NOTES

ADMINISTRATION OF ESTATES — YEAR'S SUPPORT — RIGHT OF MINOR HEIR TO FORMAL NOTICE

Petitioner instituted this action against decedent's widow to set aside the order of the court of ordinary awarding the entire estate to the widow for a year's support. Petitioner is decedent's grandson, claiming through his deceased father, a son of decedent. Upon appeal to the Supreme Court of Georgia from the superior court's order sustaining a motion to dismiss, the case was transferred to the court of appeals.[1] This court held that a minor heir at the time of decedent's death, who was not given *formal notice* of the proceedings in which decedent's widow was awarded the entire estate for one year's support, could maintain an action to set aside the award upon attaining legal age, notwithstanding the statute of limitations governing such action had run.[2]

A year's support is a necessary expense of administration to be preferred above all other debts.[3] Upon application to the ordinary by a qualified person,[4] and *on notice to the representative of the estate,* if there is one, five appraisers are appointed to set apart an amount of the estate necessary for the support of the widow and children, or children only. Following the return of the appraisers, the ordinary is required *to issue citation and publish notice* as required in the appointment of permanent administrators.[5] Where no objections are filed, and the return is recorded, the record has the binding effect of a judgment.[6]

From this résumé of the statute it is obvious that the present case

1. Outlaw v. Outlaw, 225 Ga. 317, 168 S.E.2d 163 (1969).

2. Outlaw v. Outlaw, 121 Ga. App. 284, 173 S.E.2d 459 (1970).

3. GA. CODE ANN. § 113-1002 (Supp. 1969). There are exceptions, however. An excellent discussion of these is found in 2 REDFEARN, WILLS AND ADMINISTRATION IN GEORGIA § 334 (J. Jackson 3rd ed. 1965).

4. A qualified person is either the widow, guardian of the children, or any other person in the children's behalf. GA. CODE ANN. § 113-1002 (Supp. 1969).

5. GA. CODE ANN. § 113-1212 (Rev. 1959):

> The ordinary shall issue a citation, giving notice of the application to all concerned, in the newspaper in which the county advertisements are usually published, once a week for four weeks, and at the first regular term after the expiration of that time the application shall be heard or regularly continued. . . .

6. Goss v. Greenway, 70 Ga. 130 (1883); Holamon v. Jenkins, 50 Ga. App. 129, 177 S.E. 262 (1934) (and cases cited therein). Such judgment is not subject to collateral attack except for causes apparent on the face of the record. White v. Wright, 211 Ga. 556, 87 S.E.2d 394 (1955); Tabb v. Collier, 68 Ga. 641 (1882). Even recordation is not essential to the validity of a year's support. Bank of Waynesboro v. Graham, 110 Ga. App. 426, 238 S.E.2d 693 (1964).

imposes a requirement of notice not present in the year's support law: the minor must be served personally. Personal service upon minors where their interests are involved is not a new concept at all. However, a study of case law indicates that reasons for personal service have varied from case to case, while the strict letter of the law has ruled in other cases.

In *Brownlee v. Brownlee*[7] plaintiff children sought to set aside a year's support awarded to their mother after the mother first agreed with them on the distribution of the estate, and later, after the award, conveyed the real property by warranty deed. Upholding the award and the conveyances, the court held that the plaintiff's claim of lack of notice was not valid.

> The oral testimony of the plaintiffs clearly showed that a part of them, at least, had actual notice of the application. *But whether the plaintiffs had actual notice or not, the law was complied with as to notice by publication of the citation.* No personal service or notice is required where there is no administration on the estate of the deceased, as was true in this case. (emphasis added).[8]

Brownlee illustrates the spirit of the year's support law. But the spirit of compliance with the notice requirements was dampened in *Byrd v. Byrd.*[9] In *Byrd* a minor son of decedent, through his mother, the first wife of decedent, set aside an award to the second wife. The widow did not make application for herself and minor child, and the resulting award was in her favor only. The court stated:

> By not making a full disclosure, the widow . . . might have misled the ordinary into ordering the appraisers to set apart the property for her sole benefit, thereby excluding the minor. Furthermore, she never discussed the matter with the minor or his mother, neither of whom ever saw the citation published in the . . . [county] newspaper.[10]

Although *Byrd* relies upon the possibility of fraud by the widow, the decision is not a novelty based on this ground. In *DeJarnette v. DeJarnette*[11] the petitioner was the stepson of the widow who, although

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7. 203 Ga. 377, 46 S.E.2d 901 (1948).

8. *Id.* at 381, 46 S.E.2d at 904. In *Smith v. Brogan*, 207 Ga. 642, 63 S.E.2d 647 (1951) the court affirmed a dismissal of the petition of non-residents who had no actual notice. The petitioners admitted that notice was published in accordance with Georgia law, but challenged its constitutionality. The supreme court ruled that the manner of the constitutional attack was improper, and left unanswered the question whether compliance with the notice requirement of the year's support law was sufficient.

9. 223 Ga. 24, 153 S.E.2d 422 (1967).

10. *Id.* at 28, 153 S.E.2d at 425. The first wife and minor child lived outside the state. *Cf.* DeJarnette v. DeJarnette, 176 Ga. 204, 167 S.E. 526 (1932).

11. 176 Ga. 204, 167 S.E. 526 (1932).

included in the petition by the widow, was not included in the award by the appraisers. They acted in good faith upon incorrect legal advice that the inclusion of the minor was not compulsory. The court stated:

> It will be observed that the language of § 4041 [present § 113-1002] is mandatory; for it declares that it *shall* be the duty of the appraisers to set apart and assign "to such widow and children," etc. . . .[12]

Thus where a widow makes application for herself, only, and a minor stepchild files a caveat, the stepchild is entitled to set aside the award. This is the *Byrd* situation. But the minor cannot share in the widow's award, for his action is an independent one. His caveat merely protects his interest until the appraisers set apart a necessary amount for him.[13]

DeJarnette did not rest on its statutory interpretation. It emphatically held that notice should have been given to the minor stepson.

> To arbitrarily discriminate against the child or children, and set apart for the widow alone the entire net proceeds of an insolvent estate, and *give the minor child no notice of such action,* is so unreasonable and contrary to law, as in our opinion, to void such judgment. It may be true that as between a stepmother and stepchild there is no such fiduciary relation . . . as would require the stepmother to notify the child of the action of the appraisers . . . (emphasis added).[14]

The court continues the last sentence of the quote explaining that good faith requires the stepmother to give notice to the minor. Hence, the *equity* of the situation requires that the minor should know what is going on. Only then will he be able to protect his interest.

Protection of the interests of minors is favored public policy, ingrained throughout the law. Wherever the courts have found the situation to warrant the given protection, the basis lay in equity. Now, however, the instant case gives the case law a statute on which to rely.[15] Although the court admits that the year's support procedures were strictly followed,[16] it announces a requirement not found in the year's support laws. In justifying this, the court stated:

> The absence in the laws relating to a year's support of any reference to the laws designed to protect minors in legal proceedings affords no

12. *Id.* at 209, 167 S.E. at 529.

13. *See* Williams v. Tosette, 177 Ga. 528, 170 S.E. 373 (1933); Anderson v. Walker, 114 Ga. 505, 40 S.E. 705 (1901); Collins v. Collins, 110 Ga. App. 569, 139 S.E.2d 459 (1964).

14. 176 Ga. at 209, 167 S.E. at 529.

15. GA. CODE ANN. §§ 81A-104 (d)(3), 117 (c) (Supp. 1970).

16. 121 Ga. App. at 286, 173 S.E.2d at 461.

> support for any contention that these statutes are inapplicable to an application for a year's support.[17]

Thus *Outlaw* accomplishes what should have been explicit in the year's support statute from its inception. This is done by applying the notice requirement of § 4 of the Civil Practice Act[18] to the year's support law. The resulting change in Georgia law and procedure relating to year's support is certainly equitable, and should prevent fraud upon minors whose right to a part of their deceased parent's estate has heretofore been extinguished.[19]

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17. *Id. See* GA. CODE ANN. §§ 81A-104(d)(3), 117(c) (Supp. 1970).

18. GA. CODE ANN. § 81A-104(d)(3) (Supp. 1970):

> If [the suit is] against the minor, [service shall be made by delivering a copy of the summons attached to a copy of the complaint] to such minor, *personally*, and also to his father or his mother or his guardian or his duly-appointed guardian ad litem. (emphasis added).

19. As a result of this case, the application for a year's support now includes a form entitled Sheriff's Entry of Service, on which the county sheriff deposes that he has served personally the minors of the decedent with a copy of the petition.