Wills, Trusts and Administration of Estates

By James C. Rehberg*

Both the General Assembly and the courts were active during the past year in the area of fiduciary law. The marked increase in legislation, at least as compared to that of the immediately preceding session, may be a reflection of the nationwide attention being given to revision of the probate codes.[1] The work of the General Assembly and of the courts will be discussed in that order.

I. LEGISLATION

A. *Year's Support*

The year's support statute was amended for the obvious purpose of filling some gaps in the prior law and thus adding to the stability of titles to land awarded as year's support.[2] Two new code sections were added.[3] The first requires that an application for year's support contain such detailed information as the given name and maiden name of the widow, the surname of the deceased husband, the full name, birth date and age of minor children and, if the application is on behalf of an unborn child, the surname of the deceased father and "unborn child" in lieu of a given name of such child. The second of the new sections requires that the probate judge, within thirty days after an award of realty as year's support, issue a certificate containing, in addition to the information just mentioned, a legal description of the real property awarded. This certificate must be filed with the clerk of the superior court who must then record it and index it in the deed records in the names of the decedent, as grantor, and of the widow, minor children and unborn children, as grantees. Lastly, the act specifically exempts awards of realty as year's support from the tax on transfers of realty.[4]

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1. Twelve states had adopted the Uniform Probate Code in substantial part as of the end of the year 1975. *See* 11 REAL PROPERTY PROBATE & TRUST J. 99 (Spring 1976). A thorough review of all Georgia legislation on fiduciary law is being made by the Fiduciary Law Study Committee of the Fiduciary Law Section of the State Bar of Georgia.

2. Ga. Laws, 1976, p. 1059.

3. GA. CODE §§ 133-1002.1 and 113-1006.1. (The present GA. CODE ANN. § 113-1002.1 appears to have been erroneously numbered. It should be § 113-1002A. *See* Ga. Laws, 1947, p. 866.)

4. *See* GA. CODE ANN. § 92-803 (1974).

B. *Proof of Will by Affidavit*

An additional procedure for the taking of the testimony of a witness to a will was authorized.[5] Under it a witness who resides outside the county in which the probate proceeding is being conducted may file an affidavit a form of which is included in the act. The act is not to be construed as affecting any present statutes allowing the taking of such testimony by interrogatories or depositions. It is merely cumulative.

C. *Administration Upon Estates of Missing Persons*

The seven-years unexplained absence Statute raises a presumption of death upon the elapse of that period of time and thus allows for administration upon the estate of the missing person.[6] The statute was amended in 1976 to allow for administration upon the estate of a person who has been missing from his usual place of abode for at least one year if his absence has been under circumstances which make it appear that he is dead.[7] The "seven-year" statute remains in force. It is still effectuated by the statutory presumption of death. Under the "one-year" amendment to the statute no presumption of death ever arises; on the contrary, under it the probate judge must find that there is a preponderance of evidence of death.

D. *Survivorship Rights in Concurrently Owned Property*

Drastic changes in the substantive law of concurrent ownership of property were made by amendments to the Financial Institutions Code[8] and to the Property title[9] of the Georgia Code. The sections of the Financial Institutions Code dealing with joint deposits,[10] tentative trusts[11] and joint accounts[12] were repealed and their substance re-enacted as a part of a new Chapter 41A-38, entitled "Multiple Party Accounts."[13] This new chapter is substantially the same as Part 1 of Article VI (Non-Probate Transfers) of the UNIFORM PROBATE CODE. It is interesting and, perhaps, significant to note that in adopting this part of the UNIFORM PROBATE CODE the General Assembly omitted the section dealing with the rights of creditors as against the assets which are the subject-matter of these non-probate transfers.[14] This omitted section exposes to the claims of creditors, if other assets

5. Ga. Laws, 1976, p. 640, *codified as* GA. CODE § 113-620.1.
6. GA. CODE ANN. § 113-2601 *et seq.* (1975).
7. Ga. Laws, 1976, p. 1008.
8. GA. CODE ANN. § 41A-101 *et seq.* (1974).
9. GA. CODE ANN. § 85-101 *et seq.* (1969).
10. GA. CODE ANN. § 81A-1606 (1978).
11. GA. CODE ANN. § 41A-1604 (1974).
12. GA. CODE ANN. § 41A-3521 (1974).
13. Ga. Laws, 1976, p. 1388.
14. U.P.C. § 6-107.

of the estate are insufficient, the proportion of the account that the decedent owned beneficially immediately before his death. The amount owned beneficially immediately before death is defined as the net contribution of the decedent to the sum on deposit.[15] It was apparently felt that other provisions of Georgia law afford adequate protection to creditors.

The manner in which the changes in the law on concurrent ownership of realty were brought about is somewhat strange. First, the act just discussed[16] contained a section adding as a prefix the words "Unless otherwise specifically provided by statute" to GA. CODE § 85-1001 (which defines a tenancy in common) and to section 85-1002 (which abolished the common law joint tenancy in Georgia). Then, one day after the date of approval of that act, there was approved another act which completely rewrote and drastically changed the two sections.[17] The later act expressly authorizes what appears to be the common law joint tenancy in realty, which had been forbidden in Georgia since 1777.[18] The effect of the newly enacted Code sections 85-1001 and 85-1002 is to continue, in all cases of multiple ownership except joint tenancies in corporate shares and securities, the statutory presumption in favor of the tenancy in common, but to authorize the creation, by any deed or will taking effect after January 1, 1977, of the estate of joint tenancy with right of survivorship. To create such an estate the instrument must expressly refer to the takers as "joint tenants," "joint tenants and not as tenants in common," or "joint tenants with survivorship," or the takers must be described as taking "jointly with survivorship". The estate or interest of any of the joint tenants may be severed by a lifetime transfer of it, the effect of such severance being to make his transferee a tenant in common with the other tenant (or tenants).

E. Guardian and Ward

Several sections of the Guardian and Ward title of the code were amended to eliminate some obvious examples of sex discrimination.[19] The amendment provides that either parent, not just the father, is the natural guardian,[20] that widowers, as well as widows, may appoint testamentary guardians for their children,[21] and that married men, as well as married women, may serve as guardian of the person or property of a minor child.[22]

15. GA. CODE ANN. § 41A-380(a), which is an almost exact copy of U.P.C. § 6-103.
16. Ga. Laws, 1976, p. 1388.
17. Ga. Laws, 1976, p. 1438.
18. *See* Ga. Laws, 1828, Cobb, p. 545.
19. Ga. Laws, 1976, p. 688.
20. GA. CODE ANN. § 49-102 (1974).
21. GA. CODE ANN. § 49-104 (1974).
22. GA. CODE ANN. § 49-108 (1974).

F. Corporate Trustees

Within recent years there has been a concerted effort to obtain legislation and administrative rulings which would grant trust powers to federally chartered savings and loan associations. One of the principal arguments of the proponents of this move is that it would open up a badly neglected segment of the trust market, namely the family with an estate ranging from $50,000 to $400,000.[23] The move has reached Georgia and is getting results. The 1976 session of the General Assembly enacted a law which extends to banks, building and loan associations and credit unions all the rights, privileges, powers and responsibilities heretofore extended to trust companies, provided that prior written approval shall have been obtained from the Department of Banking and Finance.[24] The act further provides that this approval must have been based upon detailed findings and careful consideration of the factors enumerated in the statutes relating to the initial chartering of trust companies.[25]

G. Trust Investments

In 1972 the General Assembly enacted the "prudent investor" rule for executors and trustees acting under instruments executed after the effective date of that act.[26] Apparently it was feared that this rule might authorize a trustee of a marital deduction trust to acquire or hold unproductive or non-income-producing property and that this authorization might disqualify that property from the deduction.[27] A 1976 act clarified existing law on this point by expressly authorizing the income beneficiary to direct the trustee to convert such property into productive or income-producing property.[28]

II. JUDICIAL DECISIONS

A. Protection of Parties Interested in the Estate

The statutory safeguards designed to protect all who have interests in an estate may sometimes appear rather technical, but they are essential if we are to assure both an orderly and a conclusive administration. One of these statutory safeguards is that which identifies the necessary and proper parties in the proceeding. In *Phillips v. Gladney*[29] an adult brother of an

23. *See* Roessner, *City Federal S&L Applies for Trust Powers*, 115 TRUSTS AND ESTATES 310 (May, 1976).

24. Ga. Laws, 1976, p. 274, *amending* GA. CODE ANN. § 41A-1401 (1974).

25. GA. CODE ANN. § 41A-1805 (1974).

26. Ga. Laws, 1972, p. 450, GA. CODE ANN. § 113-1531 (1975).

27. *See* LOWNDES, KRAMER & MCCORD, FEDERAL ESTATE AND GIFT TAXES (3d ed.) at 957.

28. Ga. Laws, 1976, p. 1524, *amending* GA. CODE ANN. § 113-1531 (1975).

29. 234 Ga. 399, 216 S.E.2d 297 (1975).

intestate had been qualified as administrator even though his petition for appointment showed on its face that the sole heirs of the intestate were two named minor children. Upon a proper challenge on behalf of the minor children the judgment granting letters of administration to the brother was held to be totally void. These children, acting through a guardian, had the sole right to select the administrator.[30]

In *Davenport v. Idlett*[31] persons claiming to be illegitimate children of a decedent sued the administrator of his estate to enforce an alleged contract of the decedent to devise certain property to them. The administrator defaulted but then later moved to vacate the default judgment on the ground that the true heirs of the decedent were necessary parties to the proceeding and that, since they were not made parties, the judgment was void. Denial of the motion to vacate the judgment was affirmed. While the heirs were proper parties, they were not indispensible because they were represented by the administrator. Even though title to the decedent's realty vested in these heirs at the moment of his death, both it and the personalty in the estate remained subject to administration for the benefit of heirs and creditors.

Although necessary and proper parties have been established by the pleadings, there will still sometimes remain the issue of the adequacy of the notice given them. This issue was clarified considerably in two recent cases, one a probate proceeding and the other a year's support proceeding.

In *Oakley v. Anderson*[32] the petition for probate of a will in solemn form alleged that the heirs at law of the testator were unknown to the petitioner. These unknown heirs were subsequently served by publication, and the will was admitted to probate in solemn form. Two of the heirs, who were residents of Georgia, later sued to revoke probate on the ground that, at least as to them, notice only by publication was constitutionally inadequate. A summary judgment in their favor was affirmed. The facts failed, in the opinion of the court, to show that the propounder had exercised reasonable diligence in trying to ascertain heirs. He could not rely solely upon his personal knowledge. Since the evidence showed that the complaining heirs were life-time residents of Georgia, that they had been in frequent contact with the testatrix, and that they were known to the neighbors, medical personnel and other relatives, the propounder's efforts to ascertain heirs fell short of that reasonable diligence which would justify notice only by publication.

The other case[33] was concerned with the adequacy of notice in proceedings for year's support. Since it involved an estate on which there had been no administration of any kind, the only notice given was the statutory

30. GA. CODE ANN. § 113-1202 (1975).
31. 234 Ga. 864, 218 S.E.2d 577 (1975).
32. 235 Ga. 607, 221 S.E.2d 31 (1975).
33. Allan v. Allan, 236 Ga. 199, 223 S.E.2d 445 (1976).

notice given by publication of the appraisers' return in Cobb County, the county of the decedent's residence.[34] A part of the awarded property was the decedent's undivided one-half interest in some realty in Fulton County (the other one-half belonging to his ex-wife as tenant-in-common). It then developed that there was an unprobated will in which the decedent had purported to devise his one-half interest in the Fulton County realty to his ex-wife, this one-half interest being the same interest which had been awarded to his widow, his second wife, in the year's support proceedings in Cobb County. The court concluded that the statutory notice by publication of the appraisers' return in Cobb County was constitutionally inadequate to affect a "legally protected interest" in realty in Fulton County where the owner of such interest resided, and where there had been appointed no legal representative to protect the interested parties. Of particular interest in this case was the holding that the interest of a devisee in an unprobated will is such a "legally protected interest." In an obvious attempt to lessen the impact of its decision, the court stressed that notice by mail to the ex-wife, whose address was known, would have been adequate and that, in any event, the ruling in this case would have only prospective operation and therefore, will not jeopardize any previously adjudicated year's support proceedings in which the only notice was by publication.

B. Contracts to Will

Nothing threatens to distort the dispositive scheme of a decedent as does an alleged contract to will. There is initially the difficult issue of whether there was, in fact, such a contract. Assuming adequate proof of the contract, though, there then remains the question of the extent to which giving effect to it will distort the dispositive scheme. The problem is further complicated by the fact that such a contract is seldom in writing.

Martin v. Turner[35] was an action for specific performance of such an alleged oral contract. For about a year before his death the decedent whose estate was involved had lived with and had been taken care of by his foster son and the plaintiff, the son's wife. The plaintiff's allegations were that all this was in execution of a contract in which the decedent had promised her that she would receive at his death the proceeds of a certain note and the deed to some realty given to secure it. The appeal from a judgment for the plaintiff raised several interesting issues as to the admissibility of evidence to prove such a contract. Testimony as to statements made by the decedent to third persons, indicating that he had made such an agreement with the plaintiff, was held admissible on the theory that these statements were declarations against the decedent's interest.[36] Testimony

34. GA. CODE ANN. § 113-1005 (1975).
35. 235 Ga. 35, 218 S.E.2d 789 (1975).
36. GA. CODE ANN. § 38-309 (1974).

that the decedent had told other persons that his making a codicil in favor of the plaintiff was a mistake and that he, for that reason, had torn up the codicil was held inadmissible on the ground that such evidence was self-serving. Lastly, a copy of the codicil was held admissible because, even though it had been revoked, it was still a writing specifying the decedent's obligations under the alleged contract and was therefore some evidence of a contract.

Another type of nebulous contract claim against an estate, exemplified in *Freeman v. Phillips*,[37] is that in which a near relative who took care of decedent prior to death alleges that other members of the family promised that he would be paid for such services. Under Georgia law the rendition of services to another gives rise to an implied promise to pay for them in all cases except where they were rendered by a near relative.[38] Still, the court in the *Freeman* case held that an express contract for the payment of these services need not be shown. It is sufficient to create a claim if the surrounding circumstances show that the parties contemplated payment. The holding, on a motion for summary judgment, was that a cause of action was stated against the estate of the deceased mother, even though she was not alleged to have been a party to the contract. This aspect of the case was not mentioned. The court and the parties apparently treated the entire proceeding, not as an attempt to enforce a contract claim against an estate, but as one for final distribution of an estate among members of a group all of whom had interests in it.

C. *Probate of Wills*

While Georgia law does not specify a time limit following the death of a testator within which his will must be offered for probate, it does make it the duty of the person in possession of the will to present it to the probate judge.[39] The judge is expressly authorized to cite for contempt one who fails to perform this duty. *Thomas v. Harper*[40] illustrated some of the other possible consequences of a breach of this duty. There the testatrix left her husband as her sole surviving heir. Her will left her entire estate to him, but only for his life, with remainder over to her cousin. The husband and the cousin agreed informally that they could handle the estate without administration; so they put the will back into a trunk, and there it stayed for the next five and a half years. Then it was offered for probate. When the cousin discovered that the husband had sold the land, representing to his purchaser that he as sole heir was sole owner, the cousin sued to eject the purchaser. Judgment was in favor of the latter. The cousin's willing participation in the withholding of the will from probate made it possible

37. 135 Ga. App. 466, 218 S.E.2d 144 (1975).
38. GA. CODE ANN. § 3-107 (1975).
39. GA. CODE ANN. § 113-610 (1975).
40. 235 Ga. 92, 218 S.E.2d 832 (1975).

for the husband to mislead the bona fide purchaser. That wilful participation estopped the cousin from setting up, as against the bona fide purchase, his claim to remainder interest devised to him in the will. The evidence showed that the purchaser had made bona fide inquiries as to whether there was a will and had purchased only after those inquiries uncovered nothing to suggest that there was one.

D. Joint and Survivor Accounts and Gifts to Minors

The obligation of a personal representative to take control of the estate assets as soon as possible after his qualification is universally recognized, but sometimes it is realistically impossible for him to determine whether a particular asset is an estate asset. The mere existence of a joint and survivor account, or of a safety deposit box rented in the names of the decedent and another, invites controversy at the death of the joint owner who was the source of the asset. These complications, and more, were present in *Fotiatis v. Clemmons.*[41] The decedent had rented a safety deposit box in the names of "J.L. Camp, Estelle Clemmons (on death)". Estelle had both keys to the box and was always with Camp, who was her uncle, when the box was opened. After Camp's death the bank refused Estelle access to the box which, it was then discovered, contained a $30,000 savings certificate, payable to "J.L. Camp or Estelle Clemmons", and $36,000 in cash. In Estelle's trover action which followed the court held, relying upon the law of gifts, that Estelle was the sole owner of the contents of the box and that the administrator of her uncle's estate had no interest in it. The Court relied upon prior holdings to the effect that the delivery requirement of a gift is not as strictly enforced between members of the same household as it is between other persons. The court was also impressed by the fact that the uncle had given Estelle the keys, which could be regarded under the law of gifts as symbolic delivery of the contents of the box, and that he had had the certificate made out to him "or" her.

Let us look at the facts of this case in the context of the new statute.[42] The mere rental of the box in the names of "J.L. Camp, Estelle Clemmons (on death)" would not, under the old law or the new one, have any bearing on the issue of ownership of the contents of the box. It follows that it was and, under the new statute, would still be necessary to use the gift theory to get title to the cash into the survivor. The savings certificate poses a different problem. The survivor could claim it either as the donee under the gift theory or as third party beneficiary of the contract evidenced by the savings certificate.

The Georgia Gifts to Minors Act[43] is a useful device for *inter vivos* estate planning. The exact nature of the rights created under the act and the

41. 134 Ga. App. 487, 214 S.E.2d 736 (1975).
42. Ga. Laws, 1976, p. 1388.
43. GA. CODE ANN. ch. 48-3 (1974).

appropriate procedure for enforcing those rights had not heretofore been spelled out as clearly as was done in *Honeycutt v. Edwards*.[44] There the beneficiary, shortly after reaching her majority, sued the custodian of her account for damages in the State Court of Muscogee County, alleging that the custodian had closed out the account and had converted the assets to his own use. Dismissal of the action on the ground that the State Court lacked jurisdiction of the subject matter was affirmed. The Gifts to Minors Act specifically provides that the custodian shall not be required to account for his acts unless the minor should petition the probate court for an accounting not later than one year after the minor reaches the age of twenty-one.[45] This section of the act was construed as giving the probate court exclusive jurisdiction of accountings under the act. The contention was then made that this action was not one for an accounting but was, instead, one for conversion of property, and that conversion was within the jurisdiction of the State Court. This contention also failed because, apart from the Gifts to Minors Act, the beneficiary has no title which would support an action for conversion. Under the general law of gifts no title would have passed to the beneficiary because of a total lack of delivery of the subject matter of the gift. Since the right of the beneficiary is derived solely from the Gifts to Minors Act, the exclusive remedy afforded by that act must be pursued. That remedy can be pursued only in the probate court.

E. Will Construction Problems

The flexibility of a power of sale is the very attribute which makes it so useful in estate planning. The more flexible a power is, however, the more open it is likely to be to a charge of vagueness which will necessitate judicial construction of an instrument. Two recent cases serve as examples. In *Vickers v. Vickers*[46] the power involved was a broad power of sale given to the executor but it was qualified by a direction that certain relatives would be entitled to a preference in buying the property if they offered a price ". . . equal to, or substantially equal to, the best bona fide offer of a third person not entitled to preference."[47] This qualification of the power of sale was held to create in the relatives a right of first refusal which would entitle them to notice of any offers made by other persons and to a reasonable time thereafter in which to meet those other offers.

The relatives did not fare so well in *Williams v. Williams*.[48] In this case there was at least an apparent conflict in the language of the will creating certain powers. First, there was a broad power given to the executor to sell

44. 136 Ga. App. 486, 221 S.E.2d 678 (1975).
45. GA. CODE ANN. § 48-310 (1974).
46. 234 Ga. 849, 218 S.E.2d 565 (1975).
47. *Id.* at 849, 218 S.E.2d at 566.
48. 236 Ga. 133, 223 S.E.2d 109 (1976).

for the purpose of paying debts and making distributions; and second, there was a power given to the relatives named in the will to sell their interests to each other or to outsiders. The court concluded that, in fact, no conflict existed between these powers. The interests of the relatives as beneficiaries under the will, including their power to sell those interests, were necessarily subject to the power of the executor to sell for purposes of administration and distribution.

The issue in *Whittle v. Spier*[49] was whether certain heirs of a testator had standing to challenge a devise to a son of the testator. The devise was made defeasible in favor of the testator's other children if the son should die "leaving no children in life." He died leaving no natural children, but he was survived by a child whom he had adopted in 1932. The evidence disclosed that in 1933 the testator executed a codicil to the will which, though he knew of the adoption, was silent as to the effect, if any, that it should have on the devise. The court held that the son died leaving a child in life, within the meaning of the will; hence, the other heirs of the testator had no interest in the land.

This case was decided since the passage of the 1975 amendment to the adoption statute,[50] but before its effective date. Had the amendment been applicable, however, it would only have supported the decision because it expressly provides that an adopted child may take under a class gift to children made by the will of a third person. If he could thus qualify as a child of the deceased son, it would appear inconsistent to say that the son died leaving no children in life.

F. Private Trusts

In *Yancey v. Harris*[51] the court had to choose between the logic on which the purchase money resulting trust is based and the public policy which favors a bona fide purchaser of realty from a record title-holder. In this case a mother-in-law paid the purchase money for some land but allowed title to go to her son-in-law, hoping thereby to improve the appearance of his credit rating. The son-in-law then mortgaged the property to a bona fide purchaser who relied upon the record title of the son-in-law as security. The crucial issue was raised by the fact that the bona fide purchaser failed to inquire of the mother-in-law, who was in sole possession of the property, as to her rights. In a four-to-three decision the majority of the supreme court relied upon GA. CODE ANN. § 85-408, under which the sole possession of realty charges an outsider with a duty to inquire of the possessor as to the basis of that possession, and held that the bona fide purchaser's failure to pursue that inquiry subordinated his rights to the rights of the possessor.

49. 235 Ga. 14, 218 S.E.2d 775 (1975).
50. Ga. Laws, 1975, p. 797, *amending* GA. CODE ANN. § 74-414 (1973).
51. 234 Ga. 320, 216 S.E.2d 83 (1975).

Justices Gunter and Ingram, in separate dissenting opinions, vigorously argued that the circumstances were such as to impose upon the mother-in-law, the sole possessor, a duty of disclosure and that by remaining silent she was equitably estopped to assert the purchase money resulting trust argument against the bona fide purchaser. Justice Ingram expressed regret as to the adverse effect that the decision will have upon the real estate practice in Georgia.

The testamentary scheme contained in the will of a testatrix was radically distorted in *National Bank of Georgia v. First National Bank of Atlanta*[52] because it violated the rule against perpetuities. The will provided for continuation of a trust through the lives of four named grandchildren and until the child or children of the grandchildren should reach the age of twenty-five. All these great-grandchildren would come into being within the lives of the four grandchildren, but if any of them should be less than four years old at the death of the last surviving grandchild they could not possible reach the age of twenty-five within twenty-one years after the end of the measuring lives. Since this possibility made the ultimate limitations void, the residue vested in fee in the four grandchildren as "the last taker under legal limitations."[53] The entire trust, though, did not fail. Since two of the four were still minors, the court ordered it continued in force until their majority.

In 1973 an amendment was passed to provide that a trust expressly or impliedly made irrevocable shall continue irrevocable and executory even though the sole settlor is also the sole beneficiary and, in these two capacities, attempts to revoke it.[54] The effect of the amendment was to overrule, at least on the issue of revocability, the case of *Moore v. First National Bank & Trust Company of Macon*.[55] In 1974 *Woodruff v. Trust Company of Georgia*[56] held that it would be unconstitutional to apply this amendment to such a trust created between the date of the *Moore* case and the date of the amendment; consequently, the sole settlor who was also the sole beneficiary of the trust in the *Woodruff* case could revoke it notwithstanding the language of irrevocability in the trust instrument. In 1976 the *Woodruff* trust got back into court[57] when an attempt was made to hold the trustee liable for a decrease in the value of the trust assets between the date of the termination of the trust, by the court's decree in 1974, and the date of delivery of the assets to the settlor-sole beneficiary. The court held that, in view of the fact that this delivery was made within forty-eight hours of the time when the judgment of the supreme court was made the

52. 234 Ga. 734, 218 S.E.2d 23 (1975).
53. GA. CODE ANN. § 85-707 (1970).
54. Ga. Laws, 1973, p. 844, *amending* GA. CODE ANN. § 108-111.1 (1973).
55. 218 Ga. 798, 130 S.E.2d 718 (1963).
56. 233 Ga. 135, 210 S.E.2d 321 (1974).
57. Trust Co. of Georgia v. Woodruff, 236 Ga. 220, 223 S.E.2d 91 (1976).

judgment of the trial court, the decrease in value could not have been caused by the trustee.

G. *Charitable Trusts*

While the First Amendment forbids the bringing of religious or ecclesiastical disputes to the courts for resolution, the property rights of disputing parties—even though they be churches or other religious organizations—are proper subjects of judicial consideration.[58] There is a further qualification, though, that even in the case of disputed property rights the case must be one that is capable of resolution on the basis of "neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded."[59]

In *Carnes v. Smith*[60] the supreme court found it necessary to review the guidelines to which the courts must adhere in dealing with such cases. The local church involved in this case was established in 1852. The property now in dispute was conveyed in that year to named individuals as "trustees of the Methodist Episcopal Church at Mount Pleasant Academy . . . their successors in office as such forever in fee simple." From 1852 until 1969 the church continued as a connectional church of the United Methodist Church (or its predecessor), conducting its affairs in compliance with the laws and rules of the general church organization and in accord with its church discipline. In 1969 the local church formally voted to withdraw from the general church. The general church recognized the right to withdraw but claimed that it, not the local church, was entitled to the property. The general church argued that the local church, having always been a connectional church, was subject to the Book of Discipline and the Constitution of the general church and that, under these, the local trustees held legal title to the property under an implied trust for the benefit of the general church. It acknowledged that the Supreme Court of Georgia had held in *Presbyterian Church in the United States v. Eastern Heights Presbyterian Church*[61] that there is no longer an implied trust theory applicable to this situation, but contended that the court there meant only that there can be no implied trust arising solely from a connectional church relationship and that a trust for the general church may still be implied on the basis of other "neutral principles of law."

The court awarded the property to the general church, finding the necessary "neutral principles" in the fact that the Book of Discipline of the

58. Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871).

59. Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969).

60. Carnes v. Smith, 236 Ga. 30, 222 S.E.2d 322 (1976).

61. 225 Ga. 259, 167 S.E.2d 658 (1969), *cert. denied*, 396 U.S. 1041 (1970). For an excellent discussion of problems left unresolved by this decision see Jenkins, *Ownership of Church Property and the Doctrine of Implied Trusts*, 22 MERCER L. REV. 515.

general church, to which the local church had adhered throughout its existence, provided: (1) That title to realty held by the trustees of a local church is held in trust for the general church; (2) That every conveyance of land to a local church "shall contain the appropriate trust clause as set forth in the [Book of] Discipline"; and (3) That a failure to include such a clause should not affect a local church's connectional responsibility and accountability.[62] The presence of these "neutral principles" in the portion of the Book of Discipline dealing with church property was held sufficient to distinguish this case from *Presbyterian Church*. Three of the justices dissented.[63] They felt that the *Presbyterian Church* decision completely abolished the implied trust theory as to church property and required application of the "formal title" doctrine. Under this doctrine, since the formal title to the property was in the names of the trustees of the local church and there was no evidence in the deed to indicate a trust for any beneficiary other than the local church, there could be no implication of a trust for any other beneficiary.

62. 236 Ga. at 38, 222 S.E.2d at 328.
63. *Id.* at 43, 222 S.E.2d at 330.