Wills, Trusts, and Administration of Estates

James C. Rehberg
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by James C. Rehberg*

A survey of developments in any area of law requires a look backward and a look forward—a look backward at what the appellate courts have done with controversies that developed under existing statutes and decisions, and a look forward at what those courts will probably do with comparable controversies that develop under recently enacted statutes. Thus, in this survey of fiduciary law developments during the past year, we begin with reported cases that appear to be instructive. Classifying these cases under one heading or another is difficult, but an effort will be made to do so in the chronological sequence in which the issues typically appear.

I. RECENT DECISIONS—WILLS AND ADMINISTRATION

A. Preliminary Matters Affecting the Right to Succeed to Property

Year's Support and Creditors' Rights. The nature of the claim to succeed to realty after the owner's death was the issue in Martin v. Jones.¹ There, after the husband's death, his wife contracted to personally pay the $3,514 burial expenses, but then failed to do so. Instead, she filed for year's support and did not name the mortuary as an interested party. The court awarded the wife all of the husband's realty as a year's support. Thereafter, the holder of the mortuary's claim sued her for the burial expenses and obtained a default judgment, which was duly recorded in the general execution docket. She then conveyed the realty to A, who later conveyed it to B. When the sheriff levied

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execution on the realty and advertised it for sale to satisfy the judgment, the wife and her transferees, A and B, sued to enjoin the sale, arguing that the realty was not subject to levy and sale because it was year's support property. Affirming the denial of the injunction, the Georgia Supreme Court pointed out that the argument "misses the mark." No claim had been filed against the estate of the husband, nor would any such claim lie because the wife did not contract on behalf of his estate. Her contract was her personal obligation. Since the obligation was outstanding at the time the year's support award vested title to the realty in her fee, that fee became automatically burdened with the lien of the default judgment. That judgment lien attached to all of her property, real and personal.

Common Law Wife of Decedent as Administrator. Following the death of the decedent in Baynes v Baynes, his daughter and a woman claiming to be his surviving common law wife, filed separate petitions for letters of administration. The daughter challenged the validity of the alleged common law marriage and, hence, the standing of the alleged widow. After a full hearing, the probate court ruled that the alleged widow failed to prove a common law marriage because she failed to prove an essential element of all marriages, an actual contract of marriage. Seldom, if ever, is there direct proof of an actual contract for a common law marriage; thus, the marriage must be established by circumstantial evidence over an extended period of time. In the fifteen years the parties lived together the decedent never told his daughter, his mother, his brother, or his best friend that he was married to the alleged "spouse." His firearm license and his voter registration card showed his mother's address as his actual place of residence. Further, the alleged spouse herself did not list the decedent as her spouse on documents she filed for public housing. Because there was evidence that on some occasions the parties did not hold themselves out as husband and wife, but instead, acted inconsistently with respect to marriage, the trial court had evidence supporting its finding and therefore did not commit reversible error.

2. Id. at 156, 465 S.E.2d at 274.
3. Id. at 156-57, 465 S.E.2d at 275.
4. Id. at 157, 465 S.E.2d at 275.
It should be noted that, while the operative facts of this case existed prior to 1996, the Georgia General Assembly in that year enacted a statute providing that no common-law marriage shall be entered into in Georgia on or after January 1, 1997.10

**Virtual Legitimation.** In *Prince v. Black,*11 the supreme court first recognized the doctrine of virtual or equitable legitimation, allowing a virtually legitimated child to share in the estate of the father if there was clear and convincing evidence that the child was the natural child of the father, and that the father intended for the child to share in his intestate estate "in the same manner that the child would have shared if he had been formally legitimated."12 In 1991 the General Assembly amended the Official Code of Georgia Annotated ("O.C.G.A." or "Code") section governing inheritance by children born out of wedlock to incorporate the holding in *Prince v. Black.* It did this by enacting a new subsection.13

In *Varner v. Sharp,*14 the court of appeals construed this new subsection. Upon the decedent's death, his brother applied for letters of administration, claiming to be the sole heir. A few weeks later Dorothy Varner also applied for these letters, claiming that she was the decedent's child born out of wedlock and that she was his sole heir. When each filed a caveat to the application of the other, the probate court found clear and convincing evidence that Dorothy was the intestate's child, but it did not find clear and convincing evidence that he intended for her to inherit the estate to the exclusion of the brother. Consequently, it concluded that she could not inherit from the estate.15

The court of appeals reversed this holding, in essence stating that it read the statutory language of the subsection, "in the same manner in which the child would have shared if legitimate," as meaning "to the same extent to which the child would have shared if legitimate" or "in the exact same proportion in which the child would have shared if legitimate."16 The probate court's reading of the statute imposed upon the daughter a greater burden of proof than is required.17 That reading would assume that a layman knows the rules of inheritance and would require that he leave clear and convincing evidence that he intended the

12. Id. at 80, 344 S.E.2d at 412.
15. Id. at 125, 464 S.E.2d at 388.
16. Id., 464 S.E.2d at 389.
17. Id., 464 S.E.2d at 388-89.
daughter to share in the estate as provided in those rules.\textsuperscript{18} The court of appeals concluded that the phrase "in the same manner in which the child would have shared if legitimate" means nothing more than "as if she were legitimate."\textsuperscript{19} If the daughter, on remand, proves that the decedent was her father and that he intended for her to inherit from his estate, then the probate court must determine based on the rules of intestate succession the extent of the estate to which she is entitled.\textsuperscript{20}

The brother also contended that the probate court erred in finding that there was clear and convincing evidence that Dorothy was the decedent's daughter. The court disagreed and enumerated the many bits of evidence which were introduced to prove the virtual legitimation,\textsuperscript{21} making out what appears to the writer to be an even stronger case than was made in \textit{Prince v Black}.\textsuperscript{22}

\textbf{Contracts to Will.} The 1983 divorce decree in \textit{Lattimore v. Meadows}\textsuperscript{23} obligated the husband to reaffirm his 1981 will in which he left his entire estate to his wife. When he executed a new will in 1984, he again complied with the decree. In 1991 he executed a codicil bequeathing one hundred thousand dollars to another person. When the (then) ex-husband died in 1994, his 1984 will and the 1991 codicil were admitted to probate. The (now) ex-wife sued the executor for specific performance of the contract to will. The supreme court affirmed summary judgment in favor of the ex-wife on the theory that the divorce decree operated as a contract to leave the entire estate to the ex-wife.\textsuperscript{24} Accordingly, the 1991 codicil, while valid as a codicil, contravened the terms of the divorce decree and was a breach of the contract to will.\textsuperscript{25}

The principles of estoppel barred even the raising of the issue of a contract to will in \textit{Scoggins v. Strickland}.\textsuperscript{26} There, the will named as coexecutors the testator's second wife and his stepson (the son of his first wife from her previous marriage). The evidence disclosed that during his life the testator had transferred certain stock to the second wife, had changed his bank account to a joint account with her, and had named her as beneficiary of his life insurance. At his death, his will left a life estate in the marital residence to her and the residue to the stepson and

\textsuperscript{18} \textit{Id.} at 126-27, 464 S.E.2d at 389.
\textsuperscript{19} \textit{Id.} at 127, 464 S.E.2d at 389.
\textsuperscript{20} \textit{Id.}
\textsuperscript{21} \textit{Id.}, 464 S.E.2d at 390.
\textsuperscript{22} 256 Ga. 79, 344 S.E.2d 411 (1986).
\textsuperscript{23} 266 Ga. 640, 468 S.E.2d 745 (1996).
\textsuperscript{24} \textit{Id.} at 640-41, 468 S.E.2d at 746.
\textsuperscript{25} \textit{Id.}
\textsuperscript{26} 265 Ga. 417, 456 S.E.2d 208 (1995).
the stepson's two daughters. After the second wife and the stepson qualified as coexecutors, the stepson sued the wife, alleging that the testator had breached an oral contract to leave everything to the stepson because he devised the life estate in the realty to the wife and made his bank account a joint account with her. After the jury found that a contract to will existed and that the testator had breached it, the trial court entered a judgment cancelling the wife's life estate in the residence and awarding it, along with the funds in the joint account, to the stepson.27

The supreme court reversed on this issue, holding that the stepson was estopped from asserting a contract to will claim against the estate after he had qualified as coexecutor.28 Trustees and other fiduciaries are estopped from asserting a title adverse to their trust.29

B. Jurisdiction

Issues of a court's jurisdiction to entertain a case, or to make a particular ruling in one, are often found intertwined with issues of substantive law. Two recent cases serve as examples. In Kesler v. Watts,30 the will contained an in terrorem clause which did not contain a gift over in the event of a contest.31 When it was offered for probate a granddaughter, who was left a portion of the estate, filed a complaint in superior court for declaratory and injunctive relief. She asked for a declaration that the in terrorem clause was invalid and that the court enjoin the probate court from entering any substantive order in the case. The appeal was from the superior court's finding that the granddaughter was not an "interested party" qualified to bring the declaratory judgment action, and further, that she did not present a justiciable controversy as required for this action.32

The court of appeals agreed that while the superior court generally has power to issue injunctions, it does not have the power to enjoin the judge of another court from exercising his judicial powers.33 An injunction issued by a superior court can only be addressed to parties before that court, and the probate judge was not such a party.34

27. Id. at 417, 456 S.E.2d at 208-09.
28. Id., 456 S.E.2d at 209.
29. Id., 456 S.E.2d at 208 (citing O.C.G.A. § 24-4-26 (1995)). In Scoggins, the court cited numerous instances in which executors and administrators had sought, as individuals, to obtain title to all or part of the estate they represented. Id.
31. Id. at 105, 460 S.E.2d at 823.
33. 218 Ga. App. at 105, 460 S.E.2d at 823.
34. Id., 460 S.E.2d at 823-24.
trial court was in error, however, in holding that the granddaughter was not an “interested party,” and being neither an heir nor a legatee under an earlier will, had nothing to gain from a possible finding that the interrorem clause was invalid.\textsuperscript{35} As a legatee she had a direct interest in the estate and, therefore, could clearly establish that a justiciable controversy existed.\textsuperscript{36} The statute specifically so provides.\textsuperscript{37} 

\textit{Yancey v. Hall}\textsuperscript{38} clarified the appellate jurisdiction of the superior court. After the probate court disposed of several caveats in favor of the propounder, the will was admitted to probate, and an appeal to the superior court followed. The superior court affirmed the decision to admit the will, but then it ordered the propounder’s removal as executor. The matter of removal had not previously been considered; the only issue in the probate court was the validity of the will. On appeal, the court of appeals reversed the order of removal.\textsuperscript{39} Because the issue of removal of the executor had not been raised in probate court, the only issue before it was that of the admissibility of the will to probate. Because the probate court was limited to that issue, the jurisdiction of the superior court was similarly limited. The caveator argued that the issue had been raised in the amended caveat by the request for “any and further relief that the court may deem just and equitable” and by the fact that a court of equity has the power “to supervise the administration of an estate to see that justice is done.”\textsuperscript{40} The Georgia Supreme Court disagreed.\textsuperscript{41} The superior court was not sitting as a court of equity but as an appellate court that “has only the jurisdiction of the [probate] court . . ., which has no equitable powers in such a case.”\textsuperscript{42}

C. \textit{Probate of Wills}

\textbf{Instanter Probate.} The principles of estoppel come into play when the heirs are all sui juris and assent to probate instanter. In \textit{Clark v. Clark},\textsuperscript{43} the widow and son of the testator, as the only heirs, signed an acknowledgment of service and an assent to probate of the will instanter; then, the chief clerk of the probate court executed an order admitting the will to record by affixing the signature of the probate judge. Five

\begin{itemize}
  \item 35. \textit{Id.} at 106, 460 S.E.2d at 824.
  \item 36. \textit{Id.}
  \item 37. O.C.G.A. § 9-4-4(a)(3) (1982).
  \item 38. 265 Ga. 466, 458 S.E.2d 121 (1995).
  \item 39. \textit{Id.} at 468, 458 S.E.2d at 123.
  \item 40. \textit{Id.}
  \item 41. \textit{Id.}, 458 S.E.2d at 122.
  \item 42. \textit{Id.} (citing Byrd v. Riggs, 209 Ga. 59, 60(2)(a), 70 S.E.2d 755 (1952)).
  \item 43. 265 Ga. 434, 457 S.E.2d 564 (1995).
\end{itemize}
months later the son filed a caveat, but the probate court awarded summary judgment to the widow. The son then appealed to the superior court contending that the order admitting the will was not signed by the probate judge. On appeal, the Georgia Supreme Court affirmed the grant of summary judgment to the widow. The court held that the son was estopped from challenging the will after he had formally acknowledged service and consented to probate with full knowledge of the contents of the will. Since it was undisputed that the probate judge had expressly authorized the chief clerk to affix the judge's signature to the order, the Georgia Supreme Court saw no need to decide whether this was a proper delegation of authority. The son's assent to probate instanter estopped him from later challenging that delegation.

Testamentary Capacity and Undue Influence. In Bishop v. Kenny, a will executed three years before the testatrix's death at the age of eighty-six left the entire estate to a niece. When she offered it for probate, a granddaughter who was then serving as the testatrix's legal guardian filed a caveat alleging lack of testamentary capacity and undue influence. An appeal followed the admission of the will to probate. The Georgia Supreme Court held, first, that testimony as to why the granddaughter became guardian of the testatrix three years after execution of the will was too remote to show capacity at the time of execution; second, that while expert testimony that the testatrix was diagnosed with degenerative dementia three months after execution of the will may have been properly admitted, testimony as to lack of capacity two years thereafter was too remote and was properly excluded; and third, that while testimony as to the source and history of the testatrix's real property may be relevant to show the reasonableness of the testamentary scheme, testimony of the caveator that she "believed" that she and her brother were to receive certain real property was inadmissible. The testimony of a disappointed recipient had no bearing on either the source of the property or the testamentary capacity of the testatrix. While there was testimony as to the testatrix's forgetfulness and repetitive mannerisms, there was also testimony that

44. Id. at 434, 457 S.E.2d at 564.
45. Id.
46. Id.
47. Id.
49. Id. at 231-32, 466 S.E.2d at 582-83.
50. Id. at 232, 466 S.E.2d at 583.
she regularly knew friends and relatives, conversed logically with them, and gave the draftsman logical reasons for the dispositions made of property. Her testimony was ample evidence of the requisite mental capacity to make her will. The only other evidence offered to show undue influence was that the niece drove the testatrix to the attorney's office for execution of the will at a time when the caveator was away on vacation and that the niece was present during the execution of the will. None of this was evidence of any force, influence, or fear that would destroy the free agency of the testatrix.\textsuperscript{51}

Another case in which a will was challenged on the grounds of lack of capacity and undue influence is interesting not only with regard to these matters, but also with regard to the manner in which the case went to the supreme court. In \textit{Andrews v. Wilbanks},\textsuperscript{52} the will left one-half of the estate to certain relatives and the other one-half to an attorney who had served as guardian of the person and property of the testatrix since 1983. The relatives filed a caveat, asserting that the attorney, while in a fiduciary relationship, had exercised undue influence in that he had deceived the testatrix by appearing to visit her frequently and to care for her wants and needs while, unbeknownst to her, he was charging her for all this time and attention. To show at the trial that this amounted to undue influence, the relatives filed a motion in limine asking that the court permit a showing of the amount of compensation paid to the attorney. The probate court entered a rule in limine but refused to permit the evidence showing the amount of compensation. It then granted the relatives' application for an interlocutory appeal, which was accepted by the supreme court. The supreme court then ruled that the probate court erred on this point.\textsuperscript{53} By its very nature the grant of a motion in limine that excludes certain evidence suggests that there are no circumstances under which the evidence is likely to be admissible at trial.\textsuperscript{54} This was too far-reaching.\textsuperscript{55} The court suggested that there may be situations in which proof of the guardian's compensation may be relevant in the later proceedings of this case.\textsuperscript{56}

\textbf{Fees of Named Executor.} The court of appeals faced a narrow problem of statutory construction in \textit{Holland v. Farmer}.\textsuperscript{57} There, petitioner offered for probate a will of a named testator that was dated

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\item \textsuperscript{51} \textit{Id.} at 234, 466 S.E.2d at 584.
\item \textsuperscript{52} 265 Ga. 555, 458 S.E.2d 817 (1995).
\item \textsuperscript{53} \textit{Id.} at 556, 458 S.E.2d at 818.
\item \textsuperscript{54} \textit{Id.}
\item \textsuperscript{55} \textit{Id.}
\item \textsuperscript{56} \textit{Id.}
\item \textsuperscript{57} 217 Ga. App. 546, 458 S.E.2d 175 (1995).
\end{itemize}
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April 23, 1988, and named petitioner as executrix. A caveat was filed by another person, who offered for probate a later will of the same testator, dated May 31, 1990. After a jury returned a verdict in favor of the later will and against the earlier one, the petitioner was denied attorney fees on the ground that her efforts to probate the earlier will "were efforts to defeat a later dated last will and testament."[58]

The petitioner contended that one Code section[59] required her to "offer" the will that named her as executrix as soon as practicable after the death of the testator and that another section[60] entitled her, as named executrix in a purported will, to recover expenses from the estate for "offering" the will for probate even if the purported will turns out not to be valid. The trial court concluded that petitioner's personal interest (as named executrix) in the probate of the earlier will, and with full knowledge of the existence of the later will, precluded a finding that she proceeded in good faith, as required by the last cited Code section.[61]

The court of appeals disagreed with the trial court's reasoning but upheld its judgment.[62] "The mere fact that a propounder of an earlier will attempts to 'defeat' a later will does not prove that the propounder did not act in good faith."[63] Also, lack of good faith is not conclusively shown by evidence that the propounder of the earlier will has a "personal interest" in it.[64] "Any person who propounds a will under O.C.G.A. section 53-3-23 may necessarily be attempting to 'defeat' another will which he or she believes to be invalid, and it may also be the case that he has a 'personal interest' in it."[65] Notwithstanding these principles, the court of appeals concluded that the evidence in this case supported the trial court's implicit conclusion that the propounder did not act in good faith.[66] The specific evidence supporting this implicit conclusion consisted of the following: first, testimony of the propounder that a certain handwriting expert had indicated that the signature on a particular deed was not that of the testator, while that same expert testified at this trial that he had given no such indication; and second, while the propounder contended that the testator was incompetent when he made the later will, she had only seen him once in many months before his death, while many of the witnesses who had

58. Id. at 547, 458 S.E.2d at 176.
60. Id. § 53-3-23.
61. 217 Ga. App. at 547, 458 S.E.2d at 176.
62. Id.
63. Id. at 546, 458 S.E.2d at 176.
64. Id.
65. Id.
66. Id. at 548, 458 S.E.2d at 176.
known him for years testified as to his good mental capacity at the time of execution of the later will.\textsuperscript{67}

**Family Settlements.** Family settlements of disputes arising over the estate of a decedent are basically contractual and are encouraged by statute if all the parties are adult and sui juris.\textsuperscript{68} The basic issue in *Hennessey v. Froehlich*\textsuperscript{69} was whether the parties had reached an agreement. The principal disputed asset was a seventy-five thousand dollar certificate of deposit which was in the names of the testator and a daughter (defendant) and which had been cashed by the daughter. After court-ordered mediation the other children sued the defendant for enforcement of an agreement that the parties' attorneys reached by telephone. After each side moved for summary judgment, the probate court granted the motion of the daughter, finding that the parties had failed to agree as to disposition of the certificate of deposit. The court of appeals affirmed in part and reversed in part, sending the case back down with three pointed instructions: (1) The attorney's notes indicated that any asset not specifically allocated would go to the defendant daughter, thus contradicting the trial court's finding that the parties' agreement failed to cover the certificate; (2) The understanding of the children that disposition of certain keepsake items would be resolved after agreement did not preclude a finding that the agreement was final. Parties frequently agree to resolve certain minor details after the making of a contract; (3) The fact that the agreement was oral did not render it unenforceable, notwithstanding the language in the statute that the agreement be assented to in writing by all the interested parties.\textsuperscript{70} The theory appears to be that there would be no other possible parties with standing to challenge the agreement if it were proved.

**Mistake.** Georgia law provides that in the case of a will executed under a mistake of fact as to the existence or the conduct of an heir the will shall be inoperative as to that heir.\textsuperscript{71} In *Kaplan v. Kaplan*\textsuperscript{72} the issue was whether an alleged mistake was one of fact or of law. There, the testator's wife alleged that he was mistaken about her conduct in signing an enforceable antenuptial agreement. The supreme court affirmed the probate court's dismissal of her caveat for failure to state

\textsuperscript{67} Id. at 547-48, 458 S.E.2d at 176-77.
\textsuperscript{70} Id. at 99-100, 464 S.E.2d at 248. See O.C.G.A. § 53-3-22(b) (1995).
\textsuperscript{72} 266 Ga. 612, 469 S.E.2d 198 (1996).
a claim.\textsuperscript{73} The flaw in her argument was that the caveat did not allege a mistake of fact, but of judgment.\textsuperscript{74} Her conduct was her signing the antenuptial agreement, and the testator was not mistaken as to that fact.\textsuperscript{75} Whether he believed that the agreement was valid was a judgment of the law, not an issue of fact.\textsuperscript{76}

II. RECENT DECISIONS—TRUSTS

A. Trust or No Trust?

The answer to this question determines the applicability of the principles of trust law, but the question is not one which is easily answered. As illustrated in \textit{Dismuke v. Abbott},\textsuperscript{77} what we call a trust is not necessarily a trust. This case was a declaratory judgment action in which the court had to distinguish a “trust account” as defined in the financial institutions code\textsuperscript{78} from a true trust governed by the trust code.\textsuperscript{79} In 1988, a husband and wife each purchased savings certificates and set up a trust account which was designated on the bank’s signature card as a “Revocable Trust.” The one set up by the husband named himself as trustee and his wife as beneficiary, while the one set up by the wife named herself as trustee and her husband as beneficiary. Each of these certificates was to mature in February 1989.\textsuperscript{80}

When the husband died in 1988 the funds in the account naming him as trustee were paid to the wife. When the one naming her as trustee matured, she took possession of the proceeds. After her death in 1991, the estate of the husband, being administered by the plaintiff, filed this declaratory judgment action, claiming the funds from both trust accounts. The wife’s estate answered that the funds from both accounts passed to her and into her estate. The plaintiff, a daughter representing her father’s estate, filed an affidavit stating that her father had told her that he had “opened other accounts solely for the purpose of maintaining the insurability of the funds on deposit”; and that ‘the only deposits [he] had, other than some joint certificates of deposit, were the trust accounts.’\textsuperscript{81} Therefore, he must have intended for the accounts to

\textsuperscript{73} \textit{Id.} at 613, 469 S.E.2d at 199.
\textsuperscript{74} \textit{Id.} at 612-13, 469 S.E.2d at 198.
\textsuperscript{75} \textit{Id.}
\textsuperscript{76} \textit{Id.} at 613, 469 S.E.2d at 198.
\textsuperscript{78} O.C.G.A. § 7-1-810 (14) (1989).
\textsuperscript{79} \textit{Id.} § 53-12-1 (1995).
\textsuperscript{80} 217 Ga. App. at 524, 457 S.E.2d at 838.
\textsuperscript{81} \textit{Id.}
serve only purposes of insurability and for them to pass into his estate and not to the wife. The trial court denied a motion by the wife's estate for summary judgment, but on an interlocutory appeal the court of appeals reversed. Despite the confusion created by the designation of each account as a "Revocable Trust," the court concluded that the deposit form came within the description of a "trust account" as defined in the financial institutions code. Unless there is clear and convincing evidence to the contrary in the trust agreement (the deposit), the account belongs beneficially to the "trustee" during his lifetime and after his death to the person named as beneficiary. Here, the court concluded that there was no clear and convincing evidence to the contrary.

B. Resulting Trust

An attempt to assert a purchase-money resulting trust failed in Stone v. Williams. The widow of an intestate decedent sued to eject his sister from a residential lot which the decedent had purchased in 1959, and on which the sister had resided until the decedent's death in 1993. The sister filed a counterclaim seeking the declaration of a resulting trust on the ground that she had given the decedent five hundred dollars toward the two thousand dollar purchase price of the lot. Legal title was in the decedent at all times. The supreme court affirmed the trial court's grant of a summary judgment in favor of the widow.

An equitable action, as the one asserted in the counterclaim, is barred if the truth cannot be fairly established because of a long delay in asserting the claim. It would be inequitable to allow the sister to assert a resulting trust claim after she had waited thirty-five years when, during all this time, legal ownership of the property was in the decedent and knowledge of that fact was easily discoverable. Laches will not arise from delay alone; prejudice must also be shown. Prejudice to the widow was shown by the long delay and by the fact that

82. Id. at 526, 457 S.E.2d at 840.
83. Id. at 525, 457 S.E.2d at 840. See O.C.G.A. § 7-1-810(14) (1989).
86. 217 Ga. App. at 526, 457 S.E.2d at 839.
88. Id. at 480, 458 S.E.2d at 344.
89. Id.
90. Id.
91. Id.
the decedent's death rendered ascertainment of the truth extremely
difficult, if not impossible.\footnote{Id. at 481, 458 S.E.2d at 344.}

C. Support Trust

The case of \textit{Ivey v. Ivey}\footnote{266 Ga. 143, 465 S.E.2d 434 (1996).} is instructive on the subject of support
trusts. In that case, a settlor set up an irrecovable trust for his son,
Richard, providing for Richard's life-time support with remainder to the
descendants of Richard. The settlor's other son, David, was named as
trustee. Later, Richard, the life beneficiary, conveyed some of his own
real property to the trust to become a part of the trust assets. Thereaf-
ther, the trustee conveyed the real property to the settlor by a security
deed in consideration for the settlor's voluntary satisfaction of some
personal debts of Richard, the life beneficiary.\footnote{Id. at 143-44, 465 S.E.2d at 436.}

Thereafter, Richard brought suit against the trustee seeking: (1)
cancellation of his conveyance of the realty to the trust; (2) cancellation
of the trustee's conveyance of that realty by security deed to the settlor;
and (3) removal of the trustee and termination of the trust. After a
bench trial, the trial court granted the trustee's motion for dismissal.
On appeal, the supreme court affirmed in part and reversed in part.\footnote{Id. at 143-44, 146, 465 S.E.2d at 436, 438.}

The supreme court affirmed the trial court's involuntary dismissal of
the cancellation claim because the beneficiary's claim that he did not
recall signing the deed conveying the realty to the trust was insufficient
to raise an issue of fraud that would justify cancellation on the ground
of a legal mistake.\footnote{Id. at 144, 465 S.E.2d at 436.} Fraud will not be presumed but must be shown
by evidence.\footnote{Id.}

The trustee's conveyance of the realty to the settlor for the purpose of
satisfying some personal debts of the beneficiary was beyond the power
of the trustee; hence, the security deed should have been cancelled.\footnote{Id. at 145, 465 S.E.2d at 437.} The trustee had no power, express or implied, to encumber the trust
property for a nontrust purpose.\footnote{Id. at 144, 465 S.E.2d at 437.} The actual trust purpose was
expressly stated to be the support of the beneficiary. The court noted
that the trust instrument incorporated by reference many statutory
powers, one of which is the power to sell or encumber trust property;\footnote{Id. at 144-45, 465 S.E.2d at 437 (citing O.C.G.A. § 53-12-232(8)(d), (11)(b) & (12)
(1995)).}
nevertheless, all of these powers must be exercised for the accomplishment of valid trust purposes. Here, the only trust purpose was support of the beneficiary and preservation of the trust assets for the remainder beneficiaries.

The supreme court affirmed the trial court's refusal to remove the trustee. Although he erroneously executed the security deed, that alone does not demand a finding that he was guilty of fraud or other breach which would demand his dismissal. Where, as here, the settlor selects the trustee, courts are reluctant to remove him. Nor did the court err in refusing to terminate the trust. The trust's purpose to support the life beneficiary has not yet been accomplished. Another valid reason for refusal to terminate was that there were other beneficiaries—the descendants of the life beneficiary.

D. Charitable Trusts

Gustafson v. Wesley Foundation well illustrated the public policy favoring charitable trusts. The will left one-half of the residue of the estate to the “Wesley Foundation, University of Minnesota,” a Methodist student organization in which the testatrix was active during her college days in the 1920's and 1930's. That organization continued to minister to Methodist students until 1967 when it transferred its assets to the “Metropolitan Methodist Campus Ministry” which continued to minister to the university students. “Wesley Foundation” ceased to exist. Beginning in 1974, “Metropolitan” carried on its same work but has since ministered to the needs of students who are members of five Protestant churches, one of which was the United Methodist Church of the University of Minnesota. As a participating member, “Metropolitan” has actively supported ecumenical campus ministries similar to those once supported by “Wesley Foundation.”

After the death of the testatrix in 1993 her sole heir argued in a will construction action that the above developments had resulted in a lapse of the share of the residue left to “Wesley Foundation,” since that body

101. Id. at 145, 465 S.E.2d at 437.
102. Id.
103. Id.
104. Id.
105. Id.
106. Id. at 146, 465 S.E.2d at 438.
107. Id. at 145, 465 S.E.2d at 437.
108. Id. at 146, 465 S.E.2d at 438.
110. Id. at 679-80, 469 S.E.2d at 161-62.
no longer existed. However, the supreme court affirmed the finding that "Metropolitan," as successor to "Wesley Foundation," was entitled to the bequest. The court stated the traditional approach that where a named charitable beneficiary merges or consolidates with another similar entity, the new entity will be entitled to the bequest if its aims and purposes are similar to those of the named beneficiary. The court felt that the fact that "Metropolitan" had joined with other, non-Methodist denominations in ministering to students did not defeat the bequest because the testatrix did not condition it in such a way as to restrict the beneficiary's participation in an ecumenical Protestant mission. The supreme court also agreed with the trial court's conclusion that because there was still an existing qualified beneficiary, there was no occasion for the application of the cy pres doctrine.

The attempt to claim another benefit of the public policy favoring charities, that of exemption from ad valorem taxes, failed in Zach, Inc. v. Fulton County. There, a nonprofit corporation which owned property used as a fraternity house on the Georgia Tech campus claimed exemption from ad valorem taxation, asserting that it was the use of the property which was determinative. After the trial court denied the plaintiff's motion for summary judgment but certified the case for immediate review, the court of appeals affirmed the decision.

The controlling statute provides that "all buildings erected for and used as a college" are exempt from taxation. The court of appeals examined the two leading cases in which the supreme court had construed this statute. Alford v. Emory University held that fraternity houses owned by a university were exempt. This holding was extended in Johnson v. Southern Greek Housing Corp., to hold that the statute exempted fraternity houses even if they were not actually owned by a college but were, instead, owned by a nonprofit corporation which had been created by a college as an "arm and extension" of the college. In the instant case, however, the taxpayer corporation that

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111. Id. at 681, 469 S.E.2d at 162.
112. Id. at 680, 469 S.E.2d at 162. As authority for this traditional approach the court cited one Massachusetts and three New York cases, suggesting the death of Georgia authority on this admittedly traditional approach. Id.
113. Id. at 681, 469 S.E.2d at 162.
114. Id.
116. Id. at 316, 457 S.E.2d at 575.
117. Id. (citing O.C.G.A. § 48-5-41(a)(6) (1991)).
118. Id. at 315, 457 S.E.2d at 574.
owned the house was created by a national fraternity and was run by a board made up of members from outside the college community. The court of appeals concluded that those two cases represent the outer limits of circumstances that will justify exemption.121

III. PROBLEMS OF CONSTRUCTION

A. Precatory Language

Language in a will that refers to the testator's wish, desire, or request regarding a disposition of property is an invitation to litigation. The will in Garrett v. Morton122 was this type of will. After a specific devise of "any interest in real estate I may own at the time of my death" to a named daughter, the will continued: "[I]t is my request but not absolute direction" that a named sister-in-law should pay real estate taxes and insurance and in return should be entitled to live on the property until death.123

The trial court construed the will to leave to the sister-in-law a life estate in the property, but the supreme court reversed the decision on this point.124 Because the will first unequivocally left all real property to the daughter and because, on the other hand, it used language of request only regarding the sister-in-law, the express language used in the devise to the daughter prevailed over the vague language that only suggested a life estate in the sister-in-law.125 As further evidence, the court presumed that the testatrix would prefer that her property pass within her bloodline.126

B. Renunciation and Acceleration

The will under scrutiny in Wetherbee v. First State Bank & Trust Co.127 left property in marital and residuary trusts to the wife for life, remainder in trust for the support and maintenance of the testator's two then living sons for life, but if any son should predecease his mother, "[t]hen his interest shall vest in his then surviving unmarried wife and in his then surviving descendants."128

121. 217 Ga. App. at 315-16, 457 S.E.2d at 575.
123. Id. at 394, 458 S.E.2d at 618.
124. Id.
125. Id.
126. Id.
128. Id. at 364, 466 S.E.2d at 835.
After the testator's death, each of the sons, pursuant to the Georgia renunciation statute,\(^{129}\) duly renounced his interest, and each of them thereafter divorced. After the death of the testator's widow, in 1991, the trustee filed a bill for construction as to whether the renunciations accelerated the vesting of the interest in each son's "then surviving unmarried wife and . . . his then surviving descendants."\(^{130}\) The trial court ruled that no acceleration had occurred and that the income that would have been paid to each son should be accumulated and upon his death paid to his then surviving wife and descendants. The supreme court affirmed this ruling.\(^{131}\)

The renunciation statute in Georgia codifies the common-law principle that a testator is presumed to have intended the devise of a remainder to take effect at the termination of the precedent estate, rather than at the death of the owner of it.\(^{132}\) However, this presumption is rebuttable if the testator has indicated otherwise.\(^{133}\) The indication need not be expressed; it may be shown by implications found in the will.\(^{134}\) Examining this will and its implications, the court noted that the testator did not identify by name the wife or descendants of his sons whom he wished to take.\(^{135}\) Instead, they were identified by class descriptions only, suggesting futurity, and the time for ascertainment of those takers is impliedly the actual deaths of the sons, not the determination (by renunciation) of the sons' interests.\(^{136}\)

IV. LEGISLATION

A. A New Statute of Wills

In 1991, the General Assembly of Georgia enacted a comprehensive revision of Georgia's trust law.\(^{137}\) In 1996, it continued this revision of Georgia's fiduciary law by enacting a comprehensive revision of chapters 1 through 11 of Title 53.\(^{138}\) This recent revision, primarily affecting wills and intestacy, will be effective only for the estates of

\(^{129}\) Id. (citing O.C.G.A. § 53-2-115(c) (1995)).

\(^{130}\) Id., 466 S.E.2d at 836.

\(^{131}\) Id. at 366, 466 S.E.2d at 837.

\(^{132}\) Id. at 365, 466 S.E.2d at 836.

\(^{133}\) Id.

\(^{134}\) Id.

\(^{135}\) Id.

\(^{136}\) Id.

\(^{137}\) Id. at 366, 466 S.E.2d at 836.


\(^{139}\) Id. § 53-1-1 to 53-11-11 (Supp. 1996).
decedents dying on or after January 1, 1998, thus giving the General Assembly of 1997 an opportunity to consider any proposals for further change in this 1996 act.

With this enactment, Georgia has updated almost all of its fiduciary law. The principal exception is its law of guardianship and that, too, seems slated for revision. The 1996 session approved, and the Governor signed, a resolution creating the Joint Guardianship Rewrite Committee. This committee is charged with the responsibility of submitting an interim report no later than December 1, 1996, and shall stand abolished on that date.

B. Affidavit of Self-Proved Will

The General Assembly amended the statute authorizing the self-proving of wills to allow affidavits of the testator and attesting witnesses to be made before a duly qualified officer of the state "where the will or codicil was executed" rather than "under the laws of this state."

C. Common-Law Marriages Prohibited

Although there appears to be no specific statute on the subject of common-law marriage in Georgia, its validity has been recognized as far back as 1860. However, its prospective demise has now been made a matter of legislative record. The 1996 session of the General Assembly enacted a new Code section providing that no common-law marriage shall be entered into in this state on or after January 1, 1997, but that otherwise valid common-law marriages entered into prior to that date shall continue to be recognized.

V. CONCLUSION

With the enactment of a new trust code in 1991 and of a new wills and intestacy code in 1996, Georgia appears to have made great progress in the codification of its fiduciary law. The anticipated report of the Joint Guardianship Rewrite Committee should further enhance this progress.

139. Id. § 53-1-1.