# Wills, Trusts, and Administration of Estates

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While both legislative and judicial developments are within the scope of this article, the legislative developments affecting this area of the law will not be discussed separately. Instead, these developments will be included in the discussion of cases dealing with issues closely related to the subject matter of the legislation.

## I. Contracts To Will

When it is alleged that a decedent had entered into a contract obligating him to make a particular disposition of his property at death, the legal issues are usually evidentiary. Since one of the parties to the alleged contract is no longer present to testify, and the other has a selfish interest to be served in proving the contract, it is understandable that the courts impose rather strict rules of evidence in resolving these issues. The two rules of evidence most often called into play are the "Dead Man's Rule" and the parol evidence rule, both of which were applied in recent cases.

In *Rigby v. Powell,*[1] a husband sought to prove that he and his wife had agreed to make mutual wills, each leaving the entire estate to the other, and that pursuant to that agreement he had paid the purchase price of land and had allowed title to be taken in her name only. After her death he alleged that her will did not comply with the agreement. The court held that the "Dead Man's Rule"[2] rendered the husband incompetent to testify concerning any transaction which the wife, if alive, could possibly have rebutted, denied, or explained. This rule barred admission of parol evidence which otherwise might have rebutted the presumption of a gift and might have proved a purchase money resulting trust.[3]

Proof of such a parol agreement was allowed in *Johnson v. Walton,*[4] but only because of the tripartite nature of the agreement. There the plaintiff

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1. 236 Ga. 687, 225 S.E.2d 48 (1976). This case had previously been to the supreme court on procedural issues. *See* Rigby v. Powell, 233 Ga. 158, 210 S.E.2d 696 (1974), discussed in Rehberg, *Trusts, Wills and Administration of Estates,* 27 Mercer L. Rev. 261, 263-64 (1975).

2. Ga. Code Ann. §38-1603(1) (1974).

3. *See* Ga. Code Ann. §108-116 (1973).

4. 236 Ga. 675, 225 S.E.2d 55 (1976).

sought specific performance of a parol agreement allegedly entered into by her with the decedent and with the person who was named in the will as executrix of the estate and to whom the decedent's will left the entire estate. The alleged agreement was that the decedent's property would be left to the executrix who would then give the plaintiff one-half the estate in return for the latter's caring for the decedent from the time of the making of the agreement until his death. The court held that, while parol evidence was inadmissible to prove the contract between the plaintiff and the decedent, it was admissible to prove the alleged agreement between the plaintiff and the executrix, who was still present to testify in rebuttal, denial or explanation of the agreement. It should be noted that in leaving his entire estate to the executrix, the decedent did precisely what the alleged contract obligated him to do.

In *Zorn v. Robertson*,[5] the court experienced some difficulty in reconciling two apparently contradictory rules. The first rule provides that the consideration of a deed may always be inquired into when the principles of justice require it,[6] while the other makes inadmissible any parol evidence contradicting or varying the terms of a written instrument.[7] In this case a husband had conveyed land in fee to his wife by a deed which stated the consideration as "One ($1.00) dollar and love and affection . . . ." After her death he sued her executrix for breach of an alleged oral promise by her to devise the land back to him if he survived her. Evidence of the alleged oral promise was held inadmissible. The court reasoned that the cited code sections should be construed together to mean that one cannot, under the guise of inquiring into the consideration of a deed, contradict or vary by parol evidence the consideration stated in the deed.

While this reasoning leaves some unanswered questions, it is probably the best way to deal with the problem of balancing the public policy elements on which these two code sections are based. Would it be more logical and more in keeping with the probable intention of the parties to allow such parol evidence in a case where the deed stated only a nominal or "good" consideration and to exclude such evidence in a case where the deed stated a substantial or "valuable" consideration? In the former case the parties have knowingly left unstated the actual consideration and, therefore, could be said to have invited further inquiry; in the latter case the stated consideration could very well be the actual consideration. The court obviously was not following this reasoning in *Zorn* because in the four cases cited by the court the stated considerations were $500,[8] $340,[9] one

5. 237 Ga. 395, 228 S.E.2d 804 (1976).
6. GA. CODE ANN. §29-101 (1969).
7. GA. CODE ANN. §38-501 (1974).
8. Awtrey v. Awtrey, 225 Ga. 666, 171 S.E.2d 126 (1969).
9. Stonecypher v. Georgia Power Co., 183 Ga. 498, 189 S.E. 13 (1936).

dollar,[10] and "natural love and affection,"[11] and in all of them the parol evidence was held to be inadmissible.

## II. YEAR'S SUPPORT

During last year's survey period, the Georgia Supreme Court decided *Allan v. Allan,*[12] a case in which an initial award of year's support was sought out of an estate on which there had been no administration. The court concluded that the statutory notice by publication only of the appraiser's return in the county where the decedent resided at death was inadequate to affect a "legally protected interest" in realty located in another county, particularly in view of the fact that the owner of such interest resided in that other county and her address was known. The court stressed that notice by mail, addressed to the known address of the interested party, would have been adequate. To forestall reopening of cases in which an award might have been made without notice to anyone, the court ruled that the instant decision would have only prospective effect as precedent. Nevertheless, in *Ringer v. Lockhart,*[13] an attempt was made to extend the *Allan* holding to a somewhat different factual situation. In this later case the decedent's will had left the entire estate to his widow for life, with remainder to his son by a previous marriage. That son participated in the probate proceedings and after the widow had assured him that she would handle the estate fairly, he returned to his home in another state. The widow then applied for and was awarded the entire estate as year's support. The only notice that the son received of the year's support proceeding was that afforded by publication, and while that notice was running in the Georgia newspaper he was at his home in the other state. The court held that *Allan v. Allan* did not require that he be given personal service because the opinion in that case expressly provided that it would operate only prospectively. *Allan* was decided on January 28, 1976, and the decision in *Ringer v. Lockhart* was rendered on November 24, 1976. One justice dissented on this point. He felt that the rule in *Allan* should be applied because the constructive service issue in *Ringer v. Lockhart* was pending in the Supreme Court of Georgia when the decision in *Allan v. Allan* was rendered, having been docketed twelve days before that decision.

The son prevailed though, without the benefit of the *Allan* decision, because his allegations that a confidential relationship existed between him and his stepmother and that her securing the year's support award without his remainder interest's being protected amounted to allegations

10. Miller v. Shaw, 212 Ga. 302, 92 S.E.2d 98 (1956).
11. Dodson v. Phagan, 227 Ga. 480, 181 S.E.2d 366 (1971).
12. 236 Ga. 199, 223 S.E.2d 445 (1976).
13. 237 Ga. 166, 227 S.E.2d 57 (1976).

of fraud. The judgment on the pleadings, awarding the entire estate to the stepmother, was reversed.

The logic of *Allan* was extended in *Tribble v. Knight*[14] to cover a proceeding for leave to sell property previously awarded as year's support to a widow and minor children. In that case the party upon whom service by publication was made was one of the children who, though now an adult, was a minor and was included along with the widow at the time of the original award. Although the notice by publication was in accordance with the statute,[15] it was held constitutionally inadequate where, as in this case, the address of that child was known or easily ascertainable. Again, the court felt it important to specify that the decision would operate prospectively only and would not apply to sales made prior to the date of this decision.

The legislative response to these decisions was an act, effective July 1, 1977, designed to remedy the constitutional defects in the notice provisions of the year's support statutes.[16] Georgia Code Ann. §§113-1005.1 to -1005.3 were enacted to deal specifically with the constitutional problems dealt with in such cases as *Allan* and *Tribble*.

In the same act that added these three code sections the General Assembly made a noble, but apparently unsuccessful, effort to repeal the code section imposing restrictions on testamentary dispositions to charities. The title of the act begins: "An act to repeal Code Section 113-107;" but nowhere in the body of the act is there any further reference to that section.

There were attacks on year's support awards based on grounds other than constitutional infirmity. *Patrick v. Simon*[17] established that an award to one as the widow of the decedent may be challenged by a subsequently qualified administratrix on the ground that the one to whom the award was made was not in fact the widow. The evidence showed that she had been married to another man prior to her ceremonial marriage to the decedent, that the prior husband was still alive, and that her marriage to him had not been dissolved. Since the subsequently appointed administratrix was not party to the year's support proceeding, the court held that the judgment was not *res judicata* as to her. Similarly, a consent decree by creditors that the one to whom the award was made was in fact the widow was held not binding on the subsequently appointed administratrix.

The opinion in this case contains a good discussion of the presumption of validity which attaches to a second marriage. That presumption continues until evidence is adduced that the spouse of the first marriage is still alive; then the burden is upon the party relying upon the validity of the second marriage to go forward with evidence showing that the first mar-

14. 238 Ga. 84, 231 S.E.2d 68 (1976).
15. GA. CODE ANN. §113-1026 (1975) (amended in 1977).
16. Codified as GA. CODE ANN. §§113-1005.1 to -1005.3, -1026 (Supp. 1977).
17. 237 Ga. 742, 229 S.E.2d 746 (1976).

riage has been dissolved. Those relying upon the validity of the second marriage and upon the validity of the year's support award to the second "wife" failed in this case to carry that burden. Those holding property under the invalid award held it as constructive trustees for the estate of the decedent.

In *Carter v. Carter*,[18] the court of appeals held that since an appeal of a year's support award to the superior court, as distinguished from a mere caveat to an award in the probate court, is a *de novo* hearing, no inquiry is permitted in the former as to whether the appraisers acted singly or as a group nor as to the evidence they considered in making their return in the latter. A concurring opinion in this case called for a thorough review of the year's support statutes and decisional authority with a view "toward injecting a measure of fairness into the proceeding." This criticism, coupled with the fact that the notice provisions of two sections of the law have recently been declared constitutionally inadequate, makes entirely appropriate this call for a reexamination of all of our year's support law.

## III. Probate Of Wills

When the propounder of an apparently duly executed will offers it for probate and the witnesses testify as to its due execution and attestation and as to the mental capacity of the testator, a prima facie case is made for the validity of the will. In *Melton v. Shaw*,[19] however, the caveator attempted to rebut that prima facie case by showing that the will was on onionskin paper and that, consequently, it must be probated, if at all, as a copy of a lost or destroyed will.[20] The caveat was unsuccessfull. A will bearing the original ink signatures and date, though typed on onionskin paper, is still the original will.

*Lavender v. Wilkins*[21] raised the interesting question of whether a properly executed instrument, though not admissible to probate as a will, may nevertheless operate to exercise a testamentary power of appointment. The will of the testator's deceased wife gave him a testamentary power of appointment over the assets of a marital deduction trust and named two nephews as takers in default of exercise of the power. The testator then executed his will, expressly exercising the power in favor of his estate. When he died the nephews successfully challenged his will on the ground that he had subsequently entered into a common law marriage which revoked the will by operation of law. The propounders questioned the standing of the nephews to challenge the will, arguing that Ga. Code Ann. §113-408 (1975) was obviously designed to protect only the wife, the heirs

18. 139 Ga. App. 548, 228 S.E.2d 708 (1976).
19. 237 Ga. 250, 227 S.E.2d 326 (1976).
20. Ga. Code Ann. §113-611 (1975).
21. 237 Ga. 510, 228 S.E.2d 888 (1976).

or the after-born children of a testator. Since their interest as takers in default under the wife's will depended upon the validity of the exercise of power in the donee's will, they had standing to challenge his will.

The propounders then made an ingenious argument that even though the testator's will was ineffective, because of his subsequent marriage, to dispose of his own property, it was still effective to exercise a power of appointment over the donor's property. The court agreed that this argument found support in the English Wills Act of 1837 but pointed out that the predecessor of our section making subsequent marriage a revocation was enacted in 1834, prior to the English Wills Act of 1837. In short, a testamentary power can be exercised in Georgia only by an instrument probated as a valid will.

## IV. Problems Arising During Administration

After an application for the grant of letters of administration has been filed, the only notice to or service upon interested parties that the law requires is that afforded by the published citation.[22] Since the mere appointment of a personal representative of an unrepresented estate does not deprive anyone of property without due process of law, the court held in *Brooks v. Williams*[23] that it is immaterial that even an interested party does not receive personal notice. There are other procedures which assure him of an opportunity to be heard before his claim against or his interest in the estate may be foreclosed.

From the moment of his qualification, a personal representative is charged with the responsibility of ascertaining, collecting, and preserving the assets of the estate. One such asset would be the proceeds of any insurance policies on the life of the decedent which named his estate as beneficiary. If the policy named some other legal entity as the beneficiary, then normally the estate has no beneficial interest in the proceeds. These elemental matters of contract law led to a disappointing result for a surviving wife in *Hagins v. Fuller.*[24] She had purchased a policy on the life of her husband. It named her as owner and beneficiary and gave her the power to change the beneficiary. Later, to assist her husband in securing a bank loan, she caused the beneficiary to be changed to the executors, administrators or assigns of the insured. After the insured husband had repaid this loan, but before any action was taken to change the beneficiary back to the wife, he died. Since contract law governed, the proceeds became a part of the estate of the husband rather than being directly payable to the wife.

The surviving wife fared somewhat better in *Spurlock v. Commercial*

22. Ga. Code Ann. §113-1212 (1975) requires publication of the citation once a week for four weeks.

23. 237 Ga. 767, 229 S.E.2d 623 (1976).

24. 138 Ga. App. 23, 225 S.E.2d 485 (1976).

*Banking Co.*[25] After a bank had issued a certificate of deposit to a husband and wife as joint tenants with right of survivorship, the husband pledged his interest in it to the bank as security for a loan extended to him individually. He died before the loan was repaid and before the maturity date of the certificate, leaving his wife surviving him. The bank's effort to assert a lien on the certificate was unsuccessful. The interest of the husband in the certificate and, of necessity, the interest of the bank to which he had pledged that interest ceased at the moment he died with his wife surviving. Because his estate no longer had an interest in the certificate, the bank could not set off the certificate against the debt which he alone owed.

After this case reached the courts the General Assembly enacted a completely new statute governing all multiple-party accounts.[26] This statute is substantially the same as Part I of Article VI (Non-Probate Transfers) of the Uniform Probate Code. The legislature omitted §6-107 of the Uniform Probate Code which exposes to the claims of creditors, if other assets of the estate are insufficient, the proportion of the account that the decedent owned beneficially before his death. That proportion is defined, in a section which was included in the Georgia act, as the net contribution of the decedent to the sum on deposit.[27] It may have been felt that the omitted section was not needed because other provisions of Georgia law afford adequate protection to creditors. That may be the case if the creditor is a financial institution, because the section of the Uniform Probate Code giving a financial institution a right of set-off[28] was enacted. If the creditor is not a financial institution, the Georgia Act does not appear to give him the protection which the Uniform Probate Code intended to give him. Under its terms the amount of the account subject to set-off is either the proportion of the account to which the debtor was "beneficially entitled" immediately before his death, or, if his net contribution cannot be shown, an equal share with all the parties having present rights of withdrawal.

A bank which has been named as co-executor with the widow of the testator often feels, sometimes with justification, that it can act most effectively for the estate when it acts alone. There are risks in this course of action, though, as the bank learned in *First National Bank & Trust Company of Vidalia v. McNatt.*[29] After the bank qualified as co-executor, it employed a real estate broker to sell some of the estate's land. The broker performed his part of the contract and then sued the bank in its individual capacity for his commission. The bank, and not the estate, was held liable. One co-executor cannot by contract bind the estate unless the other co-

25. 138 Ga. App. 892, 227 S.E.2d 790 (1976), *aff'd.*, 238 Ga. 123, 231 S.E.2d 748 (1977).
26. GA. CODE ANN., ch. 41A-38 (Supp. 1977).
27. UNIFORM PROBATE CODE §6-103(a), an exact copy of which was enacted as GA. CODE ANN. §41A-3803(a) (Supp. 1977).
28. UNIFORM PROBATE CODE §6-113, codified as GA. CODE ANN. §41A-3812 (Supp. 1977).
29. 141 Ga. App. 6, 232 S.E.2d 356 (1977).

executor joins in the agreement or unless such action is otherwise authorized either by law or by the terms of the will. The bank's right of reimbursement for the amount of the judgment would be a subsequent matter of accounting and settlement.

The status of a person as a creditor of an estate or as a beneficiary of it had to be determined in *National Bank & Trust Company v. Grant.*[30] This person had loaned money to the decedent, taking in return a promissory note and a security deed on some land, and the decedent had agreed that if the note were not paid at his death the lender could keep the land in satisfaction of the debt. After the decedent died, without having paid the debt, the lender elected to keep the land. In this action the administrator of the decedent's estate sued the lender for the pro rata share of the estate tax liability which was attributable to the inclusion of this land in the taxable estate. The court held that the lender was not liable to contribute; he took the land as a creditor, not as a beneficiary.

## V. Effect Of Adoption On Devolution Of Property

As background for consideration of the General Assembly's comprehensive revision of the adoption law, a recent case decided under the prior law should be instructive. This case was *Smyth v. Anderson.*[31] In it the will of a testator who died in 1937 left realty to his daughter for life, with remainder to "her children." Then followed a gift over, if the daughter died "without child, or children," to the trustees of a named school district for the benefit of the "white children" of the district. Lastly, the will provided that if the property were not accepted by the school district or if it were used "for any other purpose than above indicated," it should revert to the estate of the testator. The testator's daughter was married at the time of his death in 1937 but had no children, natural or adopted. Three years later, though, she adopted a child who survived her and who turned out to be the only child, natural or adopted, that the daughter ever had. The court held that this child could not qualify, under the testator's language, as a "child" of his daughter. Under the Georgia law in force at the execution of the will and at the testator's death an adopted grandchild was not considered a relative of the testator. This suggests, but does not necessarily prove, that the testator did not contemplate inclusion of an adopted grandchild in a gift to the children of his daughter. The suggestion is strengthened, though, by the facts that the daughter had no children, natural or adopted, at the time of execution of the will and that the adoption took place three years after the testator's death. The court relied upon *Brown v. Trust Company of Georgia*[32] and *Whittle v. Speir*[33] to emphasize the

30. 237 Ga. 337, 227 S.E.2d 372 (1976).
31. 238 Ga. 343, 232 S.E.2d 835 (1977).
32. 230 Ga. 301, 196 S.E.2d 872 (1973).
33. 235 Ga. 14, 218 S.E.2d 775 (1975).

importance of the testator's intention as to possible inclusion of adopted children in class gifts to children.

Holding that this adopted grandchild could not take, the court was still faced with difficult questions of constitutional law and of trust law. The constitutional issue was raised by the fact that the gift over to the school district limited the charitable benefits to "white children," a clearly unenforceable racially discriminatory provision. The issue of trust law, then, was whether the court should apply the *cy prés* doctrine by simply striking the word "white" or whether it should declare that the trust failed and the property reverted to the estate of the testator. On this issue the court concluded that the express provision for a reversion to the estate if the property were used "for any other purpose than above indicated" precluded appplication of the *cy prés* doctrine and required a reversion to the estate.

Speculation is in order as to whether the most recent revision of the adoption laws would have required, if applicable, a different result in *Smyth v. Anderson.* The 1977 session of the General Assembly enacted a comprehensive revision of Georgia's adoption laws.[34] Section 74-413 of the revised chapter provides that an adopted child shall be deemed a natural child of the adopting parent for purposes of inheritance and for purposes of taking under testamentary instruments, whether executed before or after the adoption, unless expressly excluded. It is further provided that an adopted child shall take as a "child" of the adopting parent under a class gift made by the will of a third person. So sweeping is the language of this section that it is hard to conceive of any circumstance involving the devolution of property in which, short of an express exclusion of adopted persons, it will make any difference whether a person is a natural or adopted child of his parent. Nevertheless, since our previous adoption laws have been so often amended and so often litigated, the subsequent history of this latest amendment will be interesting to follow.

## VI. Problems Of Construction

A declaratory judgment action is often the best way to resolve a will construction problem, but this route can be followed only if there is a presently existing justiciable controversy. Several recent cases turned on this issue. In *Kaylor v. Kaylor,*[35] the will left the entire estate to the widow and the son, but in leaving to the widow one-half of the estate it was specified that she was to select her one-half out of personal property. As the personal property was not sufficient to equal one-half the estate and the estate thus might not get the full benefit of the marital deduction, the widow and the son as co-executors brought a declaratory judgment action

34. Ga. Code Ann. §§74-401 to -418, -9903.1 (Supp. 1977) (effective January 1, 1978).
35. 236 Ga. 777, 225 S.E.2d 320 (1976).

against themselves as individuals, seeking a decree that the widow was entitled to all of the personalty and to enough of the realty to make her entire share amount to one-half the adjusted gross estate. The action was dismissed. No justiciable controversy was shown between the parties as co-executors and as individuals. Indeed, the court noted, there was complete agreement between the parties. They both wanted, in both capacities, whatever would assure the maximum marital deduction. The real adverse party was the Internal Revenue Service, and it was not made a party to the litigation.

In two other cases, though, justiciable controversies were found to exist. In *Raby v. Minshew*,[36] the issue was whether a legacy from a father to two of his children had lapsed for failure of the condition attached to it. The condition was that the legatees support their mother from the time of their father's death until that of their mother's. That condition was rendered impossible because the mother predeceased the father. The legacy was upheld on the ground that the condition was a condition subsequent, now impossible of occurrence.

Whether a will violates the rule against perpetuities is also a justiciable issue because that issue is raised at the testator's death. In *Rogers v. Rooth*,[37] the devise was to *A*, *B*, and *C* successively for their respective lives, remainder to the child or children "born or to be born" to *C* for their respective lives, with ultimate remainder in fee to the children of that child or children. The ultimate remainder in fee violated the rule because it used as measuring lives some potential lives (children of *C*) that were not in being at the creation of the interests. The rule is concerned with possibilities not probabilities or actualities. When *C's* life estate ended and he left only one child, that child took the property in fee. Being the "last taker under legal limitations," his life estate under the will was enlarged into a fee.[38]

It is unfortunate, but probably unavoidable, that the disposition of substantial assets sometimes will turn upon what a testator actually meant when he employed some commonly used but nevertheless imprecise words or phrases. In *Alford v. Citizens & Southern National Bank*,[39] the will contained a bequest to the widow of all bonds, capital stock, or other securities and then left to a residuary trust "all other property of every kind and description." The widow contended that promissory notes secured by real estate and savings and loan association certificates and passbook accounts were "other securities" given to her in the prior clause, while the residuary trust beneficiaries contended that these items were included in the "all other property" left to the residuary trust. The court held that

36. 238 Ga. 41, 231 S.E.2d 53 (1976).
37. 237 Ga. 713, 229 S.E.2d 445 (1976).
38. GA. CODE ANN. §85-707(a) (1970).
39. 237 Ga. 194, 226 S.E.2d 905 (1976).

these items were neither bonds, capital stock, nor securities; hence they passed to the residuary trust rather than to the widow.

The same sort of constructional problem was litigated in *Cannon v. First National Bank of Atlanta,*[40] where the will bequeathed to a son "the remainder of my personal property, except cash, stocks and bonds" and then created a trust of the residue. The issue was whether promissory notes held by the testatrix at her death, which had been given as the purchase price of realty sold by her, passed as personal property under the bequest to the son or as a part of the residue going into the trust. The court concluded that the term "personal property" in the bequest to the son was intended to include only tangible personal property and not such intangibles as the promissory notes. The court was influenced by the fact that a contrary construction would have left no assets to fund the residuary trust.

Where the residuum of an estate is completely used up in the payment of debts and expenses of administration and it appears that there must be some abatement of legacies, the statutory order of abatement[41] will not always resolve the problems. Many of the varied approaches taken by courts in resolving these problems were employed in *Killingsworth v. First National Bank of Columbus.*[42] While the issues raised in this case with respect to particular legacies will be discussed in a manner which would suggest that they are independent of each other, these legacies all had hovering over them the threat of total or partial abatement. A direction to the executor to rent an office building for a ten-year period and then to convey it to *A* and *B* was held to be a devise of a future interest, possession and enjoyment of which would begin ten years after the testator's death. The result, of course, was that the income from the property during that ten-year period would go to the estate for general estate purposes. While there were mortgage liens on this property, the record did not show whether they represented debts created by the testator or an assumption by him of debts of the predecessor in title. The answer to this question might have some bearing on the testator's intention as to exoneration but, since there were no funds to pay any of the general legacies, exoneration of this realty would not be justifiable since it would have to be at the expense of other specific legatees.

Another item of the will provided for a college education for the testator's nephews and nieces. It was argued that such legacies, being conditional, should abate before other general legacies, but the court responded that our law makes no subclassification of general legacies for purposes of abatement. The same reasoning was applied to a bequest of $500 per month for sixty months.

The most interesting holding in *Killingsworth,* and probably the most

40. 237 Ga. 562, 229 S.E.2d 361 (1976).
41. GA. CODE ANN. §§113-821, -1509 (1975).
42. 237 Ga. 544, 228 S.E.2d 901 (1976).

questionable one, was the holding that a direction that the executor purchase for a named legatee a new automobile costing up to $5,000 was a specific legacy which was not subject to abatement along with the general legacies. The court cited two cases as authority, neither of which, in the writer's opinion, supports the holding. The first case was *Young v. Young*,[43] from which the court quoted an excellent definition of a specific legacy as one that "can be separated from the body of the estate . . . ." It is submitted that the new automobile which was the subject matter of the legacy under discussion was not in the estate either at the testator's death or at the time of the court's opinion; therefore, it could not be "separated from the body of the estate." The real issue in *Young* was whether six bonds, admittedly in the testator's estate at the time of execution of the will, were the subject matter of six specific legacies—in which event three of them would have been adeemed—or of six general or demonstrative legacies. Regardless of their classification they were at one time a part of the testator's estate. The same cannot be said of the "new automobile" referred to by the testator in the case under discussion.

The other case cited by the court in *Killingsworth* was *Woodall v. First National Bank of Columbus*, and it was cited only for the following quotation: "It is the particular designation of the property itself, not who holds its legal title, which makes the legacy specific."[44] This quotation, which was perfectly true in the context from which it was taken, is meaningless in the context of the facts of *Killingsworth*. The statement was made in *Woodall* solely to make the point that a legacy may be specific even though it is a beneficial interest in trust property, legal title to which is in a trustee. In *Woodall*, the testator had equitable title to the property at death and thus could make a specific devise of that equitable title. In *Killingsworth* the testator never, at any time, had either legal or equitable title to the "new automobile" which he made the subject matter of his legacy.

One other issue resolved in *Killingsworth* merits mention. A marital deduction trust was held entitled to preference over other general legacies, not because there are subclassifications of general legacies for purposes of abatement, but because the legatee under the marital deduction trust takes, in effect, as a creditor and not as a volunteer. She gave up a valuable right to take against the will, a right which the other general legatees did not have.

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43. 202 Ga. 694, 44 S.E.2d 659 (1947).

44. 237 Ga. at 547-48, 228 S.E.2d at 904, *quoting from* Woodall v. First National Bank of Columbus, 223 Ga. 688, 691, 157 S.E.2d 261, 264 (1967).