TRUSTS, WILLS AND ADMINISTRATION OF ESTATES

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LEGISLATION

The 1972 session of the General Assembly enacted an unusually large number of statutes affecting the subject matter of this article. Some of them make rather far-reaching changes in the fundamental law while others are examples of piecemeal legislation, designed to operate remedially, but in a narrowly defined area.

Probably the most important statute of the former type is that one reducing the age of majority from twenty-one to eighteen years.[1] While the caption of this act refers to some specific statutes and code sections to be amended, the body of the act fails to mention one of the important ones, the Georgia Gift to Minors Act.[2] The thrust of the recent act appears in section 10 where the intention of the act is stated to be that of reducing the age of legal majority from twenty-one to eighteen years "for all purposes" and where it is further stated that it is the legislative intention to make this change "in all laws of this state" where the age of majority is stated to be twenty-one.[3] The act does not affect legal instruments or court decrees in existence prior to its effective date in which instruments or decrees there is only a general reference to "the age of majority." All wills of persons still in life and all amendable trusts which may contain this general reference are fit subjects of review.

Another statute effecting a fundamental change in Georgia law amends the rules of inheritance.[4] The statute was probably the reaction to *Waters v. Roberts*,[5] which held that an intestate's cousins, uncles and aunts take in preference to his grandparents. The rules of inheritance

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1. Ga. Laws, 1972, p. 193.

2. The caption of the act lists this act as one of the acts to be amended, but the body of the act does not refer to the Gift to Minors Act at all.

3. *Quaere.* Does the act affect the Rule Against Perpetuities? GA. CODE ANN., § 85-707 (Rev. 1970) refers to lives in being "and 21 years." Nothing is said in it about "majority" or "age of majority." Nevertheless, apart from the presumption against statutory amendment by implication, logic would now make the appropriate period of the Rule Against Perpetuities "lives in being plus eighteen years," because the twenty-one year period contained in the common law rule (of which GA. CODE ANN. § 85-707 (Rev. 1970) is a codification) was the period of legal minority. The legislative intention, as stated in section 10 of the act, was to reduce the age of legal majority from twenty-one to eighteen years "for all purposes."

4. Ga. Laws, 1972, p. 880, *amending* GA. CODE ANN. § 113-903 (Rev. 1971).

5. 116 Ga. App. 620, 158 S.E.2d 428 (1967).

under the new statute place grandparents ahead of uncles and aunts and first cousins. Another drastic change made by this statute is the substitution of the civil law method for the canon law method of determining remote degrees of kinship for inheritance purposes. Under the civil law method the degree of kinship is the sum of the steps in the two lines; *i.e.*, the line running from the intestate to the nearest common ancestor and the line running from the common ancestor to the claimant. Under the canon law method the degree of kinship is the number of steps in the longer of these two lines. Though this new statute would have required a different result in the classic case of *Wetter v. Habersham*,[6] that case will retain its historical and educational value.

At common law, and under prior Georgia law,[7] an heir was without power to renounce what passed to him by intestacy. A legatee or devisee, on the other hand, has always been recognized as having a power of renunciation. This distinction, which finds its validity only in the concepts of feudal tenure, was obliterated by a statute expressly authorizing renunciation by either an heir, a devisee or legatee, an appointee under the exercise of a testamentary power, or a person succeeding to a renounced interest.[8] The renunciation may be in whole or in part, and the renounced interest will pass as if the person renouncing had predeceased the decedent or, in case of a power, had predeceased the donee of the power. This act, which is a verbatim copy of section 2-801 of the Uniform Probate Code, makes it extremely important that the draftsman stress to the testator the importance of a provision disposing of property in the event of a renunciation. The disposition provided for by this statute may, or may not, be the substitute disposition which the testator would prefer.

This new section provides that the renounced interest passes "as if the person renouncing had predeceased the decedent"; that is, a renounced bequest or devise passes as if it were a lapsed bequest or devise. The consequences of a lapse are quite different, however, under the Uniform Probate Code and under Georgia law. Under the uniform act[9] a lapse is prevented only in the situation where the legatee or devisee is a grandparent or lineal descendant of a grandparent and leaves issue surviving the decedent. Under the Georgia statute[10] it is immaterial whether the legatee or devisee is a relative of the testator. Another difference in

6. 60 Ga. 193 (1878).
7. Payton v. Monroe, 110 Ga. 262, 34 S.E. 305 (1899).
8. Ga. Laws, 1972, p. 452, *creating* GA. CODE ANN. § 113-824.
9. UNIFORM PROBATE CODE § 2-605.
10. GA. CODE ANN. § 113-812 (Rev. 1959).

the consequences of a lapse is that the anti-lapse section of the uniform act is expressly made applicable to class gifts while the Georgia statute has been consistently construed as applicable only to bequests and devises to individuals.[11]

As of January 1, 1973 Georgia will join the small but steadily increasing number of states which have in force the Uniform Disposition of Unclaimed Property Act.[12] Of interest to readers of this article is section 7 of the Georgia act, which gives rise to a presumption of abandonment of any intangible personalty and the income thereon held in a fiduciary capacity unless the owner has taken stated action with reference to it within fifteen years after it became payable or distributable.

In 1947 an act was passed in Georgia authorizing administration upon estates of persons who, because of seven years' unexplained absence, are presumed dead.[13] In the same year another act was passed authorizing a conservatorship of the estate of one who has been missing for at least ninety days under circumstances which would lead to a conclusion that he is dead.[14] This latter act authorized the conservator to pay debts and to provide for support of the dependants of the missing person.

Both of these acts are premised upon a presumption that the missing person is dead. Neither of them reached the situation of the person who is missing and is likely to continue missing for an indefinite period but whose absence is, nevertheless, logically consistent with his continuance in life. The estate of such a person needs the same sort of attention as that of a missing person who is presumed dead. His dependants need support. His debts should be paid. This gap in the law was filled by a recent statute.[15] It concerns the estate of a member of the armed forces who, during a state of hostility and a period of one year thereafter, has been reported as missing in action, interned in a neutral country or as having been captured by the enemy. The same sort of full conservatorship as that authorized by the 1947 statutes is authorized here, but if it appears that there is no need for a full conservatorship the recent act authorizes the making of isolated sales, leases or other dealings with particular portions of the estate of the missing person.

No full administration of the estate may be had under any of these conservatorship statutes without actual proof of death or the elapse of

11. *See* 1 D. REDFEARN, WILLS AND ADMINISTRATION OF ESTATES IN GEORGIA, § 156 (3d ed. 1965) and cases there cited.

12. Ga. Laws, 1972, p. 762.

13. Ga. Laws, 1947, p. 1131, GA. CODE ANN. ch. 113-26 (Rev. 1959).

14. Ga. Laws, 1947, p. 1134, GA. CODE ANN. ch. 113-27 (Rev. 1959).

15. Ga. Laws, 1972, p. 202.

a period of seven years' unexplained absence which would give rise to a presumption of death. The statutes, nevertheless, afford some of the flexibility needed in dealing with the affairs of missing persons.

The 1972 session enacted many statutes affecting the day-to-day duties of a fiduciary. By far the most significant of these is the one adopting the "prudent man" rule as the standard of the fiduciary in making investments.[16] There are important limitations on this apparently far-reaching change in Georgia trust law. For example, its application is expressly limited to "executors and trustees"; it seems to have no application to guardians, administrators (*quaere*, administrators *cum testamento annexo*), or executors and trustees acting under instruments made prior to the effective date of the act. Another limitation on the operation of this statute is that the "legal list" statutes remain on the books. Can a fiduciary now make a "prudent investment," outside the "legal list," with the same assurance that he can make one within that list?

Obtaining prompt access to the safety deposit box of a decedent or a legally incompetent person has always been a problem, albeit an understandable one, because of the risk of later accusations of intermeddling. A recent statute goes a long way toward a solution to this problem.[17] It authorizes the financial institution to afford such access to one armed with an order from the court of ordinary and acquits the institution of liability for affording such access.

The matter of a fiduciary's entitlement to compensation for delivery of property in kind underwent a change, but it appears to be only a change in the route, not in the destination. The prior law on the subject began with the premise that administrators and executors would not be entitled to commissions for delivery in kind, but then went on to provide that the ordinary, in his discretion, could allow reasonable compensation for such services.[18] The 1972 statute begins with the premise that commissions "may be allowed" for such services, but there appears to be no substantive change in the law.

In 1971 legislation was passed reducing from one year to six months the period after which the personal representative may safely pay the debts and during which he is immune from suit on such debts and, also, authorizing him to apply for discharge after six months from the date

16. Ga. Laws, 1972, p. 450.

17. Ga. Laws, 1972, p. 437.

18. GA. CODE ANN. § 113-2004 (Rev. 1959). Similar provisions were made applicable, also, to guardians [GA. CODE ANN. § 49-223 (Rev. 1965)] and to trustees [GA. CODE ANN. § 108-432 (Supp. 1971)].

of his qualification.[19] This effort at expediting administration was completed in 1972. Legislation was passed reducing from twelve to six months from date of qualification the period allowed a personal representative to ascertain the condition of the estate, and reducing from six to three months from the date of publication of the last notice to creditors the period within which the creditors may file claims without loss of priority. The same legislation reduced from one year to six months from the date of grant of letters the period after which the personal representative may be called upon for settlement of the estate.[20]

DECISIONS

Contracts to Will

Contracts to will and contracts to assure that a particular state of affairs will exist at the death of one of the contracting parties have inherent in them a logical difficulty which can be resolved only on the theory that such a contract is a surrender of a part of the testamentary powers one would otherwise have. Enforcement of such a contract, which is almost always after the death of one of the contracting parties, requires a careful blending of the law of contracts, the law of wills and the law of trusts.

Tomlinson v. Patrick[21] was an action brought by the surviving party for breach of an alleged oral contract to devise the entire estate in specified ways in return for the surviving party's promise to move into decedent's home and render specified services. The relief sought was either specific performance or damages. The supreme court reversed a judgment for the plaintiff and ordered a new trial, holding that while the evidence showed performance by the plaintiff it did not show the value of the services rendered. Such contracts, the court noted, are generally of two kinds. In one kind the complaining party shows a contract obligating him to go into the home of the other party and render services of such a personal nature that they cannot be equated with money. In the other kind, the services are such as may be readily purchased by employing the one who is to render them. The contract here was of the latter type and, in such case, the value of the services must be established. A new trial was ordered because plaintiff, while he sought the entire estate, failed to prove the value of his services. Justice

19. Ga. Laws, 1971, p. 433, *amending* GA. CODE ANN. §§ 113-1507, -1526 (Rev. 1959) and enacting new sections 113-2310 through 113-2312.

20. Ga. Laws, 1972, p. 455, *amending* GA. CODE ANN. §§ 113-1505, -2201.

21. 228 Ga. 373, 185 S.E.2d 407 (1971).

Felton dissented from the grant of the new trial, reasoning that plaintiff made an election of remedies and therefore should be bound by it; the grant of a new trial will enable him to proceed on quantum meruit, a theory not pleaded or litigated at the trial.

The contract in *Brooks v. Jones*[22] was a property settlement which was made a part of a divorce decree. It obligated the husband to maintain life insurance in specified amounts, payable to the wife or her children. After the divorce the husband remarried and later died, survived by his second wife. The petition of the first wife alleged the contract, that at his death the husband breached it by failing to have in force the insurance mentioned, and that he did, though, have in force other insurance, some payable to his estate and some payable to his second wife. The bill brought by the divorced wife against the executor of the husband's estate sought specific performance of the agreement and an injunction against disposing of or wasting the assets of the estate. Two interesting defenses were set up. The first one was that the action alleged a debt of the estate and was, therefore, premature, having been brought within twelve months of the death of the husband.[23] The other was that the claimant, being a creditor, had an adequate remedy at law; *i.e.*, in the administration proceedings.

In its holding that the action was not premature, the court appears to be saying that some part of the assets of the estate are impressed with a trust in favor of the first wife; otherwise, she would have only a creditor's claim, howsoever meritorious, against the estate, and such a claim would be prematurely asserted if it were filed in less than twelve months.

Execution of Wills

Waldrep v. Goodwin[24] was of only passing interest insofar as it held that no issue of incapacity, undue influence or fraud was raised by such facts as that the testatrix was depressed, said some things that "didn't make sense," and left the entire estate, except for one dollar to her husband, to their only daughter. The more unusual issue had to do with the place of testatrix' signature. It was in the blank space for her name in the attestation clause rather than at the end of the body of the will. This issue was disposed of, in favor of the will, with little more than

22. 227 Ga. 566, 181 S.E.2d 861 (1971).

23. GA. CODE ANN. § 113-1526 (Rev. 1959). This period was reduced to six months subsequent to the operative facts of the instant case. *See* Ga. Laws, 1971, p. 433.

24. 227 Ga. 560, 181 S.E.2d 837 (1971).

citation of an old case[25] in which the testator signed below rather than above the attestation clause. Both cases are correct because, though the statute requires that a will be "signed by the party making the same," there is no mention of where he must sign.[26]

Brown v. Butts[27] involved a duly spoken nuncupative will which was challenged on the ground that before her death the testratrix had signed a written testamentary instrument. The nuncupative will was admitted, the jury having found that the subsequent written instrument, though signed by testatrix, lacked the requisite testamentary intention. It was found to have been intended only as a memorandum of the terms of the nuncupative will rather than as a will itself.

Probate of Wills

Taylor v. Donaldson[28] raised a question of first impression under the Civil Practice Act,[29] namely, whether a superior court may grant a summary judgment in the appeal from the probate of a will in solemn form. Section 56 of the Act[30] specifically authorizes the grant of summary judgment in the case of a "claim," and section 1 of the Act[31] makes the Act applicable to "all suits of a civil nature." After holding that the proceeding involved a "claim" within the meaning of the act the supreme court affirmed the trial court's grant of summary judgment to the propounder of the will on the ground that the affidavits and interrogatories filed by the caveators still failed to raise any litigable issues.

In *Caldwell v. Miles*[32] a testator's sole heir attacked the probate of the will in common form by filing a declaratory judgment action in superior court, alleging that the will was void because it made excessive gifts to charities. The superior court entered a summary judgment in favor of the heir, declaring that the will was void. In reversing this judgment, the supreme court pointed out the obvious principle of law; namely, that, since the court of ordinary has exclusive jurisdiction over the probate of wills, its admission of a will to probate, even in common form, cannot be collaterally attacked without a showing of fraud relating to jurisdiction.

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25. Huff v. Huff, 41 Ga. 696 (1871).
26. GA. CODE ANN. § 113-301 (Rev. 1959).
27. 227 Ga. 591, 182 S.E.2d 99 (1971).
28. 227 Ga. 496, 181 S.E.2d 340 (1971).
29. GA. CODE ANN., tit. 81-A (1966).
30. GA. CODE ANN. § 81A-156 (Rev. 1972).
31. GA. CODE ANN. § 81A-101 (Rev. 1972).
32. 228 Ga. 177, 184 S.E.2d 470 (1971).

Problems of Construction

The decision in *McNeely v. McNeely*[33] forced attention to the power of one to whom property would otherwise pass to renounce that interest. The will had left the residue, consisting of realty and personalty, to the wife and the son in specified portions, some in trust and some outright. The son formally renounced twenty-six percent of his interest in this residue, raising the question of whether the renounced interest goes to the other residuary taker or passes as intestate property. The court held that to the extent that the renounced property was personalty it passed to the other residuary taker (the widow) and to the extent that it was realty it passed as intestate property.

It has previously been established that the legal effect of renunciation of a testamentary gift is the same as that of a lapse and that the lapse of the interest of one of two or more residuary legatees in personal property does not cause the lapsed interest to pass to the next of kin by intestacy but rather causes it to go to the other residuary legatees.[34] On the other hand, a lapsed devise, even if it is a residuary devise, will cause the property to pass by intestacy.[35] Fortuitously, only 3.03 percent of the residue in this case consisted of realty.[36]

The will in *Johnson v. Wishard*[37] left property to four named daughters of the testatrix for so long as any of them remained unmarried and, at the death or remarriage of all of them, the property was directed to be divided among testatrix' named six children (the four daughters being among these six) "and if any of them dead, their lineal descends [sic] to stand in their stead." After the death of the second of the two daughters, neither of whom ever married, the disposition of their shares became material. It was held that each of the six took absolute interests in the remainder at the death of the testatrix and that the quoted phrase indicated only that the testatrix viewed the devise as a class gift, notwithstanding the fact that the takers were identified by name, and that the phrase was used only to avoid the effect of Georgia's minority view that the anti-lapse statute[38] does not apply to class gifts.[39]

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33. 228 Ga. 418, 186 S.E.2d 105 (1971).

34. Snellings v. Downer, 193 Ga. 340, 18 S.E.2d 531 (1942).

35. GA. CODE ANN. § 113-813 (Rev. 1959).

36. The opportunities for using a renunciation as a device for post mortem estate planning are greatly expanded by the 1972 act which gives heirs, as well as devisees, the power to renounce. *See* note 8 *supra*.

37. 227 Ga. 355, 180 S.E.2d 738 (1971).

38. GA. CODE ANN. § 113-812 (Rev. 1959).

39. One can only wonder if a testatrix (or her draftsman) who did not know how to spell "descendants" was really that conversant with the law of class gifts and the applicability or the

The will in *Ham v. Watkins*[40] devised realty to the widow for life, remainder to the children for life, remainder over in fee to children of children. After the death of the widow the executor conveyed a portion of the land to one of the daughters in fee, the executor's deed purporting to be in execution of a family settlement. A decree of court subsequently registering a fee simple title to this portion in the daughter was reversed. The will clearly left the daughter only a life estate, and, while a family settlement was referred to, there was no evidence of its terms nor was there any showing that the ultimate remaindermen under the will were parties to it. The executor's deed thus could not enlarge the life estate into a fee.

Hicks v. Rushin[41] held that a declaratory judgment action seeking construction of a will is not a contest of the will within the meaning of an *in terrorem* clause, but the holding on this point is of questionable value as authority because the clause would appear to have been ineffective, in any event, since it did not provide for a gift over in the event of contest.[42]

In *Walker v. Hall*[43] it was held that illegitimate children do not have standing to sue for the wrongful death of their father. The sequel to that case was one in which the father of the deceased then brought such an action. This action met a similar fate, there being undisputed evidence of a ceremonial marriage of decedent to a named person. That marriage is presumed to have continued in the absence of evidence to the contrary; so any cause of action for wrongful death would be in that named person, as widow of the decedent,[44] and not in decedent's father.

Trusts

While the implied trust[45] has for centuries been recognized as a valuable device for undoing wrongs which are otherwise difficult to deal with, there must nevertheless be a clear showing of a wrong before resort can be had to this device. Such was the problem in *Beckwith v. Peterson*.[46] There the plaintiff attempted to have a trust impressed upon a part of

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inapplicability of an anti-lapse statute to such gifts.

40. 227 Ga. 454, 181 S.E.2d 490 (1971).

41. 228 Ga. 320, 185 S.E.2d 390 (1971).

42. *See* GA. CODE ANN. § 113-820 (Rev. 1959).

43. 122 Ga. App. 11, 176 S.E.2d 246 (1970).

44. GA. CODE ANN. § 105-1302 (Rev. 1968).

45. *See* GA. CODE ANN. § 108-106 (Rev. 1959) for a broad statement of the circumstances in which a trust will be implied.

46. 227 Ga. 403, 181 S.E.2d 51 (1971).

the proceeds of a life insurance policy in which defendant was named as the sole beneficiary, on the ground that the insured had orally instructed the beneficiary to divide the proceeds among herself and two other persons, one of whom was the plaintiff, and that defendant had failed to perform the promise to make that division. Dismissal of the complaint was affirmed on the grounds that, first, the allegation is of an oral trust, while the law requires a writing for the creation of an express trust,[47] and, second, there is no concrete allegation of any of the wrongs cited in Ga. Code Ann. § 108-106 (Rev. 1959), which would give rise to an implied trust.

Some fundamental issues of the law of charitable trusts were dealt with by the supreme court during this survey period. The issue in *Hines v. Village of St. Joseph, Inc.*[48] was whether the will creating the trust showed a general charitable intent, which would leave the heirs of the testatrix no standing to claim a resulting trust because of failure of the specified trust purpose, or a specific charitable intent, which, if it became impossible of accomplishment, would give them standing to make such a claim. The will, executed in 1947, left the residue of the estate "to the trustees of St. Joseph Orphanage at Washington, Georgia," for admittedly charitable purposes. At that time, as well as at the time of execution of a codicil in 1958, there was in Washington, Georgia an incorporated orphanage named "The St. Joseph's Male Orphanage." In 1962, upon renewal of its charter, its name was changed to "St. Joseph's Home, Inc." In 1968 the testatrix died, and in 1969 the corporate name was again changed, this time to "The Village of St. Joseph, Inc.," and its situs moved to Fulton County. In granting a motion to strike the answer of the defendant heirs, the trial court held merely that the legacy had not lapsed and, therefore, the heirs had no standing to claim on the theory of a resulting trust. The supreme court found no ambiguity which would justify admitting extrinsic evidence bearing on the scope of testatrix' charitable intent, emphasizing, however, that it was not reaching the issue of whether the time had come at which *cy pres* was called for. Three of the justices dissented, finding "a classic example of a latent ambiguity" which, in their opinion, opened the way for admission of extrinsic evidence bearing on the intent of the testatrix. In the words of the dissenting opinion, "the heirs were entitled to their day in court."

Whether the plaintiffs had standing to sue was the issue in *Miller v. Alderhold*[49] and, while the court unanimously agreed that they did not,

47. GA. CODE ANN. § 108-105 (Rev. 1959).
48. 227 Ga. 431, 181 S.E.2d 54 (1971).
49. 228 Ga. 65, 184 S.E.2d 172 (1971).

it was sharply divided as to why this was so. The action was one in which a group of students challenged acts of the board of trustees of Atlanta Baptist College, as breaches of trusts, and sought injunctive relief against further such alleged breaches. The principal opinion based its finding of lack of standing to sue on the unconvincing grounds that Atlanta Baptist College was not a "charitable trust" but was, instead, a "private corporation," and that the relation between the plaintiff students and the college was "essentially contractual in character." An excellent concurring opinion, disagreeing completely with the statement that there was no charitable trust, discussed the point thoroughly with a view toward avoiding the possible consequences of the principal opinion upon the law of charitable trusts in Georgia. To the concurring justices, it was apparent that Atlanta Baptist College, Inc. was a charitable trust. To them the real issue was whether these plaintiffs had standing to sue. These justices felt that they lacked such standing, not because the college was not a charitable trust, but because the General Assembly, in 1952,[50] expressly provided that "in all cases in which the rights of beneficiaries under a charitable trust shall be involved," the Attorney General, or the local district attorney, shall represent the interests of the beneficiaries and of the state as *parens patriae*.

Guardian and Ward

In *Union Camp Corp. v. Youmans*[51] an order of the superior court, in 1953, granted a guardian authority to execute a sixty-six year lease with an option to purchase after the first twenty years of the lease. Fifteen years after execution of the lease, the ward, having reached her majority and the guardianship having ended, challenged the validity of the lease. The order authorizing the sale contained recitals of findings by the court that the nature of the property, its potential income-producing capacity and the welfare of the ward made this form of sale and re-investment not only advisable but necessary to avoid depletion of the ward's estate. The only basis of the attack appears to have been that the lease was made, in 1953, just a few months after legislation was passed authorizing leases by guardians for terms which will extend beyond the period of the guardianship.[52]

50. GA. CODE ANN. § 108-212 (Rev. 1959), *as amended*, Ga. Laws, 1962, p. 527.
51. 227 Ga. 687, 182 S.E.2d 468 (1971).
52. Ga. Laws, 1953, p. 44, GA. CODE ANN. §§ 108-439 *et seq.* (Rev. 1959).