments since that date have made necessary a completely new edition.

The other event was the passage of an act[2] designed to remove the lingering doubts as to the constitutionality of the 1958 act[3] reducing from three to two the number of witnesses required for a will in Georgia. The 1964 act states that it was passed "as remedial legislation in the public interest to avoid any conceivable controversy" as to the validity of wills executed in compliance with the 1958 act. The effect of the new act is to assure that only two witnesses shall be required (1) for wills and codicils of persons dying after the effective date of the 1964 act, and (2) for wills and codicils executed or republished after March 25, 1958, even though the testator may have died prior to the effective date of the 1964 act.

A case challenging the constitutionality of the 1958 act was in the courts at the time the 1964 act was passed. In this case,[4] involving a 1963 will which had only two witnesses, it was claimed that the 1958 act violated the constitutional prohibition against an act's embracing more than one subject-matter.[5] Though the act did amend many different sections in Title 113 of the GA. CODE, the supreme court upheld it on the ground that the word "subject-matter," as used in the Constitution, has a broad meaning which would include anything germane to the subject-matter of wills and administration of estates.

PROBLEMS OF CONSTRUCTION

The cases raising serious questions of construction involved testamentary trusts. *Bedgood v. Thomas*[6] tacitly recognized the fact that the trust situa-

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1. REDFEARN, WILLS & ADMINISTRATION OF ESTATES IN GEORGIA (3d ed., 1965).
2. GA. LAWS, 1964, Ex. Sess., p. 16.
3. GA. LAWS, 1958, p. 657.
4. Crews v. Cook, 220 Ga. 479, 139 S.E.2d 490 (1964).
5. GA. CONST., art. III, §7, para. 8 (1945); GA. CODE ANN. §2-1908 (1948 Rev.).
6. 220 Ga. 262, 138 S.E.2d 313 (1964).

tion, with a separation of legal and equitable ownership, is the exceptional form of property ownership and that when the reason for the separation ceases, the separation itself ceases. The will provided that the trust should terminate on the beneficiary's reaching her majority. When that time arrived, she had become incompetent. This was held to be no justification for continuing the trust beyond the time set by the settlor. Instead, the trust fund should be turned over to the guardian of the incompetent. Guardianship law adequately provides for the handling of the property of incompetents.

The will in *Simpson v. Anderson*[7] left substantial property to the testator's personal attorney "to be distributed by him to or among child welfare organizations such as . . . [Charity *A* and Charity *B*]," and expressly provided that his judgment should be final. The attorney predeceased the testator and at the latter's death, when the will was probated, the testator's heirs claimed that the trust had failed. In construing the will, the court held that the trust remained valid. There was simply a vacancy in the trusteeship. The bequest created a mandatory power, and there was no evidence that the testator intended that power to be personal to the named trustee. A new trustee was appointed and directed to submit to the court for approval a list of the charities selected by him.

The Rule Against Perpetuities struck down substantial bequests in *Burton v. Hicks*.[8] The will left property to be held in trust for twenty-five years "and then divided" one-third to *A*, one-third to *B*, and 1/3 to *C* if *C* is then living, otherwise over. The will contained no residuary clause. *A* filed a bill against the administrator c.t.a., claiming (1) that the provision violates the Rule Against Perpetuities, and (2) that the trust is therefore executed, putting legal title in the beneficiaries. The court held that *C*'s claims were totally inconsistent; obviously, if a limitation is too remote, the result is not that the one whose interest is void for remoteness shall take legal title free of trust. The court was eminently correct on this point, but it went on to hold, without explanation, that under the authority of *Fuller v. Fuller*[9] the entire clause referred to was in violation of the Rule Against Perpetuities.

The Rule Against Perpetuities is a rule against remoteness of vesting in interest. Surely the interests of *A*, *B* and *C* vested at the testator's death; only the time at which they might possess and control the property was postponed. No condition whatever was attached to their *right* to the property interest, except with reference to *C*'s interest, and even there the condition seems to be a divesting one rather than one which is precedent to a vesting

7. 220 Ga. 155, 137 S.E.2d 638 (1964).
8. 220 Ga. 29, 136 S.E.2d 759 (1964), noted 1 GA. S. B. J. 361 (1965)
9. 217 Ga. 316, 122 S.E.2d 234 (1961).

in interest. The only interest which is too remote is the executory devise to those who were named to take if *C* failed to survive the twenty-five year period. Striking down that executory interest would only convert *C*'s interest from a defeasible one to an indefeasible one (as *A*'s and *B*'s were all along).

The only line of reasoning leading to the result reached by the court would seem to lie in the so-called "divide and pay over" rule, a rule of construction which is generally ignored if not affirmatively discredited today.[10] This rule says that "where the only words of gift are found in the direction to divide or pay at a future time the gift is future, not immediate; contingent, not vested."[11] The court did not mention and it is hoped did not intend to rely upon (and make a part of the law of Georgia) this discredited rule.

CONTRACTS TO WILL

Some logical difficulties necessarily arise when one attempts to contract away his testamentary powers. More than the usual number of cases involving these difficulties reached the appellate courts during this survey period. In *Simpson v. Dodge*,[12] the children of the testator's first wife (his step-children) were excluded from their mother's will, which left everything to the testator. To avoid a contest by these step-children, they and their step-father entered into a contract in which the latter agreed to make a will leaving all his property, including that received under the wife's will, to the step-children. The children in turn agreed not to contest the will of their mother. This contract was executed in the sense that the step-father duly executed a will complying with the terms of the contract, and the children refrained from caveating their mother's will. Later the step-father remarried and subsequently died without having made another will. The step-children offered his will for probate. The supreme court affirmed denial of probate on the ground that GA. CODE section 113-408 (1933) expressly provides that "in all cases" marriage of a testator subsequent to the making of a will in which no provision is made in contemplation of such marriage shall be a revocation of the will.

It seems that this should have disposed of the case, but the court did not stop there. It went on to say that the contract simply did not protect the step-children in the eventuality which occurred and that the revocation was by operation of law, a knowledge of which law is imputed to all the parties as of the time of the making of the contract. This additional holding bars any claim against the promisor's estate. The real contractual understanding must have been that the step-father's obligation was to make an *effective*

10. See LEACH & LOGAN, CASES ON FUTURE INTERESTS & ESTATE PLANNING 323-24 (1961).
11. Matter of Crane, 164 N.Y. 71, 58 N.E. 47 (1900).
12. 220 Ga. 705, 141 S.E.2d 532 (1965).

testamentary disposition of his property pursuant to the terms of the contract, not merely to execute a will which was valid at the time of execution. The decision seems to bar the step-children from any of the forms of equitable relief customarily open to the innocent party after a contract to will is breached.

It is because such contracts, if effectuated, vary the laws of descent and distribution without formal compliance with the statute of wills that a heavy burden is imposed on the one relying upon such a contract. Whether the claimant successfully carried that burden was the issue in several cases. In *Ray v. Sears*,[13] a niece sued the administrator of her uncle's estate for specific performance of an alleged oral contract under which the uncle agreed, in return for the niece's living with and caring for him, to make a will leaving his entire estate to her. The trial court charged that the burden was on the niece to "prove her case" beyond a reasonable doubt and to prove performance of the contract on her part beyond a reasonable doubt. The jury found against the niece and she appealed. The decision was reversed on the ground that the charge imposed too onerous a burden in requiring her to "prove her case" (presumably every element of it) beyond a reasonable doubt. The factum of such an oral contract must be proved beyond a reasonable doubt and, while there are cases inferring that performance of such contract must also be so proved, in none of them was it required that every element of the case be so proved. Even these cases were questioned by the court, which went on to hold that proof of performance need be by only a preponderance of the evidence and that a plaintiff's proof of substantial compliance with such a contract is sufficient.

Two cases were decided against the claimants primarily because they failed to carry the burden of proving the factum of the contracts beyond a reasonable doubt. In one of them, *Hudson v. Hampton*,[14] the court stressed the fact that this burden is as onerous as that imposed on the state in a criminal case. In the other, *Matthews v. McCorkle*,[15] the claimant failed because the evidence established that what motivated the rendering of services to decedent could have been either a natural sense of duty, love, and affection or an expectation of payment.

Probate Problems

Two cases involved rather unusual questions of probate—one of admittance to probate and the other of revocation of probate. In *Brown v. Bryant*,[16] the will offered for probate was attacked on the ground of lack

13. 220 Ga. 521, 140 S.E.2d 194 (1965).
14. 220 Ga. 165, 137 S.E.2d 644 (1964).
15. 111 Ga. App. 310, 141 S.E.2d 597 (1965).
16. 220 Ga. 80, 137 S.E.2d 36 (1964).

of testamentary capacity and the exercise of undue influence. Two of the witnesses to the will testified unequivocally in favor of the requisite testamentary capacaity while the third witness testified to the contrary. The testimony of the two was held ample to support the verdict upholding the will. The issue of undue influence was held to have been correctly taken from the jury because mere evidence of an opportunity for the exercise of undue influence is no evidence whatever of undue influence.

Cunningham v. Cozart[17] was an action to set aside a judgment admitting a will to probate in solemn form. A subsequently executed will was introduced and received in evidence on the testimony of one of the witnesses to the probated will that he and others did witness the subsequent will. The holding was that, since that witness' testimony would have been sufficient to authorize probate of the subsequent will in common form, it is sufficient to authorize admission of the will in evidence in an action to set aside probate of a prior will in solemn form. With this second will thus in evidence, testimony of the propounder of the earlier, probated will that he knew of the existence of the later will at the time that he offered the earlier one for probate was sufficient to demand a directed verdict setting aside the probate of the earlier will. Whether the later will itself is entitled to probate in solemn form must be determined when it is offered for probate.

YEAR'S SUPPORT

While the right of a widow and minor children to a year's support out of the estate of their deceased husband and father is "a favorite of the law" and its ends "are not to be encumbered with technicalities,"[18] this right must end at the point where it clashes with other rights of equal or greater dignity. The cases which go to the appellate courts turn ultimately on whether that point has been reached.

A judgment creditor of a decedent is obviously an interested party and therefore entitled to be heard in the year's support proceeding, but what about a judgment creditor of an adult son, which son will take by intestacy a part of the estate of the decedent unless the entire estate is awarded to the widow? In *Dukes v. Cairo Banking Co.*,[19] such a judgment creditor sued to enjoin a widow and her sons (all adult) from proceeding with the widow's application that the entire estate be set apart to her. The petition alleged that the proceeding was a fraudulent scheme of the widow and sons to render insolvent the son who was plaintiff's judgment debtor, that the entire estate of decedent was about to be awarded to the widow alone, that it was grossly excessive as a year's support award, and that plaintiff had no

17. 109 Ga. App. 816, 137 S.E.2d 559 (1964).
18. Wade v. Thompson, 97 Ga. App. 675, 677, 104 S.E.2d 250, 252 (1958).
19. 220 Ga. 507, 149 S.E.2d 182 (1965).

adequate remedy at law. These allegations were, on demurrer, held sufficient to state a cause of action. Since the gist of the petition was a request that consummation of a fraudulent scheme be prevented, equity had jurisdiction and was not usurping that of the court of ordinary because a judgment here would still leave the widow free to apply to the court of ordinary for a reasonable year's support. There was no adequate remedy at law because the creditor of an heir is not one who may object in the year's support proceeding.[20] Another basis on which equity could assert jurisdiction is that under GA. CODE section 113-903 (1933) an undivided one-fifth interest in the unencumbered land and a one-fifth interest in the equity in the encumbered land of the decedent vested in the son by operation of law at decedent's death. Equity may enjoin a fraudulent transfer of that interest and, for present purposes, it is immaterial that that interest may be divested by a valid year's support award of the entire estate to the widow.

Two cases show how an award of year's support may leave a creditor of the decedent in a much more precarious position than he had anticipated. These cases also show the importance of the creditor's following every phase of administration. In *Bank of Waynesboro v. Graham*,[21] a judgment creditor of decedent petitioned to set aside a year's support award. His petition was filed at the same term of court, but after the return of the appraisers had been approved and made the judgment of the court. He claimed that the widow, as executrix under her deceased husband's will, was a fiduciary with respect to his creditors, that he reposed confidence in her as such, and that for that reason he did not bother to determine whether citation was running and, in fact, did not discover it until after judgment. The creditor was unsuccessful in re-opening the matter. Title to the property vested in the widow when the appraisers' return was filed and made the judgment of the court. That the return was not in fact recorded does not affect the validity of the year's support title. Recording is a mere ministerial duty of the ordinary.

The court recognized that allegations of fraud coupled with a fiduciary relationship may be sufficient to justify setting aside a judgment, but pointed out that in all cases where this has been done there was, in addition to a fiduciary relationship, a promise relied upon by the promisee to his detriment. In this case the widow had promised nothing.

The creditor in *Wayne County Bd. of Comm'rs v. Reddish*[22] similarly overslept its rights. Decedent in this case had been sheriff of the defendant county and at the time of his death the county was indebted to him for salary in the amount of $4,250. The widow and minor children petitioned

20. See GA. CODE §113-1002 (1933).
21. 110 Ga. App. 426, 138 S.E.2d 693 (1964).
22. 220 Ga. 262, 138 S.E.2d 375 (1964).

for year's support, the appraisers set aside this claim and other personalty, citation duly issued and was published, no objections were filed, and the return was duly recorded. The claim against the county was not paid; so the widow filed suit on the judgment against the county. By way of defense the county asserted that decedent was at the time of his death indebted to the county in an amount greater than that owed by the county to him. Summary judgment was ordered against the county and affirmed by the supreme court. When the year's-support return was made the judgment of the court, title to the account against the county vested in the widow and minor children. The claim of the county cannot be set off because a set-off must be between the same parties and in their own right.[23] The right of the widow and children to year's support is an independent right. If the decedent was in fact indebted to the county at the time of his death, that fact should have been asserted, in the year's support proceeding, as an objection to the amount set apart.

Several cases are worthy of note because they throw light on the questions of who has capacity to caveat the application for year's support and who can successfully interpose a claim after the award has been made. In *Sanders v. Fulton County*,[24] caveats were filed by the county tax commissioner and by the county itself, alleging that decedent was indebted to the state and the county for taxes, that the appraisers' award was excessive, and that any award should be made subject to the payment of such taxes. The court held that both the county and the county tax commissioner are "concerned" in the administration proceedings within the meaning of GA. CODE section 113-1005 (1933), which describes those with standing to caveat the appraisers' return, but that only one of them should file the caveat Three judges dissented on the ground that, in their opinion, neither the county nor its tax commissioner qualified as a "creditor" or as a person "concerned" with the administration. The majority emphasized that its holding did not reach the question of priorities; whatever is lawfully set aside will still be superior to taxes.

In *Williams v. Atlanta Fed. Sav. & Loan Ass'n*,[25] appeared a situation in which federal law ousted the state court of jurisdiction over the subject matter of year's support. An award had been made to the widow of her deceased husband's equity in encumbered property. Pursuant to the terms of the instrument of incumbrance, a power of sale was exercised. The portion of the sale price which represented the equity was levied upon to satisfy a federal tax lien. The petition for a declaratory judgment that the year's-support award had priority over the tax claim was dismissed because of

23. GA. CODE §20-1303 (1933).
24. 111 Ga. App. 434, 142 S.E.2d 294 (1965).
25. 110 Ga. App. 388, 138 S.E.2d 613 (1964).

the express provision of the federal statute that all property taken or detained under the federal revenue laws shall be subject only to the orders of the federal courts having jurisdiction thereof.[26]

While the law permits separate awards to the widow and to the minor children, this form of award must be applied for on behalf of each. In *Collins v. Collins*,[27] the widow had applied on behalf of herself "and no minor children." A caveat was filed on behalf of a minor child of decedent by a previous marriage, the caveator praying that the appraisers' award of the entire estate to the widow be disallowed and that an award be entered on behalf of the child. The ordinary awarded each an undivided one half. This was reversed with directions. While the caveat of the child could not serve as his application, an award of the entire estate to the widow with knowledge of the existence of a minor child would likewise be erroneous. Apparently the point is that any award must go through the procedure spelled out by the Code to assure that all interested parties will be afforded an opportunity to be heard.

26. 28 U. S. C. §2463 (1964).
27. 110 Ga. App. 569, 139 S.E.2d 459 (1964).