Wills, Trusts, and Administration of Estates

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This survey period saw the enactment of Georgia's first comprehensive trust code, the enactment of less sweeping but still significant amendments affecting wills and administration of estates, and the usual number of judicial decisions in these areas.

I. LEGISLATION

A. Georgia Trust Act

Georgia's statutory law of trusts developed slowly over a period of many decades. The creation of the Trust Law Revision Committee of the Fiduciary Law Section of the State Bar of Georgia in 1987 strengthened an already active movement toward a comprehensive trust code. After several years of work, the committee presented a proposed revision of the trust statutes to the 1991 session of the Georgia General Assembly. In most areas the proposed code differed little from prior law. However, it did reorganize the statutory material and codify a considerable amount of generally accepted judicial authority, all with a view toward the presentation of a comprehensive trust code. These efforts resulted in the enactment of the "Georgia Trust Act." The scope of the new act militates against an attempt to discuss its details. However, the pervasive nature of trust law will make some study of it helpful to the entire bar.

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1. 1991 Ga. Laws 810 (codified as amended at O.C.G.A. §§ 53-12-1 to -394 (Supp. 1991)). Scattered sections in other Titles also were amended to reconcile them with the new trust code.
B. Narrowly Focused Legislation

In addition to the enactment of the Georgia Trust Act, the General Assembly made noteworthy changes in several narrower areas of fiduciary law. Again, this Article’s purpose is to call attention to these changes rather than to discuss them exhaustively.

Inheritance by, from, or through a Child Born Out of Wedlock. As the proportion of the population represented by persons born out of wedlock has increased, so has the legislative activity regarding the right of inheritance by, from, and through such persons. Several changes in the Georgia statutes on this subject were made in 1991. First, the right of a child born out of wedlock to inherit from his father or paternal kin was statutorily enlarged to allow inheritance if there is “clear and convincing evidence that the child is the child of the father and that the father intended for the child to share in the father’s intestate estate in the same manner in which the child would have shared if legitimate.” This change appears to be a codification of the doctrine of virtual legitimation first recognized and applied in Prince v. Black. The evidence presented in Prince included naming the child as a beneficiary under insurance policies and applying for and obtaining social security benefits for the child as a son. The court stated that these actions showed an intention to allow the child to share in the father’s estate as if he had been formally legitimated.

Although the court held that the evidence was clear and convincing, it seems only illustrative of the type of evidence the 1991 statute recognizes as clear and convincing. The statute explains this enlarged right of inheritance in terms of a presumption of paternity, suggesting that the presumption becomes irrebuttable when “clear and convincing evidence” of paternity is presented and not rebutted. The statute creates another rebuttable presumption of paternity if there had “been performed, after the conception of the child, parentage-determination genetic testing which establishes at least a 97 percent probability of paternity.”

5. Id. at 79, 344 S.E.2d at 413.
6. Id.
7. 1991 Ga. Laws 660 (codified at O.C.G.A. § 53-4-4(c)(1)(E)).
9. Id. § 53-4-4(c)(2)(B).
The 1991 amendments made comparable changes in the right of the father or other paternal kin to inherit from a child born out of wedlock.\textsuperscript{10} The amendment provides an exception stating that the right shall not exist if it is established "by a preponderance of evidence that the father, during his life and after the birth of the child, failed or refused to openly treat the child as his own or failed or refused to provide support for the child."\textsuperscript{11}

\textbf{Year's Support.} The traditional challenge to a year's support award as being too large has been a caveat, on grounds of excessiveness, filed by the executor on behalf of the estate and those whom he represents.\textsuperscript{12} The inadequacy of this attack resulted in the 1986 amendment of the statute dealing with the amount of the award.\textsuperscript{13} That amendment required courts to consider the support available to the applicant from sources other than year's support, including any separate estate and earning capacity of the applicant in determining "an amount sufficient to maintain the [applicant's] standard of living" for twelve months.\textsuperscript{14} The 1991 amendment further altered the statute by substituting the words "any separate estate" for "the principal of any separate estate" and by substituting the words "the earning capacity" for "the income and earning capacity."\textsuperscript{15}

Both the prior law and the 1986 amendment were silent as to the discretion of the probate judge regarding the amount of an award.\textsuperscript{16} The 1991 amendment clarifies this point by adding an express provision that the applicant shall have the burden of proof in showing the amount necessary.\textsuperscript{17}

When a decedent's estate was to be kept open for purposes of administration for more than twelve months, prior Georgia law forbade a second or subsequent year's support award if any unpaid debts existed.\textsuperscript{18} The 1991 act amends this section and provides that such additional awards may be made despite the presence of unpaid debts if "there are sufficient

\textsuperscript{10}  Id. § 53-4-5.
\textsuperscript{11}  Id. § 53-4-5(b)(2).
\textsuperscript{14}  Id.
\textsuperscript{15}  1991 Ga. Laws 948 (codified as amended at O.C.G.A. § 53-5-2(c)).
\textsuperscript{17}  Id.
\textsuperscript{18}  Id. § 53-5-4 (1982).
assets in the estate to award such additional year's support and to pay all
known debts and claims ..."

Lost or Destroyed Will. Prior to 1991, the lost will statute provided
for the probate of a copy of a will that either was destroyed without the
consent of the testator or was lost or destroyed after the testator's
death. Thus, no provision of the statute covered the situation of a will
that was lost, as distinguished from destroyed, prior to the death of the
testator. An amendment filled the gap left in the prior statute. The
statute now provides that if a will is lost during the testator's life, de-
stroyed without his consent during his life, or lost or destroyed after his
death, a copy of the will may be admitted to probate in lieu of the origi-
nal if it is clearly proven by the subscribing witnesses and other evi-
dence. The statute continues the presumption that the testator revoked
a lost or destroyed will. That presumption may be rebutted by clear and
convincing proof.

Rules for the Grant of Letters of Administration. A separate
 provision amended the rules for granting letters of administration. Under this provision a majority in interest of the beneficiaries, rather
than a majority in number, are entitled to name the administrator with
the will annexed. If that majority in interest do not agree, the majority
in number of the beneficiaries will make the selection. If neither a ma-
jority in interest nor a majority in number can agree, then any person
interested in the estate may petition to be named, or to have another
named, and the court may exercise its discretion in selecting the adminis-
trator with the will annexed. The basic rules for the granting of letters
were amended to provide that, in the instance of a choice by the next of
kin, the choice shall be by a majority in interest of the next of kin who
are interested as distributees rather than by the majority in number of
such persons.

Real Estate Transfer Tax and Fiduciaries. The real estate trans-
fer tax was amended to exempt from its operation any deed of assent or

21. Id.
23. Id.
24. Id.
27. Id.
28. Id.
distribution from an executor, administrator, guardian, trustee, or custodian. It further exempts any deed exercising a power of appointment, or any other instrument transferring real property to or from a fiduciary, if in fact the transfer is without valuable consideration.

II. RECENT DECISIONS—WILLS AND ADMINISTRATION

A. Year's Support

The sufficiency of a year's support award continues to be a troublesome issue. In *Baker v. Baker*, the Georgia Court of Appeals found it helpful to review recent developments in this area before determining whether an award of $10,000 to a widow was arbitrary and grossly insufficient. In 1986 the legislature redefined the approach courts should take in determining the amount. It began by restating the long-established principle that the award should be sufficient for applicants to maintain the standard of living they enjoyed prior to the death of the decedent. It provided that courts shall determine the award amount after taking into consideration the support available from other sources, including any separate estate and the earning capacity of the applicant. The troubling question, which neither the legislature nor the courts have addressed, is whether the legislature's use of the words "taking into consideration" was intended to mean "subtracting therefrom" or something else.

The opinion in *Baker* will have little precedential value because it is devoid of any information on which the court based its conclusion that the award of $10,000 satisfied the statutory criteria. The court noted that the trial court examined the applicant's federal income tax returns, her monthly social security benefits, and the rental income of a room in her home. We are not told what it did with this additional information.

A clearer issue of priorities was presented in *Goodman v. Independent Life & Accident Insurance Co.* After the will of the decedent was filed and its validity disputed, the widower filed for year's support. After the entire estate of $603.45 was awarded to the applicant, decedent's son and grandson sued the widower and the insurance company (which owed the decedent $3.45 for overpayment of premiums) for conspiracy, alleging

31. Id.
35. Id.
36. 194 Ga. App. at 477-78, 390 S.E.2d at 894.
that they were the sole beneficiaries in the filed but unprobated will.\textsuperscript{38} The court of appeals affirmed summary judgment in favor of the widower.\textsuperscript{39} Since the year's support claim of the widower was a debt of first priority, it was immaterial whether the will had been or ever would be probated.\textsuperscript{40} Courts can not determine whether any assets remain to pass under a will until after the year's support award is made.

While McCoy v. Patton Georgia Corp.\textsuperscript{41} concerned a number of year's support issues, the court ultimately decided on the basis of finality of judgments. In this case, year's support property was awarded to the widow and a minor son after the husband died intestate in 1961. In 1967, after the son had reached majority, the ordinary granted the widow's petition to convey or encumber the property, but set no time limit on the sale. In 1986 the widow conveyed a portion of the property that ultimately vested in plaintiff corporation. When the son asserted a claim to a one-half interest in the property, plaintiff sought a declaratory judgment of its title.\textsuperscript{42} Summary judgment for plaintiff was affirmed.\textsuperscript{43} The son did not challenge the 1967 grant of the power to sell, even though he had reached his majority previously. That grant was never appealed nor set aside. Thus, finality of judgments barred his complaint over twenty years later.\textsuperscript{44}

The court could have reached a similar result under year's support law. When property is set aside to a widow and minor son, they take the fee as tenants in common. The courts hold that it is intended for their joint support until the minor reaches majority. After the expiration of the year in which the award is made, and thereafter as long as the property lasts, it is subject to the support of the widow during her life. The only qualification on subsequent use is the requirement that the probate court approve any proposed sale or encumbrance.\textsuperscript{45}

\textbf{B. Contracts to Will}

The only noteworthy contract to will case resulted in the finding of a valid contract.\textsuperscript{46} However, the court's strict construction of the contract left the beneficiary with nothing. The facts disclosed that in 1981 a
mother sued to enforce the alleged promise of the father to include his illegitimate child in his will equally with his three legitimate children. The trial court found that the promise was made and ordered the father to make a will awarding the illegitimate child "the same amount of property . . . that he awards to each of his children." 47 He responded by making a will leaving his entire estate to his wife and nothing to any of his children. (His prior will had left one-half of his estate to the three legitimate children.) Following his death in 1986, the 1981 will was admitted to probate. The court of appeals reversed, holding that the 1981 will violated the spirit of the trial court's order. 48 The supreme court reversed the court of appeals and held that the 1981 will was valid and complied with the trial court's order. 49 All the order required was that he leave the illegitimate child the same amount of property that he left to the other children. In leaving none of the children anything, he treated them all equally. 50

C. Probate of Wills

The divided family situation, in which each spouse has been married previously and one or both have children from the prior marriage, calls for careful estate planning and will drafting. The husband and wife in Woods v. Woods 51 gave the matter considerable attention, but still failed to cover all contingencies. The result was frustration of their obvious desires. Before departing upon a lengthy trip, they executed an instrument entitled "Agreement." The instrument stated that time was of the essence, "and in lieu of executing [their] last wills and testaments," they desired that the property owned by each prior to their marriage go to their respective heirs in the event of their deaths in a common disaster. More specifically, it provided that the husband's property would go to five named relatives, the wife's property would go to her son and daughter by her previous marriage, and if one of them should die as a result of accident or disaster, the survivor should own the other's property for life, with remainder to the above-named heirs. Last, the "Agreement" provided that a will or wills carrying out these instructions would be made as soon as convenient after their return from the lengthy trip. Three indivi-


47. Thorpe, 260 Ga. at 800, 400 S.E.2d at 620.
49. Thorpe, 260 Ga. at 800, 400 S.E.2d at 621.
50. Id.
uals witnessed this “Agreement,” none of whom were told by the husband or wife that they were executing wills.52

The couple returned safely from the trip and neither subsequently executed a will. The husband died of cancer a year and a half later. When his brother filed the “Agreement” for probate as his will, the wife filed a caveat, claiming the entire estate of the husband as his sole heir.53 The probate court and the superior court ordered admission of the “Agreement” to probate as a will and the qualification of the brother as administrator with the will annexed.54 The supreme court reversed, properly treating the case as one involving a conditional will, the condition precedent of which did not occur.55

The question was the classic one: Did the testator, by stating the condition, intend merely to state what motivated the making of a will; or did he intend to state the condition upon the occurrence of which a will was to become operative? The court concluded that the parties intended the “Agreement” to become effective as a will only if one or both of them died as a result of an accident or common disaster during the trip.56 Since neither died on the trip, the condition precedent to the “Agreement” becoming effective as a will never occurred. The wife, as sole heir, took the entire estate.57

The requirement that a testator know the contents of his will at the time of execution is universal. The degree of proof needed to satisfy the requirement, however, was complicated in Lowe v. Young58 because the only evidence on the point was the testimony of the scrivener, a primary beneficiary. The statute on point provides only that when the scrivener is a large beneficiary, “greater proof” of that knowledge is required.59 The evidence supplied “greater proof.” The will was read to the testator; he was mentally alert, coherent, and able to speak and respond to questions; and he verbally assented to the reading of the will.60

Entitlement to notice of probate proceedings became a complicated issue in Garner v. Harrison61 because petitions to probate two separate and conflicting wills were pending simultaneously in the same probate court. The named executor first offered a 1986 will for probate. One month later, testator’s step-daughter offered a 1981 will. The 1981 will named

52. Id. at 553, 397 S.E.2d at 292.
53. Id.
54. Id.
55. Id. at 554, 397 S.E.2d at 293.
56. Id., 397 S.E.2d at 292-93.
57. Id.
60. 260 Ga. at 891, 400 S.E.2d at 620.
her a beneficiary, but the 1986 will did not. The step-daughter, being
neither a legatee under the 1986 will nor an heir of the testator, did not
receive notice of the proceedings to probate the later will. After it was
admitted to probate, the step-daughter petitioned to have its admission
set aside for lack of notice.\textsuperscript{63} She appealed the probate court's dismissal
of her petition, and the court held that she had no entitlement to notice
because she was neither an heir nor a beneficiary and because the 1981
will under which she claimed was filed after the filing of the petition to
probate the 1986 will.\textsuperscript{64} The supreme court reversed and remanded.\textsuperscript{64}

The order dismissing the step-daughter's petition to probate the 1981
will was not res judicata with respect to her simply because she did not
appeal from that order. The dismissal meant only that her petition could
not be entertained while the probate of the 1986 will remained undis-
turbed. This previously probated will must be attacked before the court
can consider another will, the execution of which predates the probated
will.

The equally significant issue of whether the step-daughter could show a
deprivation of property without due process of law remained. The court
reviewed judicial and legislative developments in both state and federal
law on this issue.\textsuperscript{65} In \textit{Allan v. Allan},\textsuperscript{66} the Georgia Supreme Court held
that the inchoate interest in realty a devisee holds under a will is a "le-
gally protected interest."\textsuperscript{67} It follows that the step-daughter's interest
under the 1981 will entitled her to notice of the proceedings to probate
the 1986 will which, if probated, would defeat her inchoate interest under
the 1981 will. Following that decision, Georgia's notice statute was
amended in a manner that the court held to require the propounder of
any will to give notice to the propounders and beneficiaries of any other
will of the testator that has been offered for probate in the same county.\textsuperscript{68}
The probate court or proponents of other wills of the testator may clearly
ascertain the identity of those persons.\textsuperscript{68}

\begin{itemize}
\item \textsuperscript{62} \textit{Id.} at 867, 400 S.E.2d at 926.
\item \textsuperscript{63} \textit{Id.}
\item \textsuperscript{64} \textit{Id.} at 870, 400 S.E.2d at 927.
\item \textsuperscript{65} \textit{Id.} at 868-69, 400 S.E.2d at 926-27.
\item \textsuperscript{66} 236 Ga. 199, 223 S.E.2d 445 (1976).
\item \textsuperscript{67} \textit{Id.} at 202, 223 S.E.2d at 448.
\item \textsuperscript{68} O.C.G.A. § 53-3-13 (1982 & Supp. 1991).
\item \textsuperscript{69} The court then discussed the elaborations on the due process requirement by the
Supreme Court of the United States in such cases as Mullan v. Central Hanover Bank &
Trust Co., 339 U.S. 306 (1950); Mennonite Bd. of Missions v. Adams, 462 U.S. 791 (1982);
\end{itemize}
D. Problems Arising During Administration

The most frequently used form of a multiple-party account is one that is payable to one or more of two or more persons.70 Such accounts usually provide, though the applicable statute does not require it, that the parties also have survivorship rights.71 If the account is in the form of a joint account, a statutory presumption arises that the form controls the rights of the parties.72 However, if there is clear and convincing evidence of a different intention at the time the account was created, the courts may reach a different result.73 The cases reaching the appellate courts during this survey period illustrate the importance of intent and the difficulty of its proof.

In Turner v. Mikell,74 a jury found that only one of three certificates of deposit, all in the names of a mother and daughter as joint tenants with rights of survivorship, was a true joint account. The jury found that the other two were joint accounts created as a matter of convenience to help the mother manage her affairs.75 The problem, then, is one of evidence. In this case the testimony of the mother’s other four children was clear and convincing with regard to the latter two accounts. The children testified that the mother mentioned putting the daughter’s name on one of the certificates as a matter of convenience, but never told them that the daughter’s name was also on the other two certificates. There was testimony by some witnesses that the mother told them she wanted her children to share equally in the certificates.76 The self-serving nature of this evidence went to the question of its credibility. The court simply held that, in its entirety, the evidence satisfied the clear and convincing requirement.77

In Parker v. Peavey,78 the will left a life estate in certain realty to the testator’s widow and the balance of his estate to his two children by a previous wife. The testator purchased three certificates of deposit, one in the names of himself and the widow as joint tenants and two in his name only. After his death, the widow cashed the certificates, endorsing all of them as “Mrs. Sallie M. Parker, Executrix of Estate of Bernice Parker.”79 At the trial to determine ownership of the proceeds of these certificates,
the widow testified that she was emotionally upset when she endorsed the certificates and that she did not realize that one of the certificates was issued jointly to the testator and herself until she called the bank the following week. The trial court held for the two children by the testator's previous wife, stating that the widow had made an inter vivos gift of the joint certificate to the children and, in her capacity as executrix, had assented to the bequest of the other two to the children. The court of appeals affirmed as to the certificates solely in the name of the testator, but reversed as to the joint certificate. Under the statute, the right of survivorship vests at the death of a party to a joint account, and prior to that time the terms may be changed only by closing the account and re-opening it under another name. Here there was no clear and convincing evidence to contradict the statutory presumption that the depositor intended for the widow to have the right of survivorship. Thus, the proceeds of the joint account vested in the widow at the testator's death. It follows that she had no capacity, as executrix of his estate, to transfer those proceeds. Since she owned the proceeds individually, her signature as executrix was ineffective to deliver them as a gift to the children.

The bank acquittance statute served its purpose effectively in Echols v. Trust Co. Bank. In Echols the decedent opened two joint and survivor accounts in the bank in favor of himself, his niece, and his sister. After his death, the executor of his estate sued the bank and the niece, alleging that the accounts were estate assets because the testator opened them and added the niece for the sole purpose of expediting the payment of the decedent's debts and, therefore, no gift was intended. The complaint alleged that the niece had withdrawn from these accounts before and after the decedent's death. Prior to those withdrawals and prior to his qualifying as executor, plaintiff notified the bank that a dispute over the accounts existed. The appellate court affirmed summary judgment in favor of the bank on the basis of the acquittance statute.

The statute authorizes payment of any sums in a joint account on the request of any party to the account "without regard to whether any other
party is incapacitated or deceased at the time. . . ." 91 It further provides that payment discharges the bank from liability for sums paid, provided it has not received written notice prior to payment from a party able to request present payment that withdrawals should not be permitted. 92 Here, the executor gave the written notice in his personal capacity, prior to his acquiring the status of executor. At the time he gave notice, he was not a party able to request present payment. 93

In the multiple-party account situation, the personal representative is frequently little more than a stakeholder awaiting a court decision on whether an asset is an estate asset. In other situations he is personally concerned because of his continuing obligation to collect and protect assets. A duly qualified and serving personal representative is the only person who should collect the assets or pay the debts of an estate. Any other person who, innocently or otherwise, attempts to perform these functions is an intermeddler and stands to lose. In Stafford v. Stafford, 94 the ex-wife of a decedent petitioned for and was granted letters of administration. The following month the decedent’s will was admitted to probate and his brother qualified as executor. After publication of notice to creditors and debtors commenced, the ex-wife and daughter paid the funeral expenses and sued the executor for reimbursement. 95 The court of appeals affirmed the trial court’s ruling against them, holding that they made voluntary and gratuitous payments that had the effect of depriving the executor of his right and duty to properly administer the estate and to investigate or compromise claims for or against it. 96 The intermeddlers’ claim that they were entitled to reimbursement on a theory of unjust enrichment failed. Debt payment by the intermeddlers did not enhance the value of the estate.

The issue in Phillips v. Phillips 97 was a novel one. The testator’s will devised land to his son with a stipulation against its sale or encumbrance for a period of ten years. After the executor duly executed his deed of assent to this devise, including in it the restraint on alienation, the son petitioned the superior court to strike the restraint on the ground that it violated the common law prohibition against restraint on the alienation of

92. Id. § 7-1-820.
93. 198 Ga. App. at 340, 401 S.E.2d at 565 (The court noted that under both the prior law and the present statute a distinction must be recognized between the issue of the bank’s liability for making payment of such sums and the issue of opposing parties claiming beneficial interests in the account.) See O.C.G.A. § 7-1-811 (1989).
95. Id. at 450, 402 S.E.2d at 71-72.
96. Id. at 452, 402 S.E.2d at 71-72.
a fee and the comparable provision of the Georgia code. The supreme court affirmed dismissal of the suit on the ground that plaintiff sought the wrong form of relief. Rather than attacking the deed of assent, he should have attacked the restraint provision in the will. He derived his title from the will; the deed of assent merely perfected his inchoate title as devisee. Thus, even if the superior court reformed the deed of assent, plaintiff would be in the same position because title passed to him directly through the will that contained the restraint. A concurring opinion suggested that the proper approach would be either a complaint for a declaratory judgment or an action to quiet title under the Quiet Title Act of 1966.

III. RECENT DECISIONS—TRUSTS

The superior courts are reluctant to interfere with the probate courts' settlement of accounts of administrators and executors. However, they have concurrent jurisdiction with the probate courts when there is danger of loss or other injury to a person's interest, or where equitable interference is necessary for full protection of the rights of all parties. The supreme court found such interference necessary in Lee v. Lee. In that case the decedent set up an irrevocable trust for the benefit of his children. At his death he carried a $500,000 policy on his life that named his wife as sole beneficiary. His children claimed that the decedent had inadvertently named their mother as beneficiary of the policy. They claimed that his actual intention was for those proceeds to go into the irrevocable trust for their benefit. The superior court agreed, ruling that the wife held the proceeds in trust for the children. The supreme court held that the superior court had properly exercised its concurrent jurisdiction. Only a superior court with full equity powers could grant the full relief sought. However, the supreme court found that the superior court erred in finding a trust of any kind because the evidence was insufficient to support a finding of a resulting trust or a constructive trust.

100. Id.
101. Id. at 265-66, 392 S.E.2d at 524. See O.C.G.A. §§ 23-3-60 to -72 (1982).
104. Id. at 356-57, 392 S.E.2d at 871.
105. Id. at 357, 392 S.E.2d at 872.
106. Id. at 356, 392 S.E.2d at 871.
107. Id.
108. Id. at 357, 392 S.E.2d at 871-72.
109. Id.
The testimony of the insurance agent who wrote the policy did not corroborate the contention of the children. The acts of the decedent, prior to his death, also failed to show a clear and convincing intent on his part to set up a trust for the children. In short, there was no allegation or proof of fraud, and there was no evidence that the wife's ownership of the proceeds was against equity.

Seldom does a trustee give a general warranty of title to trust realty that he conveys. The trustees in *Moss v. Twiggs* did so and, while they escaped liability, litigation ensued. A will devised land to the trustees, giving them "the power to do all things and execute all instruments as may be deemed necessary or proper." The land passed into the hands of remote grantees who subsequently discovered that the United States had acquired fifteen acres of it in the 1940s. They sued the original grantee and the trustees who had conveyed to the original grantee. The trial court entered summary judgment in favor of the trustees, but damages were awarded to plaintiffs against their grantor for the value of the fifteen acres and for the value of improvements made by them, with interest.

The supreme court affirmed the holding in favor of the trustees. They had power to sell, but as fiduciaries, they lacked the power to warrant the title. Since they conveyed only as "[t]rustees under the will," they were not personally liable. The power to do all things necessary and proper did not bind them because their warranting title, as trustees, was not proper. The court also affirmed the judgment against the trustees' original grantee (and codefendant), but found that plaintiffs were not entitled to damages for improvements. The statute limits such damages to the purchase price with interest from the time of sale.

Traditional trust law, as well as the present Georgia law, provides that the court may order termination of a trust when the purpose of the trust has been fulfilled. This principle was applied to a court-ordered trust in

110. *Id.*
111. *Id.*
113. *Id.* at 561, 397 S.E.2d at 708.
114. *Id.*, 397 S.E.2d at 707-08.
115. *Id.* at 562, 397 S.E.2d at 708.
116. *Id.* at 561, 397 S.E.2d at 708.
118. 260 Ga. at 562, 397 S.E.2d at 708.
119. *Id.*
120. *Id.*
122. *Id.* § 53-12-3(d)(2) (Supp. 1990).
In re Trust under the Will of Arthur Lucas. In that case the parties to a divorce agreed to resolve alimony and child support obligations by establishing a trust. The trust vested each party with a one-half interest and provided that upon the death of the wife and their youngest living child reaching the age of 21, the wife's one-half interest would vest in their three children. The wife died in 1980, and her one-half interest vested in the three children, all of whom were of age and suffering no disabilities.

When the husband and the three children agreed to terminate the trust, the trustees resisted on the ground that the husband had an illegitimate son and heir who could not be found and upon whom no service had been attempted or perfected. The supreme court affirmed the superior court's order terminating the trust. Since the divorce trust was created for the sole purpose of providing alimony for the wife and support for the three children, the illegitimate son was never a beneficiary. Therefore, there was no need to serve him or to give him notice.

IV. Construction Problems

After six months from the grant of letters, any legatee or distributee may "cite the . . . personal representative to appear before . . . the probate court for a settlement." If it appears that construction of a will may be necessary, then transfer to the superior court may be in order. In Simon v. Bunch, the trustee named in a will sued the executor in probate court for a final accounting and distribution of the trust assets more than a year after the testator's death. The probate court concluded that the will failed to create a trust, and that even if it did, the trust was executed. Consequently, the named trustee lacked any interest which would give him standing to sue. The supreme court reversed, holding that the probate court's judgment, being based upon the exercise of a power it did not have (to determine trust issues), was void.

124. Id. at 337, 393 S.E.2d at 257.
125. Id.
126. Id. at 338, 393 S.E.2d at 258.
127. Id. at 337-38, 393 S.E.2d at 257-58.
128. Id.
130. Id. § 53-7-188 (1982).
132. Id. at 201, 391 S.E.2d at 648-49.
133. Id., 391 S.E.2d at 649.
134. Id. at 202, 391 S.E.2d at 649.
Caudell v. Caudell\textsuperscript{138} illustrates the problems inherent in the use of joint and mutual wills. Item Two of a husband and wife's joint and mutual will provided that upon the death of either, the survivor would take fee simple title to the entire estate of the deceased. Item Six of the will made a disposition of certain personalty and of two parcels of realty. After the husband's death and after probate of the instrument as his will, the wife disposed of certain realty. A son of the decedent testator alleged that her action conflicted with the terms of the will.\textsuperscript{138} The supreme court reversed a denial of the wife's motion for judgment on the pleadings.\textsuperscript{137} The court found that Item Two of the will gave the wife fee simple title and that no subsequent provision showed an unmistakable intent to limit that devise.\textsuperscript{138} The son's reliance upon a contract to will theory also failed. The will contained no language indicating that it was the result of a contract, nor was there any showing of consideration for reciprocal wills.\textsuperscript{139}

The single issue in Whitlock v. Lawson\textsuperscript{140} was whether a testamentary gift of eighty percent of the estate to two named individuals was a class gift. In making the gift, the testator described the services he received in the personal care home run by two individuals.\textsuperscript{141} He indicated that their bequest was in return for their services and was "'for them to share equally.'"\textsuperscript{142} In the same section the testator expressed a desire that the two use their gift "'as they see fit' " to continue their work in caring for the elderly.\textsuperscript{143} This provision, coupled with the two gifts of the remaining twenty percent of the estate that were clearly charitable (to provide scholarships for needy students at a college, and to a disabled veterans' organization), persuaded the probate court to hold the gift of eighty percent to be charitable also.\textsuperscript{144}

Since one of the two donees of the eighty percent gift predeceased the testator, leaving three children as her heirs, the issue of class gift \textit{vel non} became crucial. If it were not a class gift, the half of the deceased donee would go in equal shares to her three children. If it were a class gift, the surviving donee would hold all the eighty percent (presumably for a charitable purpose).\textsuperscript{145} The supreme court reversed, holding the gifts to the

\begin{itemize}
\item 136. \textit{Id.} at 802, 401 S.E.2d at 3.
\item 137. \textit{Id.} at 802-03, 401 S.E.2d at 3.
\item 138. \textit{Id.} at 803, 401 S.E.2d at 3.
\item 139. \textit{Id.}
\item 140. 260 Ga. 520, 397 S.E.2d 433 (1990).
\item 141. \textit{Id.} at 520-21, 397 S.E.2d at 433.
\item 142. \textit{Id.} at 521, 397 S.E.2d at 433.
\item 143. \textit{Id.}
\item 144. \textit{Id.}, 397 S.E.2d at 433-34.
\item 145. \textit{Id.} at 521-22, 397 S.E.2d at 434.
\end{itemize}
two named persons were individual gifts and the forty percent of the donee who predeceased the testator passed in equal shares to her three children. The court found that the testator's controlling intention was to reward the two donees for their services to the testator and that care for the elderly was a secondary purpose, which he left to their discretion.

When the sole income beneficiary of a trust is made a co-trustee with a corporate trustee and the will authorizes the trustees to invade the corpus for the benefit of that income beneficiary, extremely careful drafting is required. Even then, litigation is invited. Wright v. Trust Co. Bank of Northwest Georgia involved such a trust. The trust granted the trustees the power to invade the corpus for the benefit of the testator's daughter in the event that the income was insufficient "to meet any reasonable need" of the daughter. When the daughter sought approval of the corporate co-trustee to encroach so that she might purchase her husband's one-half interest in some real estate jointly owned by them, the remaindermen objected, and the corporate co-trustee sought a declaratory judgment.

The trial court held, and the supreme court agreed, that the language of the power to invade the corpus was ambiguous. Nevertheless, the court agreed that the statement of the trust's purpose ("to meet any reasonable need") referred to what might be needed for "the beneficiary's health, maintenance, and support consistent with [her] accustomed manner of living," and that, in the absence of any language enlarging that power, encroachment for investment purposes was not authorized. The testator's creation of the trust primarily for the benefit of the daughter would not justify ignoring his express limitation on the power to encroach.

The right of adopted children of the testatrix' grandson to take the remainder of a $13,000,000 trust created by the testatrix at her death was resolved by the decision in Epstein v. First National Bank. The testatrix' will made her grandsons life beneficiaries, with the remainder to go to "any child, or children, of his [a grandson's] body who may survive him." A codicil provided for a gift over, in default, to the "heirs at

146. Id. at 522, 397 S.E.2d at 434-35.
147. Id.
149. Id. at 416, 396 S.E.2d at 215.
150. Id. at 414, 396 S.E.2d at 213-14.
151. Id. at 415, 396 S.E.2d at 215.
152. Id.
153. Id. at 415-16, 396 S.E.2d at 215.
155. Id. at 217, 391 S.E.2d at 925.
V. CONCLUSION

This Article calls attention to many interesting and important developments in Georgia fiduciary law, both legislative and judicial. While it is not intended as an exhaustive treatment of any of these developments, the hope is that it will prompt further thought and research on the part of its readers.

156. Id.
157. Id. at 217-18, 391 S.E.2d at 925.
158. Id. at 220, 391 S.E.2d at 926-27.
160. 260 Ga. at 217, 391 S.E.2d at 925.
161. Id. at 219, 391 S.E.2d at 926.
162. Id. at 219-20, 391 S.E.2d at 926-27.