TRUSTS, WILLS, AND ADMINISTRATION OF ESTATES

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Two things are plain to one examining the developments in this area of the law during the recent survey period. One is the fact that the General Assembly is becoming increasingly active in this area, a fact due in large measure to the work of the Legislative Committee of the Fiduciary Law Section of the State Bar of Georgia. The other is the fact that a larger proportion of the cases reaching the appellate courts involve substantive issues of trust law and a correspondingly smaller proportion involve issues of the law of wills and administration of estates.

LEGISLATION

Legislation was passed relaxing some of the unnecessarily harsh requirements relating to fiduciary bonds by authorizing either the elimination of the requirement of the bond or a reduction in its amount. Where a will which names as executor a natural person who at the time of his qualification is a non-resident also relieves him from giving bond, the ordinary is now given the discretion as to whether a bond shall be required.[1] In recognition of the fact that real property, unlike personal property, is not very susceptible to concealment, dissipation or loss, the value of real property coming into the hands of an administrator, executor, trustee or guardian is no longer to be considered in determining the amount of the fiduciary's bond.[2] The amount of the bond required of an executor, administrator, trustee or guardian, if that bond is secured by a licensed commercial surety doing business in Georgia, is now equal to rather than double the value of the estate coming into his hands.[3]

Age of Majority

The 1972 session of the General Assembly reduced the age of legal major-

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1. Ga. Laws, 1973, p. 481, *amending* GA. CODE ANN. §113-1206 (Supp. 1972). There is a potentially troublesome conflict between the title and the body of this act. The title contains the language ". . . where the will specifically recognizes that the nominated executor or co-executor is a nonresident of the State . . . ," while the body provides: "Where the will nominates a natural person as executor or co-executor *who at the time of qualifying is a nonresident of the State* . . ." (Emphasis added.)

2. Ga. Laws, 1973, p. 1191, *creating* GA. CODE ANN. §113-1244.

3. Ga. Laws, 1973, p. 826, amending by implication such sections as GA. CODE ANN. §§113-1217 (bond of administrator), 113-1221 (bond of temporary administrator), and 108-304, -305 (bond of trustee).

ity from twenty-one to eighteen years, stating a legislative intention to make this change "for all purposes" and "in all the laws of this state."[4] This Age of Majority Act listed the Gifts to Minors Act as one of the acts to be amended, but the body of the former act did not refer to the latter one. The 1973 session amended the Age of Majority Act to exclude from its terms the Georgia Gifts to Minors Act, saying, in effect, that is was never the intention of the 1972 act to amend the Gifts to Minors Act, such words as "for all purposes" and "in all the laws of this state" to the contrary notwithstanding.[5] To further "clarify existing law" the 1973 act specifies that guardianships of the person or property of a minor (a matter not mentioned in the 1972 act) shall terminate upon the ward's reaching the age of eighteen. It is likely that additional legislative clarifications of the subject of the age of majority are forthcoming.

While the ordinary of the county of the domicile of a minor having no guardian has always had the power to appoint one, there has been no specific legislative authorization for the appointment of a successor guardian in the event of the death of a guardian. Indeed, the law has been that upon the death of a guardian the guardianship is immediately terminated, save only for the purpose of getting an accounting from the estate of the deceased guardian.[7] Two 1973 acts expressly give the ordinary discretionary authority to appoint a successor guardian in the event of the death of a guardian.[8]

The ordinary who is serving as custodian of the money of a minor or insane person who has no guardian is now specifically authorized to pay from that fund the funeral and burial expenses in case of the death of the ward.[9]

Trusts

Moore v. First National Bank & Trust Co. of Macon[10] held that in the case of a trust for the settlor for life, remainder as she should appoint by deed or will, the settlor was the sole beneficiary and that she could revoke the trust even though it was expressly stated to be irrevocable. The 1973 session of the General Assembly effectively overruled this decision and commanded just the opposite result. The new law provides that no trust which is expressly or impliedly made irrevocable may be revoked or termi-

4. Ga. Laws, 1972, p. 193, *creating* GA. CODE ANN. §74-104.1 (Supp. 1972).

5. Ga. Laws, 1973, p. 590.

6. GA. CODE ANN. §49-105 (Rev. 1965).

7. Harrison v. Tonge, 67 Ga. App. 54, 19 S.E.2d 535 (1942).

8. Ga. Laws, 1973, p. 609, *amending* GA. CODE ANN. §49-313 (Rev. 1965), which deals with guardianship of minors; and Ga. Laws, 1973, p. 610, *amending* GA. CODE ANN. §49-604 (Supp. 1972), which deals with guardianship of insane persons or persons otherwise mentally incapable of managing their affairs.

9. Ga. Laws, 1973, p. 829, *amending* GA. CODE ANN. §49-706 (Rev. 1965).

10. 218 Ga. 798, 130 S.E.2d 718 (1963).

nated while the trust remains an executory one.[11] The language of the act leaves no doubt that the General Assembly had the *Moore* case in mind.

The theory of incorporation by reference has long been used to reduce the size of a particular document and to avoid needless repetition of the same paragraphs in a large number of different instruments. The broad powers needed by executors and trustees may now be given to them without extended enumeration of these powers in the will or trust instrument. A 1973 act lists thirty such powers, many if not all of which should be in the arsenal of most fiduciaries, and authorizes the incorporation by reference of any or all of these powers into any will or trust instrument executed after the effective date of this act.[12] The practice of incorporation by reference is easy to justify in theory, but it is a practice that must be carefully examined each time it is employed. This act itself, by implication, alerts the draftsman to several potential dangers. For example, section 2 of the act points out that the powers can be incorporated only in the form in which they existed at the time of the execution of the incorporating will or, in the case of an inter vivos trust instrument, at the time of its signing by the first settlor, and section 3 warns that no power or authority conferred by this act shall be exercised by the fiduciary in such a way as to deprive the estate or trust of a tax advantage that is otherwise available.

The prudent investor rule, enacted in Georgia in 1972 for the guidance of executors and trustees,[13] was amended in 1973 to provide expressly that the words "property" and "investment", as used in that rule, shall include life insurance, endowment and annuity contracts.[14] While there may have been sufficient justification for this legislation, one wonders if the legislature is initiating the compilation of a "legal list" for "prudent" investments. If so, we will then have two legal lists—one for "prudent" investors and the present legal list for other (imprudent?) investors.

A potential conflict of interest situation was, by legislation, rendered acceptable provided certain safeguards are present. An act was passed allowing a corporation to compensate an executor or trustee for managerial, executive, or advisory services rendered by him to the corporation even though the estate he is administering has an interest in the corporation.[15] The safeguards are that the services be rendered pursuant to a contract between the fiduciary and the corporation and that the fiduciary not receive extra compensation from the estate or trust being administered by him for such executive or advisory services.

The statute dealing with annual returns of fiduciaries[16] was rewritten in

11. Ga. Laws, 1973, p. 844, *amending* GA. CODE ANN. §108-111.1 (Rev. 1959).
12. Ga. Laws, 1973, p. 846.
13. Ga. Laws, 1972, p. 450, *creating* GA. CODE ANN. §113-1531 (Supp. 1972).
14. Ga. Laws, 1973, p. 718.
15. Ga. Laws, 1973, p. 547.
16. GA. CODE ANN. §113-1415 (Supp. 1972).

its entirety to provide that all fiduciaries now required to make annual returns may file with the return either the original vouchers showing the correctness of items or an affidavit that the original vouchers have been compared to each item on the return and that the return is true.[17] The section, which was left clumsily worded after the 1972 amendment,[18] is rewritten in its entirety. The only material change in substance, though, appears to be that the ordinary is empowered only to require that the original vouchers be produced for good cause shown, while the 1972 act itself ordered their production.

The matter of a trustee's power to resign has not previously been dealt with in any detail by the Georgia statutes. The practice has been to follow the established rule to the effect that, once qualified, a trustee can be relieved of his duties only by death, full accomplishment of the purposes of the trust or acceptance of his resignation by a court of equity. A 1973 act now sets out a detailed list of acceptable reasons for a trustee's resignation and the procedure to be followed in relieving and replacing him.[19] The reasons listed as acceptable are: (1) The trustee's inability to continue because of age, illness or infirmity; (2) The fact that greater burdens have devolved upon the trustee than were originally contemplated; (3) Serious disagreement between the trustee and one or more of the beneficiaries; (4) The resignation will result in substantial financial benefit to the trust; and (5) These will be co-trustees continuing in office with no contemplated adversity to the trust. The application to resign must be served upon all present and future income beneficiaries and upon all vested remainder beneficiaries or, in the discretion of the court, upon a majority of each of these groups of beneficiaries.

Another section of this act authorizes an even speedier method of resignation. It provides that upon the written request of all the adult beneficiaries and of a majority of the vested remainder beneficiaries, and upon a showing that a suitable successor trustee is willing to accept the trust, the court shall accept the tendered resignation.

DECISIONS

Property Passing at Death Other Than by Will

A duly executed and delivered instrument, in the form of a warranty deed but containing a recital that it "is a deed of gift effective upon the death of the [grantor]", withstood an attack that it was testamentary. The court upheld the instrument as a deed, construing it to convey the fee to the named grantee, subject to a reserved life estate.[20] It distinguished

17. Ga. Laws, 1973, p. 830.
18. Ga. Laws, 1972, p. 558.
19. Ga. Laws, 1973, p. 939, *creating* GA. CODE ANN. §§108-319 to -324.
20. Black v. Poole, 230 Ga. 129, 196 S.E.2d 20 (1973).

Gardner v. Thames[21] on its facts, noting that in *Gardner* the grantor's intention was stated in terms of a future vesting (" . . . title shall not vest in the grantee until the grantor's death . . ."), thus showing an intention to transfer the property interest at death and not *in praesenti*.

The devolution of some property, in *Payton v. Johnson*,[22] turned upon whether the widow of one who died in 1941 acquired a child's part in his land. No administration was ever had on the owner's estate, but the widow and the two children of the owner by a previous marriage continued to live on and to work the land until the widow died intestate in 1950. Apparently, no issue of ownership arose until 1970, when one of the two children died. The court held that these facts were sufficient to show that the widow elected to claim a child's part, the election being shown by her remaining in possession long after her right to claim dower was barred. An undivided one-third interest was thus still vested in her at the time of her death in 1950, and this interest passed to her heirs who now hold, as she did, as tenant in common with the estates of the two children.

The contract to bequeath or devise property in a specified way obviously has a testamentary flavor, but it is still a contract, not a will. It is still subject to the same risks as are other contracts attempted to be enforced against the estate of a decedent. It is still subject to strict requirements of proof, and it is still subordinate to certain other claims against the estate. The contract involved in *Liberty National Bank & Trust Co. v. Diamond* had been in the courts for several years.[23] In this final appearance the supreme court reiterated the rule that one seeking to enforce a contract to will must offer proof of it that is so certain, definite, clear, and precise that neither party could reasonably misunderstand it. The court found that the jury had such proof before it and was authorized, therefore, in impressing a trust upon that portion of the decedent's estate which was the subject matter of the contract.

Even though the contract alleged in *Park v. Minton*[24] met these requirements of proof, it still fell victim to the rules of priority of claims against an estate. The land which was the subject matter of the contract was awarded to the widow and minor children as year's support. The top priortiy assigned to a claim for year's support[25] thus made specific enforcement of this contract impossible and relegated the contract claimant to a claim for damages, if there turned out to be any assets in the estate after the award of the year's support.

Another type of contract which, despite its testamentary flavor, is still

21. 223 Ga. 378, 154 S.E.2d 926 (1967).

22. 228 Ga. 810, 188 S.E.2d 504 (1972).

23. 229 Ga. 677, 194 S.E.2d 91 (1972). For the earlier history of this litigation, *see* Rehberg, *Trusts, Wills, and Administration of Estates*, 23 MERCER L. REV. 311, 316 (1972).

24. 229 Ga. 765, 194 S.E.2d 465 (1972).

25. GA. CODE ANN. §§113-1002, -1508 (Rev. 1959).

only a contract is the life insurance policy. In *National Life and Accident Insurance Co. v. Thornton*[26] a wife, who was beneficiary of a policy on the life of her husband, killed him and was convicted of voluntary manslaughter. The administrator of the husband's estate sued the insurer, arguing that, since the beneficiary was barred from receiving the proceeds because of her crime, they became a part of the estate of the insured. The court held that, though rights under the policy were an asset belonging to the insured during his life, at the moment of his death his interest ceased. The right to the proceeds at that moment was fixed by the contract and by the statute which bars the beneficiary from collecting on a policy on the life of one whom the beneficiary unlawfully killed. That statute[27] names the heirs of the insured, other than the killer, as the persons entitled to these proceeds. Since these heirs took as purchasers, the proceeds were never part of the estate of the insured and his administrator had no claim to them.

Execution and Probate of Wills

For more than one hundred years it had been the law of Georgia that, since what the witnesses to a will attest is the signature of the testator, a witness could not sign before the testator. The theory was that logically one cannot presently attest, i.e., bear witness to, a future act.[28] *Waldrep v. Godwin*[29] overruled this line of authority and held that the order in which the testator and the witnesses sign is immaterial where, as were the facts in this case, the testator and the witnesses all signed in the presence of each other and as a part of a single transaction. The overruled line of authority was found to have been based upon a reading of English cases arising under the English Wills Act of 1837,[30] while the Georgia statute being applied was based upon, and was almost a verbatim copy of, the English Statute of Frauds of 1677.[31] The language of the former, but not of the latter, English statute appears to require that the signature of the testator be on the document at the time of attestation.

When a carbon copy of a will is offered for probate, it is ordinarily assumed that it is the absence of the original which raises the presumption that the will was revoked.[32] *Payne v. Payne*[33] holds, however, that if the carbon copy of the instrument states that it was executed in duplicate "lest

26. 125 Ga. App. 589, 188 S.E.2d 435 (1972).
27. GA. CODE ANN. §56-2506 (Rev. 1971).
28. Duffie v. Corridon, 40 Ga. 122 (1869) was the first case in an unbroken line of authority so holding.
29. 230 Ga. 1, 195 S.E.2d 432 (1973).
30. 7 Will. IV and 1 Vict., c. 26, sec. 9 (1837).
31. 29 Car. II, c. 3, sec. 5 (1677).
32. *See* GA. CODE ANN. §113-611 (Rev. 1959).
33. 229 Ga. 822, 194 S.E.2d 458 (1972).

the original become misplaced" and that either copy might be probated, then the mere fact that it is a carbon copy which is offered does not raise any presumption of revocation. Having thus eliminated that presumption, the court rightly stated that parol declarations of the testator that he had revoked it were not admissible. Had the presumption remained, then declarations of the testator would have been admissible to support or rebut the presumption, whether or not the declarations were accompanied by proof of any act of revocation.[34] It is the ease with which the court eliminated the presumption that is troublesome. The presumption of revocation is a presumption of something that happened *after* the will was duly executed. Here, however, words written prior to execution of the will were held effective to rebut or neutralize a presumption that something happened thereafter.

Express Trusts and Guardianship

The principle that a trust shall never fail for want of a trustee[35] was applied in an unusual situation in *Wallace v. Graves*.[36] There an alimony decree contained an order that, pursuant to an agreement which was incorporated into the decree, the former husband establish a trust for the benefit of his minor children. The order contemplated the parties' agreeing upon a trustee within a specified time. When the former husband refused so to agree, he was held in contempt and, applying the principle referred to, the court named the trustee and ordered the trust into being.

McElrath v. Citizens & Southern National Bank[37] is a good illustration of the flexibility of the trust as a device for accomplishment of family planning objectives. In this case a grandfather's will set up separate trusts for each of his grandchildren, specifically providing that "the Trustee shall use a sufficient amount of the income to provide for the grandchild's support, maintenance and education," with power to encroach upon the corpus for accomplishment of these purposes. Before the settlor's death his son, the father of the trust beneficiaries, divorced their mother and, under the divorce decree, was ordered to support the children. After the settlor's death the son took the position that the language of the will obligated the trustee to furnish support and education for the trust beneficiaries (his children) and that, to the extent such trust income was sufficient, his statutory duty to support and educate them was satisfied. The supreme court agreed. While there is the statutory duty on a father to support and educate his minor children,[38] that duty is reduced by a 1962 statute to the extent that income from an estate or trust is available for the same pur-

34. Saliba v. Saliba, 202 Ga. 791, 44 S.E.2d 744 (1947).
35. GA. CODE ANN. §108-302 (Rev. 1959).
36. 229 Ga. 82, 189 S.E.2d 447 (1972).
37. 229 Ga. 20, 189 S.E.2d 49 (1972).
38. GA. CODE ANN. §74-105 (Rev. 1964).

pose.[39] The extent to which it is available would depend, of course, upon the extent of the trustee's obligation to use the income for support and education of the beneficiaries. In the instant case it was held to be a mandatory duty; so to the extent that trust income was sufficient to support and educate his children, his duty to do so did not exist.

A clearer case of conflict of interest on the part of a fiduciary could not be imagined than that involved in *Dowdy v. Jordan*;[40] yet the breach of trust almost went unpunished. In this case an octogenarian transferred her funds into a savings account with her nephew, as joint tenant with right of survivorship, but for the purpose of enabling him to get funds for her as she needed them. Six months later she was adjudged mentally incompetent, and he was appointed, on his own application, as guardian of her person and property. After her death the nephew withdrew the $13,652.15 from the joint and survivor account and had it paid to himself as surviving joint tenant. It turned out that during the guardianship he had expended on her behalf a total of $13,650 from other asset of the ward and only $4,000 from the joint account. The court of appeals, in reversing both the court of ordinary and the superior court on this point, held the nephew liable for the full amount withdrawn from the joint account, with interest from the date of withdrawal.

Ray v. Beneventi[41] recognized the potential for self-dealing on the part of a fiduciary and dealt with it by removing the fiduciary from the situation in which there was a conflict of interest. The executrix in this case was charged with wrongfully causing stock belonging to the estate to be transferred to herself personally, with wrongfully holding in her name individually title to realty which rightfully belonged to the estate, and with wrongfully delaying the setting up of a testamentary trust in favor of the complainant. These were admittedly charges of conflict of interest, but the executrix contended that equity did not have jurisdiction because these were all matters which could be resolved in an accounting in the court of ordinary. The supreme court affirmed the judgment disqualifying the executrix from representing the estate in this litigation, disqualifying her attorney from representing her in her capacity as executrix, and appointing a guardian ad litem to represent the estate. The court further held that, in view of the issues of trust law and of will construction which were raised, complete relief would be possible only in equity.

Two traditionally recognized examples of resulting trusts were before the supreme court during this survey period. One of these was a purchase money resulting trust and the other was a trust which resulted because trust property remained after complete accomplishment of the express

39. Ga. Laws, 1962, p. 623, GA. CODE ANN. §23-2311 (Rev. 1971).
40. 128 Ga. App. 200, 196 S.E.2d 160 (1973).
41. 229 Ga. 209, 190 S.E.2d 514 (1972).

trust purpose. In *Brock v. Gerlach*[42] the jury found that one person paid one-fifth the purchase price of land and was to pay the remaining four-fifths in four annual installments, but that title to the land was taken in the name of that person's agent. After the agent's death, which was shortly after this conveyance, the agent's wife paid the remaining four installments and then asserted ownership of the land. The court held that a trust was implied from the payment of a part of the purchase price if, as was found here, the understanding was that the beneficial interest would be in the one paying that part. The trust is implied notwithstanding the fact that only a part of the price was actually paid by the claimant, although he intended to pay it all, and notwithstanding the fact that the agreement was unenforceable under the statute of frauds. The subject matter of the implied trust is the one-fifth interest representing the one-fifth of the purchase price which the claimant paid.

The resulting trust in *Kiser v. Georgia Power Co.*[43] had its genesis in a voluntary separation agreement under the terms of which land was conveyed by the husband to the wife "in settlement for claims for support for herself and her minor children." Three weeks later the parties resumed cohabitation, and the husband thereafter lived with and supported the family until a divorce several years later. The divorce decree contained a lump sum payment to the wife and a child support order for the minor children. After the children reached majority the father asserted title to the land through resulting trust. The court ruled in his favor. The wife's beneficial interest terminated when she resumed cohabitation, and that of the minor children terminated when they reached their majority. The declared use having failed, a trust resulted in favor of the grantor.

In *Sheats v. Johnson*[44] a testamentary trust failed and the property passed to the heirs of the testator because of a violation of the rule against perpetuities. The residuary trust was for the primary purpose of support and education of the testatrix' daughter and her children and was to terminate and the assets to be distributed "among my grandchildren who are then in life" when the youngest grandchild shall have completed his or her education. Since the two children of testatrix might have other children, and since some of these other children might complete their education at a time more than twenty-one years after lives in being at testatrix' death, all the members of the class of takers obviously might not be capable of ascertainment within the period of the rule.

The doctrine of charitable immunity from tort liability is still recognized in Georgia, but its applicability is determined on a case-by-case basis. The test of whether assets of the charity are subject to execution of a judgment is the same as that which determines whether those assets are subject to

42. 229 Ga. 295, 191 S.E.2d 38 (1972).
43. 126 Ga. App. 551, 191 S.E.2d 311 (1972).
44. 229 Ga. 150, 189 S.E.2d 856 (1972).

taxation. Applying this test in a tort action arising out of alleged injuries to a tenant of residential premises owned by a charitable, nonprofit religious corporation, the court of appeals refused to find immunity.[45] In renting this property for residential purposes, the church was competing with other property owners in a common business activity. The fact that all the income had been and would continue to be used for valid charitable purposes is immaterial. It is the use of the property, not the use of the income from it, that determines charitable exemption from tort liability and from ad valorem taxation.

Removal of a Fiduciary

When the administrator of an estate or the trustee of a trust in Georgia moves his residence to another state, there is, at least, cause for concern that the interests of those represented by that fiduciary may be prejudiced. For that reason there may be a need to remove that fiduciary and to qualify another one who is closer to the subject matter of the estate or trust. The procedure for removal of a nonresident fiduciary, though, turns out to be less than clear.

The problem of removal of a nonresident co-administrator is compounded by the fact that we have two overlapping, and partially conflicting, statutes on the subject, one enacted in 1857[46] and the other in 1947,[47] neither of which had previously been construed. The 1857 act provides that in all cases where there are two or more executors or administrators and one of them "shall remove without the limits of this state" service of any writ or process may be made upon the remaining resident co-fiduciary. The 1947 act provides that an executor, administrator or guardian who removes from this state shall be deemed to have appointed the ordinary of the county in which he had qualified to accept service "of all process or proceedings for accounting or removal of any kind or character against them." *West v. Forehand*[48] held that the statute providing for service on the ordinary was more recently enacted than the one allowing service on the co-administrator and, also, it more specifically encompassed removal of administrators; hence, it impliedly modified the earlier statute.

King v. King[49] was an action on behalf of the beneficiaries of an inter vivos trust of land to remove the trustee, who admittedly had changed her residence to another state. The court, one justice dissenting, affirmed the direction of a verdict removing the trustee, citing and relying entirely upon a code section which provides that where a sole trustee has removed "beyond the jurisdiction" of the courts of Georgia the superior court shall have

45. Mack v. Big Bethel A.M.E. Church, Inc., 125 Ga. App. 713, 188 S.E.2d 915 (1972).
46. GA. CODE ANN. §113-2105 (Rev. 1959).
47. GA. CODE ANN. §§113-1203.1 to -1203.4 (Rev. 1959).
48. 128 Ga. App. 124, 195 S.E.2d 777 (1973).
49. 228 Ga. 818, 188 S.E.2d 502 (1972).

power to appoint a new trustee in place of the nonresident one.[50] The dissent disagreed that the trustee, who admittedly had moved her residence to New York, had "removed beyond the jurisdiction of the courts of Georgia." The Georgia courts retained jurisdiction, he felt, both because of a 1953 statute which makes foreign trustees of Georgia land subject to the jurisdiction of Georgia courts[51] and because of Georgia's "long arm" statute which gives Georgia courts personal jurisdiction over a nonresident if he "owns, uses or possesses any real property situated within this State."[52]

These two cases[53] suggest the need for a comprehensive review and reconciliation of the Georgia statutes on service of process upon, venue of cases against, and personal jurisdiction over, foreign trustees of property in Georgia.

50. GA. CODE ANN. §108-315 (Rev. 1959).
51. GA. CODE ANN. ch. 108-7 (Rev. 1959).
52. GA. CODE ANN. §24-113.1(d) (Rev. 1971).
53. West v. Forehand, *supra* note 48, and King v. King, *supra* note 49.