Wills, Trusts, and Administration of Estates

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The most recent survey period included considerably more judicial than legislative activity affecting fiduciary law, perhaps attesting to the relative stability of fiduciary law. Notwithstanding this relative stability, the issues raised in the cases ranged all the way from those of venue and jurisdiction to a case about the construction of a will probated in a now long closed estate.

While there was little substantive legislation in the area of fiduciary law, there were a few such statutes. One of these expanded upon the guardian and ward relationship, and another authorized the use of the "Financial Power of Attorney." These legislative developments will be discussed in the last section of this Article.

I. RECENT DECISIONS—WILLS AND ADMINISTRATION

A. Preliminary Issues

Jurisdiction and Venue. While issues of jurisdiction and venue do not often arise, we start this discussion with two recent cases which illustrate their fundamental importance. In In re Estate of Adamson,1 the duly qualified executor of the estate of a decedent demanded that the surviving wife turn over to him two vehicles that were being held by the wife but were titled in the name of the decedent. When she refused, claiming an ownership interest in the vehicles, the probate court found her in contempt of court. The court of appeals, however, reversed this finding, holding that the probate court in Georgia lacks jurisdiction to

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try title.\textsuperscript{2} It is given jurisdiction only over "property belonging to" a decedent's estate.\textsuperscript{3} The executor's contention that he was claiming only the right to possession of the vehicles begged the question. The probate court's total lack of jurisdiction over the vehicles thus rendered the award to the executor a void judgment, the violation of which would not be contemptuous.\textsuperscript{4}

While the county of residence of a testator at his death gives probate jurisdiction to the probate court of that county,\textsuperscript{5} removal to another county is specifically authorized under certain circumstances.\textsuperscript{6} \textit{Rentz v. Blanton}\textsuperscript{7} necessitated construction of that removal statute.\textsuperscript{8} In Rentz the decedent's will was admitted to probate in Wayne County, her place of residence, and her son was duly qualified as executor. A few months later he petitioned the Probate Court of Wayne County for removal of the proceeding to the Probate Court of Appling County, the county of his residence. The court of appeals reversed the probate court's denial of the transfer. The problem was solely one of construction of the cited code section.\textsuperscript{9} The heirs' resistance to the removal could have been based upon the fact that the section starts with the statement that removal "may" be done by the filing of certain documents in the probate court of the county to which removal is sought. Whether or not the heirs made the possible argument that the word "may" suggests that removal is discretionary, their express argument was that such removal would allow the executor to avoid the rulings of the original court.\textsuperscript{10} The court of appeals disposed of this argument by noting that in the case of such a removal the court to which the case was transferred would have "the record from the transferring court and would have the authority to reissue any orders which remained pending at the time of transfer."\textsuperscript{11}

\textbf{Georgia's Slayer Statutes.} Slayer statutes are premised on the notion that killers should not be allowed to profit as a direct result of their crimes. Georgia's slayer statute\textsuperscript{12} promotes this public policy by providing that property which would have gone to the slayer will go,

\begin{itemize}
\item \textsuperscript{2} \textit{Id.} at 613-14, 451 S.E.2d at 501.
\item \textsuperscript{3} O.C.G.A. \textsection{} 15-9-30(a)(4) (1995).
\item \textsuperscript{4} 215 Ga. App. at 614, 451 S.E.2d at 502.
\item \textsuperscript{5} O.C.G.A. \textsection{} 53-3-1(b) (1995).
\item \textsuperscript{6} \textit{Id.} \textsection{} 53-7-120(a).
\item \textsuperscript{7} 216 Ga. App. 396, 454 S.E.2d 606 (1995).
\item \textsuperscript{8} O.C.G.A. \textsection{} 53-7-120 (1995).
\item \textsuperscript{9} \textit{Id.}
\item \textsuperscript{10} 216 Ga. App. at 397, 454 S.E.2d at 607.
\item \textsuperscript{11} \textit{Id.} (referring to Uniform Transfer Rule T-13 and O.C.G.A. \textsection{} 53-7-120(a)(1) (1995)).
\item \textsuperscript{12} O.C.G.A. \textsection{} 53-4-6 (1995).
\end{itemize}
instead, to such other heirs of the victim as would be entitled thereto under the rules of descent and distribution "or by will, deed or other conveyance" executed by the victim.  

Bradley v. Bradley applied this statute to an unusual factual situation. There the testator was survived by his two sons as his only lineal descendants. His will, which was apparently well thought out, left his son James only a hundred dollars because James had previously received an advance on his inheritance in a certain land deal. The balance of the estate was left to his other son Benjamin, with the provision that if Benjamin was not alive at the time of the testator's death and had no issue, his share would go to four named alternative beneficiaries.

Later the testator was wrongfully killed by his son, Benjamin. Neither James nor Benjamin contended that Benjamin should be able to take under the will. James's argument, though, was that because Benjamin killed their father, the slayer statute must be applied to Benjamin's share of the estate, removing that share from the operation of the will and, instead, passing it through the laws of intestacy to him. The court of appeals, however, gave the slayer statute full operation; i.e., Benjamin and his heirs (he had no issue) were barred from taking by the very terms of the statute. James could not take because the will limited his claim to the hundred dollar legacy and therefore, the balance of the estate passed to the four alternative beneficiaries.

Georgia's insurance code also has a slayer statute comparable to the one just discussed. It denies any benefits under a life insurance policy to one who kills the insured and who is named as a beneficiary in the policy. In Stephens v. Adkins, the insured named as equal beneficiaries of his policy his son and his daughter. The son was later convicted of the voluntary manslaughter of his father. In a declaratory judgment action brought by the daughter, individually and as administratrix, the son offered an affidavit in defense that the killing was an accident or in the alternative, was in self-defense. The court of appeals affirmed the grant of a summary judgment that the son was not entitled to any portion of the insurance proceeds. The son's conclusory statements in the affidavit did not affect the judgment that the son was

13. Id.
15. Id. at 69, 443 S.E.2d at 864.
16. Id. (citing O.C.G.A. § 53-4-6(a) (1995)).
17. Id., 443 S.E.2d at 865.
19. Id.
21. Id. at 653-54, 448 S.E.2d at 734-35.
guilty of the voluntary manslaughter. He remained convicted of the crime which, under the terms of the slayer statute applicable to insurance, precludes a slayer from taking as beneficiary under a life insurance policy on the victim.\(^{22}\)

**Year's Support.** While the year's support claim of the surviving spouse is given precedence over any other claim against a decedent's estate,\(^{23}\) an exception exists in favor of a "perfected security interest" in property covered by Georgia's Uniform Commercial Code.\(^{24}\) *Auto Alignment Services v. Bray*\(^{25}\) necessitated a reconciliation of these two sections. In that case, after the husband's death, his wife was awarded year's support in assets which included nine hundred shares of stock then in the possession of the defendant corporation, allegedly as security for a loan made by the corporation to the decedent. After the wife's subsequent death her executors brought a trover action for the stock. The defendant corporation claimed that it had a perfected security interest in the stock which gave it priority.\(^{26}\)

The trial court held that the defendant's failure to assert its claim in the year's support action amounted to a waiver of its lien.\(^{27}\) Furthermore, even if defendant had a perfected security interest, by not asserting it until the time of the trover action amounted to an impermissible collateral attack upon the year's support judgment.\(^{28}\) The court of appeals affirmed the judgment on the following, quite different reasoning: the pledge of stock as collateral does not change ownership, it creates only a lien. Since the wife became owner of the stock by virtue of the year's support award, the only remaining question was whether the defendant's lien was extinguished by that award. It would not have been extinguished if the defendant had acquired a perfected security interest prior to the decedent's death. Here, though, the defendant failed to show such an interest. In order to perfect a security interest in corporate stock, the stock certificate must be delivered to the secured party, accompanied by a stock pledge agreement.\(^{29}\) While in this case a security agreement was alluded to in the defendant's corporate records, which were a part of the record on appeal, the agreement itself was not.

\(^{22}\) Id. at 654, 448 S.E.2d at 734.
\(^{26}\) Id. at 53, 446 S.E.2d at 753.
\(^{27}\) Id.
\(^{28}\) Id. at 54, 446 S.E.2d at 754.
\(^{29}\) Id., 446 S.E.2d at 755. See O.C.G.A. § 11-9-310 (1944), as to priority of liens, and § 11-9-203 (1944), as to attachment and enforceability.
Hence, there was no evidence that a perfected security interest existed.\textsuperscript{30}

\textbf{B. Proof of Heirship}

The problems faced by one born out of wedlock who attempts to prove a right to inherit property from his father have always been burdensome, if not impossible ones. Three recent cases attest to this statement: \textit{Pinkard v. Morris,}\textsuperscript{31} \textit{In Re Estate of Burton,}\textsuperscript{32} and \textit{Welch v. Welch.}\textsuperscript{33}

In \textit{Pinkard v. Morris,}\textsuperscript{34} the plaintiff was born five months after her mother married Hight, who was not plaintiff’s father but, instead, was one whom her mother later married, she said, “to give a name to her daughter.”\textsuperscript{35} Eighteen months later the mother, then only sixteen years of age, filed for a divorce from Hight, alleging in her petition that there had been one child “born as the issue of this marriage.”\textsuperscript{36} In her deposition the sixteen year old mother stated that she did not recall ever reading the petition, which she said she signed at the request of her attorney. The divorce decree provided for custody, visitation rights, and support for “the parties’ minor child” (the plaintiff).\textsuperscript{37} Hight never paid any support for plaintiff. The mother stated that she never attempted to enforce the decree because she did not believe that Hight owed them anything, and her only interest was in the divorce decree.\textsuperscript{38}

Here a decedent appeared on the scene. One Morris died intestate in 1992 and the plaintiff filed a claim that she was Morris’s daughter and therefore entitled to share as an heir. The trial court entered summary judgment for the estate of Morris, holding that plaintiff’s claim was barred under the doctrine of collateral estoppel because the prior divorce decree in favor of plaintiff’s mother established that Hight, not the decedent Morris, was her natural father.\textsuperscript{39}

The court of appeals reversed, holding that the facts failed to show that the plaintiff was collaterally estopped from claiming as an heir of decedent Morris.\textsuperscript{40} The doctrine of collateral estoppel precludes adjudication of an issue previously adjudicated between the parties or

\begin{itemize}
\item \textsuperscript{30} 214 Ga. App. at 55, 448 S.E.2d at 755.
\item \textsuperscript{31} 215 Ga. App. 297, 450 S.E.2d 330 (1994).
\item \textsuperscript{32} 265 Ga. 122, 453 S.E.2d 16 (1995).
\item \textsuperscript{33} 265 Ga. 89, 453 S.E.2d 445 (1995).
\item \textsuperscript{34} 215 Ga. App. 297, 450 S.E.2d 330 (1994).
\item \textsuperscript{35} \textit{Id.} at 298, 450 S.E.2d at 331.
\item \textsuperscript{36} \textit{Id.}
\item \textsuperscript{37} \textit{Id.}
\item \textsuperscript{38} \textit{Id.}
\item \textsuperscript{39} \textit{Id.}
\item \textsuperscript{40} \textit{Id.} at 299, 450 S.E.2d at 331.
\end{itemize}
their privies. Privity connotes that the interests of the party to an action must fully represent the interests of the privy and must be fully congruent with those interests. Such privity did not exist in this case; hence, the plaintiff is not estopped from asserting her claim as an heir of Morris. The plaintiff was a mere infant, relying solely upon her mother to protect her interest in the mother’s divorce proceeding. The record showed that the mother’s only concern was in getting a divorce. She did not care enough for the plaintiff’s rights to even read the petition or to enforce the support decree, which Hight failed to pay. It follows that the interests of the plaintiff were simply not represented in the divorce proceeding. Consequently, she is not collaterally estopped from claiming as an heir of Morris.

The problem of proof of heirship reached the supreme court in two cases, one of them involving a claim of virtual legitimation and the other a claim of virtual adoption. In In re Estate of Burton, the plaintiff, claiming to be the out of wedlock but virtually legitimated son and sole heir of the intestate decedent, filed for letters of administration. The claim was contested by the decedent’s brother. The concept of virtual legitimation was first fully recognized in Prince v. Black and was subsequently codified. It recognizes that an out of wedlock child can inherit from its father by establishing with clear and convincing evidence that it is the child of the intestate father and that the latter intended that the child share in the father’s estate. So, in every such case, the burden is on the claimant to produce clear and convincing evidence. The probate court’s grant of letters of administration to the child was reversed by the supreme court, which, after reviewing the evidence, concluded that the plaintiff had failed to meet the clear and convincing test.

The supreme court review of the evidence will be helpful in resolving such cases in the future. It pointed out that evidence in Burton was uncontroverted that the decedent had no contact with the plaintiff during the first twenty years of the plaintiff’s life, and it was the

41. Id. at 298, 450 S.E.2d at 331 (citing O.C.G.A. § 9-12-40 (1993)).
42. Id. (citing Miller v. Charles, 211 Ga. App. 386, 439 S.E.2d 88 (1993)).
43. Id., 450 S.E.2d at 332.
44. Id.
46. 265 Ga. 122, 453 S.E.2d 16.
47. Id. at 122-23, 453 S.E.2d 16.
50. Id.
51. 265 Ga. at 123, 453 S.E.2d at 16.
plaintiff who initiated contact. While the plaintiff and his family testified that the decedent acknowledged him as his son and never charged him for meals at decedent's restaurant, the brother of the decedent, along with other members of his family, testified that the decedent never mentioned having a son. Although one witness, an employee of the decedent, testified that the decedent introduced the plaintiff as his son, another employee testified that the decedent would claim plaintiff as his child on one occasion and vehemently deny it on another. Still another witness testified that the decedent said publicly he was childless. All the witnesses agreed that the decedent had often said that he did not care what happened to his property after his death.52 The supreme court emphasized that the evidence of paternity was much more compelling in Prince v. Black,53 where the decedent cared for the child from the age of six months, named him as insurance beneficiary, and swore under penalty of perjury that the child was his son.54 Perhaps, over time, there will be other cases such as Prince v. Black55 and Burton56 directly addressing the issue of clear and convincing evidence and giving us a more precise understanding of the meaning of the term.

The other case of disputed heirship was Welch v. Welch,57 in which the claimed right to inherit was based upon the theory of a virtual adoption, not on that of virtual legitimation. A juvenile court had placed the claimants in the custody of the Welches in the 1960s. Although they remained in such custody until they reached majority, the Welches never initiated any proceedings to adopt them formally. After both Mr. and Mrs. Welch died intestate in 1992, the children filed an action claiming children's shares of their estates. In recognition of the fact that a claim of virtual adoption must be based upon a contract,58 the plaintiffs asked the court in effect to create a contract out of the juvenile court's order establishing legal custody in the Welches and giving them authority to proceed with statutory adoption if they so chose.59

In a four to three decision, the Supreme Court affirmed the trial court's dismissal of the claims, relying upon the recent case of O'Neal v.
Wilkes,\textsuperscript{60} which held that in a virtual adoption case a contract for adoption must be proven to have been entered into by persons competent to contract for the disposition of the child.\textsuperscript{61} Ordinarily such a contract would be one between the natural parents and the adopting parents. The supreme court held that the juvenile court order granting custody to the Welches should not be expanded into a contract of virtual adoption.\textsuperscript{62} While the court had authority to approve the custodians' proceeding with a statutory adoption, the custodians never took such steps.\textsuperscript{63}

C. Probate of Will

**Undue Influence and Lack of Testamentary Capacity.** Undue influence and lack of testamentary capacity are frequently raised grounds for a caveat of a will. Since they are incapable of precise definition, the cases litigating them are good examples of how the courts determine whether the cumulative effect of the evidence is sufficient to establish either of these grounds. Two recent cases addressed this specific point.\textsuperscript{64} The executor named in the will challenged in *McGee v. Ingram*\textsuperscript{65} was also the principal beneficiary. In support of his motion for summary judgment, he produced the testimony of three witnesses: the attorney who drafted the will, the physician who treated the testatrix for eight years prior to her death, and another witness. The attorney testified that immediately prior to execution he reviewed the will, page by page, with the testatrix and that he specifically asked her if she had been subjected to any undue influence and if the terms of the will expressed her wishes. He testified that the testatrix denied that there had been any undue influence and affirmed that it was in fact her will. The physician testified that, in his opinion, the testatrix was not one who would let herself be unduly influenced. Furthermore, when he asked her if she knew what she was doing and if she agreed with the terms of the will, she replied in the affirmative.\textsuperscript{66}

In opposition the caveator offered evidence that the executor, the principal beneficiary, had for years occupied a confidential relationship with the testatrix. On appeal from the probate court's admitting of the

\begin{itemize}
\item 60. 263 Ga. 850, 439 S.E.2d 490 (1994).
\item 61. Id. at 851, 439 S.E.2d at 491.
\item 62. 265 Ga. at 90, 453 S.E.2d at 447.
\item 63. Id.
\item 65. 264 Ga. 649, 448 S.E.2d 439 (1994).
\item 66. Id. at 650, 448 S.E.2d at 440.
\end{itemize}
will to probate, the court granted the executor’s motion for summary judgment on the issue of undue influence, but denied the issue of testamentary capacity. The supreme court affirmed the issue of undue influence, but reversed the issue of testamentary capacity. There was no evidence in the record rebutting the testimony of the three attesting witnesses as to testatrix’s capacity. The fact that the executor was the primary beneficiary and was also in a confidential relationship with the testatrix did not alone establish any undue influence. On the other hand, the affidavits of lay witnesses on the issue of testamentary capacity, construed most favorably to the caveators, were sufficient to raise the issue of capacity. Other affidavits of physicians, based on the testatrix’s medical records which were not of record in superior court (though they were in probate court), lacked probative value, thus leaving unresolved the issue of capacity.

Sims v. Sims makes the point that influence of a testator in the drafting of a will and in its execution is not, in itself, bad or unlawful. Only when the influence constrains or coerces the testator to do what “his best judgment tells him not to do” is it considered undue influence. The result is that the will of the influencer is substituted for that of the testator. Elaborating on this basic premise, the court looked carefully at the three points on which the testator’s grandchildren relied, in order to prevail in probate court.

First, the grandchildren offered evidence that the testator’s children requested the testator obtain a prenuptial agreement before his second marriage in order to protect the family business and other assets acquired by him during the forty-five years of marriage to his first wife. Second, they offered evidence of his transfer of assets (five years after the execution of the will and two years after the execution of the codicil), for about one-half their value, from one corporation owned by him to another one owned by family members. Third, they alleged that one of the executors had mismanaged the estate of a deceased brother. Opposing evidence was then offered, showing that the testator, though he had retired, continued to exercise active control of his business

67. Id. at 649, 448 S.E.2d at 440.
68. Id. at 651-52, 448 S.E.2d at 441.
69. Id.
71. Id., 452 S.E.2d 762 (citing D.H. Redfearn, WILLS AND ADMINISTRATION OF ESTATES IN GEORGIA § 50 (5th ed. 1988)).
72. Id.
affairs. There was also evidence of mutual influence between the testator and his sons.\footnote{73}

Notwithstanding the probate court’s finding that there was undue influence, the supreme court reversed, holding that as a matter of law the total evidence precluded such a finding.\footnote{74} The evidence offered by the caveators failed to show any substitution of the will of the influencers for that of the testator.\footnote{75}

\textbf{Ademption.} The issue of ademption of a devise reached the supreme court in an unusual manner in \textit{In re Estate of Corbitt}.\footnote{76} When the will was offered for probate by the surviving wife, the named executor, the testator’s two children by a previous marriage filed a caveat on the ground that a devise to the wife had been adeemed by a prior conveyance of the land. Furthermore, they contended that the wife was estopped from claiming under the will by a reconciliation settlement agreement executed by the testator and the wife, pursuant to which the testator conveyed to her certain land. Pursuant to an “Appeal by Agreement” the superior court, after a pre-trial stipulation of the parties as to the validity of the will, denied the wife’s motion for summary judgment.\footnote{77}

On appeal, the supreme court held that the superior court should have ordered summary judgment for the wife.\footnote{78} The only inquiry in a probate proceeding is that of \textit{devisavit vel non}.\footnote{79} Consequently, the only issues were the legal execution of the will, the testamentary capacity of the testator, and the presence or absence of undue influence, fraud, or mistake in the execution of the will.\footnote{80} Since the probate court in such a proceeding merely adjudicates the factum of the will, the superior court on appeal is similarly limited.\footnote{81} It follows that the effect of the invalidity of a bequest, or of the ademption thereof, would be only to render the bequest void, not to invalidate the will. Having stipulated to the validity of the will, there remained no valid ground for caveat.\footnote{82}
The court noted, however, that the children are not without a remedy. They may, in a separate proceeding, challenge the validity of the devise itself, claim that there has been an ademption, or argue that the wife is estopped to claim the land. None of these points are relevant, though, in a proceeding in which the only issue is that of *devisavit vel non*.

**Revocation.** The will in *Wells v. Jackson* was caveated on the ground that it had been revoked by "obvious erasures" in the names of two residuary takers. While there were apparent water smudges on these names, they remained clearly legible. In its opinion upholding the will, the supreme court reviewed the initial burden of proof and the shifting of it in will contests, noting two points. First, the propounder has the burden of proof regarding compliance with the technical requirements of the wills act, such as capacity and the free and voluntary action on the part of the testator. Second, when the propounder has thus made out a prima facie case, the burden then shifts to the caveator to prove that the will is invalid. Here the court found that the caveator failed. Even if the smudges had been made by the testator, they still were no more than an unsuccessful attempt to revoke by obliteration. Every word of the will remained clearly legible and therefore there was no evidence that an obliteration or cancellation occurred.

**D. Trusts**

**Purchase Money Resulting Trusts.** The first of the two trust cases to be discussed in this section, *Thompson v. Beardon*, calls us back to the fundamental logic of the purchase money resulting trust. The evidence in this case showed that at an unspecified date, a small parcel of land was conveyed for $5,500 to a husband and wife. They paid $2,500 down and agreed to pay the balance in monthly installments of forty dollars each. Thereafter, the husband's brother, who lived with the couple on the land, paid the monthly installments of forty dollars until the full purchase price was paid. Thirty years after they had

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83. *Id.* at 111, 454 S.E.2d at 130.
84. *Id*.
86. *Id.* at 182, 451 S.E.2d at 691-92.
87. *Id.* at 183, 451 S.E.2d at 692.
88. *Id*.
purchased the property, the husband and wife died intestate. The
brother then asserted his claim that his monthly payments on the
purchase price established an implied trust in his favor; hence, the
property was his.90 The supreme court had no difficulty reversing a
jury verdict which had awarded the land to the brother.91

The undisputed evidence showed that the brother had neither paid nor
obligated himself to pay any part of the $2,500 down payment made at
the time of the conveyance.92 To establish a claim to a purchase money
resulting trust, it must be established that all, or at least a specified
portion, of the purchase price was paid by the claimant at or before the
time of the conveyance of title to the alleged resulting trustee.93

In the other trust case, Jordan v. Caswell,94 the court, in a two-page
opinion, dealt with issues of fraudulent conveyances, discretionary
trusts, spendthrift trusts, and the applicability of Georgia's new trust
code to trusts created prior to its enactment.95 The plaintiff in this
case had recovered a judgment in 1987 against a husband and wife and
had later received partial payment of it by settling his proof of claim in
the wife's then pending Chapter 11 bankruptcy proceeding. Then, in
1991, twelve days before her death, the wife executed the will involved
in this litigation. In it she created a discretionary trust containing the
bulk of her estate which had four results. First, it provided for the
support of her husband; second, it named her husband and their son as
trustees. Third, it gave her husband during his life the power to give his
interest to the wife's heirs. Fourth, her husband was required to devise
the property at his death to the wife's heirs as he determined.
Furthermore, the trust also provided that the husband should have no
power to appoint the property to himself, his estate, his creditors, or
creditors of his estate, and that his interest in the trust would not be
subject to claims of his creditors.96

The judgment creditor, whose claim had been only partially satisfied
in the wife's Chapter 11 proceeding, sued to have the trust created in

90. Id. at 16-17, 453 S.E.2d at 20.
91. Id. at 17, 453 S.E.2d at 21.
92. Id.
93. Id. (citing Loggins v. Daves, 201 Ga. 628, 40 S.E.2d 520 (1946)). That this is long
established trust law, though, is shown by Bogert, Trust § 74 (6th ed. 1987). As a matter
of fact, this traditional requirement is implicit in O.C.G.A. § 53-12-92 (1995), which defines
such a trust as a resulting trust implied for the benefit of one "paying consideration for the
transfer." Id. (emphasis added).
95. Id. at 638-39, 450 S.E.2d at 819-20.
96. Id., 450 S.E.2d at 819.
her will declared void. In his petition, he alleged that the transfer was a fraudulent one under Georgia's fraudulent conveyance statute and that he was entitled to have the court use its equitable powers to declare the trust void. The supreme court affirmed the trial court's holding that the trust was valid and not a fraudulent transfer. In his verified complaint, the plaintiff alleged a fraudulent transfer and he also averred that the wife had been released from further liability by the subsequent agreement in the bankruptcy court. In light of this admission in judicio that the wife was no longer his debtor, her creation of the testamentary trust was not the act of a debtor under the fraudulent conveyance statute.

Nor did the spendthrift trust provision leave the husband's claim under the wife's will open to attack. The Georgia Trust Act specifically authorizes spendthrift trusts, but an apparent problem was posed by the fact that the act became effective a few months after the creation of the trust in this case. The plaintiff argued that to apply it to him would deprive him of vested rights, but the court held that he failed to identify any such rights that he would lose. In elaboration, the court explained that the plaintiff was a judgment creditor of the husband when the trust was created and, as such, had a right to assert a claim to any money coming into the husband's possession. That is a right which the plaintiff still has. While he could have made a claim against the corpus of the trust during the months between its creation and the enactment of the Georgia Trust Act, he failed to assert such claim. When he did make the claim, the Georgia Trust Act had become effective, including the provision that the act applied to existing trusts unless "it would impair vested rights."

The plaintiff still has the right to proceed against distributions from the trust to the husband, but he is not now entitled to any form of equitable relief. The difficulty with his claim against the husband is that the husband is currently entitled only to support out of the trust, a right which is not subject to a creditor's claim. Nor does the husband's

97. Id. at 639, 450 S.E.2d at 819.
99. 264 Ga. at 639, 450 S.E.2d at 820.
100. Id., 450 S.E.2d at 819.
101. Id. at 639-40, 450 S.E.2d at 820.
103. 264 Ga. at 640, 450 S.E.2d at 820.
104. Id.
105. Id.
106. Id.
107. Id. (quoting O.C.G.A. § 53-12-3 (1995)).
power to appoint, subject the trust property to claims of his creditors. He had only a restricted power during his life. The husband could appoint his interest to his wife's heirs and, at his death, the trust property was devised to those heirs as he determined. Thus, his creditor has no present right against the trust principal or income and will have none at the husband's death.

E. Will Construction

Succession Rights of a Child Born out of Wedlock. Whether a child born out of wedlock should take as one of the "children" of the natural father under the father's testamentary trust for the benefit of his wife and children was the crucial issue in Sardy v. Hodge. The testator's will was executed in 1981 and admitted to probate after his death in 1983. In 1992, almost nine years thereafter, the child filed an action for determination of the heirs at law, claiming the right to share as one of the children and seeking exhumation of the father's body for DNA testing to prove the fact of paternity.

During the years between execution of the will and the death of the testator, the statute on the inheritance rights of children born out of wedlock went through several changes. The law in effect at his death provided that such a child could inherit from his natural father only if, during the lifetime of the father, the child had been declared legitimate by a court of competent jurisdiction or if the paternity of the putative father had been established by a court order. In 1991, the cited section was amended to provide additional conditions under which a child born out of wedlock may inherit from or through his natural father. One of these conditions requires a genetic testing establishing a ninety-seven percent probability of paternity not rebutted by clear and convincing evidence. This amendment was the basis of the plaintiff's request for exhumation for DNA testing.

The supreme court affirmed the grant of summary judgment in favor of the estate. A will is to be construed according to the law in effect at
a testator's death. A statutory change in the law of succession eight years after his death will not benefit the plaintiff. The 1991 amendment had no retroactive effect.

Devolution of Lapsed Legacy. The lapse problem that arose in Tumlin v. Butler was complicated by the fact that the lapsed bequest was a part of the residue. The will provided that all of the residue of the estate (consisting entirely of personalty), "including any lapsed or void legacies," be divided, one-fourth in trust for testatrix's brother John if he survived her, and the remaining three-fourths to be divided equally among fourteen named nephews and nieces or their descendants. With reference to the one-fourth in trust for John, the will provided that if he predeceased the testatrix it would pass equally to the fourteen named nephews and nieces who were then living.

John predeceased the testatrix and after her death, a nephew who was not named in the will, argued that there was a lapse as to the one-fourth of the residue that would have been in trust for John. The supreme court affirmed the trial court's grant of a summary judgment in favor of the executor. There was a lapse of the bequest to John, but under the Georgia statute a lapsed legacy of personalty "shall fall into the residuum and go to the residuary legatee." Case authority mandates that this result follows even where the lapsed personalty was given in a residuary clause. Under this authority the lapsed share of the residue passed to the fourteen residuary takers.

Powers of Appointment. Never is careful draftsmanship more important than in the creation and the exercise of a testamentary power of appointment. This year's object lesson in this regard is the case of Shields v. Shields. In Shields, the testator, in Item 3 of his will, left his entire estate to his wife for life or widowhood and also gave her, "the right to do anything in reference thereto, that she may deem proper,
without order of court and without the consent of, control or interference
with her by any other person . . . without any liability to any other
person, for waste or mismanagement.”\textsuperscript{129} The next item of the will left
all proceeds from the sale of property not disposed of by the wife and not
used by her “under the provisions of Item 3 of this will” to his five
named children.\textsuperscript{130} After the testator’s death in 1978, the wife continued
to live on the hundred-acre farm until 1984. She then moved in
with one of the sons, where she resided until her death in 1989. During
this period, in 1986, she conveyed the farm, in fee, to that son and his
wife.\textsuperscript{131}

The other children sought a declaration that the wife conveyed only
her life estate in the farm, and not the fee, because the language of the
will was too ambiguous to support a holding that she conveyed the fee.
The supreme court, though, affirmed a summary judgment that the
conveyance transferred the fee. While an express grant of a life estate
with an added power of disposal does not enlarge the life estate into a
fee,\textsuperscript{132} the power is construed as a power to convey the fee unless it is
expressly, or by necessary implication, limited to the smaller estate.\textsuperscript{133}
While the two items of the will did not expressly say that the power was
one to convey the fee, the majority was prompted to quote the following
language from \textit{Townsley v. Townsley}:\textsuperscript{134} “It is difficult to conceive of
language that would express a more clear intent to give a wife during
her lifetime complete control and power of disposal of the property
devised under the terms of the will than that here used by the testa-
tor.”\textsuperscript{135}

The two dissenting justices disagreed with the majority’s construction
of \textit{Townsley}, pointing to the fact that in that case and in numerous other
Georgia cases, the life tenant was specifically given the right to sell,
while in \textit{Shields} there was no such specific language.\textsuperscript{136} This sharp
disagreement within the court is a commentary on the importance of
precise draftsmanship when dealing with powers of appointment.

\begin{itemize}
\item \textsuperscript{129} \textit{Id.} at 560, 448 S.E.2d at 437.
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} \textit{Id.}
\item \textsuperscript{132} \textit{Id.} at 561, 448 S.E.2d at 437 (citing \textit{Osborn v. Morrison}, 219 Ga. 169, 132 S.E.2d 58 (1963)).
\item \textsuperscript{133} \textit{O.C.G.A.} § 53-12-258 (1995).
\item \textsuperscript{134} 209 Ga. 323, 72 S.E.2d 289 (1994).
\item \textsuperscript{135} 264 Ga. at 561, 448 S.E.2d at 438 (quoting 209 Ga. at 325, 72 S.E.2d at 289)).
\item \textsuperscript{136} \textit{Id.} at 562, 448 S.E.2d at 438.
\end{itemize}
II. LEGISLATION

While there was little substantive legislative activity in the field of fiduciary law, the readers of this paper are alerted to a couple of statutes which tangentially relate to the subject. These are mentioned here only by way of brief reference.

A. Guardian and Ward

The guardianship title of the Official Code of Georgia\(^{137}\) was extensively revised to provide more specific guidance as to the appointment and qualification of guardians and as to their power to compromise claims in favor of the ward.\(^{138}\)

B. Power of Attorney

One of the newer of the uniform laws approved by the National Conference of Commissioners on Uniform State Laws is the Uniform Statutory Form Power of Attorney Act, which was approved by the conference in 1988.\(^{139}\) This expansion of the law of agency opens up new opportunities for lifetime estate planning. The statutory form lists thirteen broad types of powers which together would give the donee of the power all the authority which the donor himself possessed with reference to his financial affairs.\(^{140}\) Flexibility is built into the process by the statutory checklist of powers, any of which the donor could grant by initialing in the space at the end of the particular power or could withhold by not so initialing in the space. The statute expressly states that the form "may be used to create a financial power of attorney but is not the exclusive method for creating such an agency."\(^{141}\)

III. CONCLUSION

The judicial decisions and the legislative action deemed worthy of mention in this paper remind us, again, of the broad scope and the detailed application of legal principles in this body of law called "fiduciary law."

\(^{140}\) O.C.G.A. § 10-6-142 (1995).
\(^{141}\) Id. § 10-6-140.