Wills, Trusts, and Administration of Estates

James C. Rehberg

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One of the most difficult tasks in the writing of a survey article is that of organization. Judicial decisions and legislative enactments just refuse to appear in any logical sequence and, just as a case or statute has been neatly assigned to a certain section of the paper, an issue pops up that suggests that it would fit better in another section. Should the discussion of that case or statute be moved into that other section or left where it is?

Given this difficulty, an effort will be made to classify the materials in a way that the major issues will be discussed in the sequence in which they usually surface in the process of administration.

I. RECENT DECISIONS—WILLS AND ADMINISTRATION

A. Preliminary Issues

There are certain problems that, though not frequently encountered, do demand early attention simply because they must be resolved before normal administration can proceed.

1. Jurisdiction of Courts. In an action to determine heirship, a claim had been filed by a person who alleged that she was the virtually adopted child and sole heir of a legatee who had predeceased the testator and that she, therefore, was entitled to the legacy that deceased legatee would have taken. After the trial court found in favor of the child, the court of appeals faced a motion that it lacked jurisdiction and the case

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* Professor Emeritus, Walter F. George School of Law, Mercer University. Mercer University (A.B., 1940; J.D., 1948); Duke University (LL.M., 1952). Member, State Bar of Georgia.

should be transferred to the supreme court as a case "involving wills." The court denied the motion. The parties did not raise, nor did the court consider or resolve, any issue relating to the validity or the meaning of the decedent's will. The sole issue was the child's virtual adoption.

2. Advancements. In Tankesley v. Thompson, after the death intestate of the mother of four adult sons, one son, Richard, along with the court-appointed administrator, asserted that the mother had advanced about seventy thousand dollars to another son, Robert, during the last two years of her life. Robert denied this assertion. Checks were offered into evidence, all but one of which were made payable to a business started by Robert. Most of those checks had a notation of "investment" or "loan." Robert testified 1) that when his mother wrote each check, she indicated that it was an investment and 2) that she stated that she wanted her estate divided equally between the four children without regard to gifts she had previously made. The other two sons corroborated that this was her intention. The record also showed that she had been a shrewd businesswoman who often invested in other businesses. The court of appeals agreed with the trial court that while a presumption of advancement had been shown, it had been clearly rebutted by this other evidence.

At this point it should be noted that Georgia's advancement statute will be considerably changed by the Revised Probate Code when it becomes effective on January 1, 1998. The new Code combines the treatment of lifetime transfers in both intestate and testate estates. It covers satisfaction of legacies as well as advancements by requiring written evidence that a lifetime transfer was intended either as a satisfaction of a legacy or as an advancement against the testamentary gift or against the intestate share the recipient would eventually receive. The new Code requires either that the will specifically contemplate the lifetime transfer as a satisfaction or advancement or

2. Id. at 388, 480 S.E.2d 398 (citing GA. CONST. OF 1983, art. VI, para. 3).
3. Id., 480 S.E.2d at 399.
4. Id. at 389, 480 S.E.2d at 399.
6. Id. at 641-42, 469 S.E.2d at 854.
7. Id. at 642, 469 S.E.2d at 854.
11. Id.
that there be a separate written expression of that intent.\textsuperscript{12} Additionally, the writing may be one that is signed by the transferor within thirty days of the transfer, or it may be one that is signed by the recipient at any other time.\textsuperscript{13}

3. Slayer Statute. In \textit{Bradley v. Bradley},\textsuperscript{14} one of two sons, James, sued the other, Benjamin, under Georgia's "slayer statute,"\textsuperscript{16} alleging that Benjamin killed their father with malice aforethought and for that reason was not entitled to share in the estate. In his will, the father left most of his property to Benjamin. However, if Benjamin predeceased his father and left no lineal descendants, that property went to other named persons. The father left James only one hundred dollars, explaining that he had previously conveyed real property to James. Later, the brothers entered into a settlement agreement in which they divided the property and James agreed to release Benjamin from the claims he had brought related to their father's death.\textsuperscript{16}

In 1995 the alternative beneficiaries in the will sued Benjamin and the executor for a declaratory judgment as to whether Benjamin killed his father with malice aforethought. Under the "slayer statute," if Benjamin had done so, he would be presumed to have predeceased his father, and the alternative beneficiaries would take under the will. Following this claim, Benjamin moved to set aside the settlement agreement, asserting that he was unable to perform under the agreement because of the declaratory judgment action.\textsuperscript{17}

In an action brought by James for enforcement of the agreement, the trial court ruled in his favor, and the court of appeals affirmed.\textsuperscript{18} The court found that Benjamin had an inchoate interest in the property that he was to take under the will, and this inchoate interest was legally assignable; hence, the settlement agreement remained effective.\textsuperscript{19} Although Benjamin's inchoate interest would not vest in him until the executor assented, the interest would relate back to the death of the father. Thus, the court determined that the declaratory judgment action

\begin{itemize}
\item \textsuperscript{12} Id.
\item \textsuperscript{13} Id.
\item \textsuperscript{14} 225 Ga. App. 530, 484 S.E.2d 280 (1997).
\item \textsuperscript{15} O.C.G.A. § 53-4-6 (1995).
\item \textsuperscript{16} 225 Ga. App. at 530, 484 S.E.2d at 282.
\item \textsuperscript{17} Id. at 531, 484 S.E.2d at 282.
\item \textsuperscript{18} Id. at 532-33, 484 S.E.2d at 283-84.
\item \textsuperscript{19} Id.
\end{itemize}
brought by the alternative beneficiaries had no bearing on the validity of the brothers' settlement.  

4. Fiduciary Commissions. The court of appeals interpreted statutes on fiduciary commissions on two occasions. In *Sams v. Leskanic*, an attorney who had served as county guardian was named administrator ex officio of the estate of an incapacitated adult ward. After completing administration, he filed a final return in which he claimed statutory commissions on extra compensation of $711.50 and on a previous commission of $46.80. The probate court denied these items, stating that it was “the practice of this court” to deny fiduciary commissions on the disbursement of extra compensation or regular commissions.

The court of appeals only partially agreed. It agreed that the administrator was entitled to the statutory commission of 2½% in and 2½% out for the payment of debts, legacies, or distributive shares, including payment of a debt owed to him by the estate. However, this statutory entitlement applies to only one payment of a debt. To allow a commission on the disbursement of a commission would permit payment of the same debt more than once and, logically, would lead to the administrator's right to get another commission on the payment of the first commission and so on ad infinitum. The court admitted that the literal language of the statute could lead to that construction but refused to ascribe to the legislature such an unreasonable intention.

The reconciliation of statutes on the subject of fiduciary commissions was also required in *In re Estate of Louise Donald*. After the death of an incapacitated adult, the probate of the will, and the qualification of the executor, the decedent's guardian filed a final return in which he proposed to pay himself the statutory commission on this final distribution as guardian. The probate court denied the claim, relying on *Roberts v. Chew*, which relied on Official Code of Georgia Annotated

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20. *Id.* Approval of these family settlements among heirs, looked upon as a division in kind, has long been the policy of the law. See *Sara Jane Love, Redfern Wills and Administration of Estates in Georgia* § 375 (5th ed. 1988).
23. 220 Ga. App. at 202, 469 S.E.2d at 703 (citing O.C.G.A. § 53-6-150 (1995)).
24. *Id.* at 202-03, 469 S.E.2d at 705.
25. *Id.* at 203, 469 S.E.2d at 705 (citing O.C.G.A. § 53-6-140 (1995)).
26. *Id.* (citing O.C.G.A. § 53-6-144 (1995)).
27. *Id.*
28. *Id.* at 204, 469 S.E.2d at 706.
section 53-6-142, dealing with commissions to successive fiduciaries, and section 29-2-43, dealing with commissions to successive guardians. The court of appeals reversed the denial of this claim.

The basic statute on fiduciary commissions contains the 2½% in and 2½% out rule, which specifically applies to commissions received by an "administrator, executor, trustee, or guardian." However, as applied to guardians, that section is limited by the more specific language of the guardianship statute, which provides that when a guardian resigns, dies, or is removed, no commission is allowed for turning the estate over to a new guardian or for receiving of the same by a new guardian. The court of appeals held that this statute, being specifically limited to the case when a guardian has died, resigned, or been removed, was not applicable in Louise Donald because the guardian was seeking dismissal only because of his duty to turn the assets over to the executor named in the ward's will.

The court of appeals agreed that it could be rationally argued that the turning over of assets by a guardian to an executor should stand on the same footing as that of a guardian turning them over to another guardian, in which case no commissions are payable. The specific language of the statute, however, does not so provide. The specific language of O.C.G.A. section 53-6-142 provides that when assets pass through the hands of "administrators and executors," the funds shall not be diminished by commissions for each successive administrator or executor. The legislature's failure to include guardians in the section is explained by the fact that the guardianship situation is specifically covered by O.C.G.A. section 29-2-43. That section, which is limited to the situation when the guardian resigns, dies, or is removed, did not apply to Louise Donald because the guardian being granted dismissal was entitled to receive the statutory commission.

32. Id. § 29-2-43 (1993).
33. 222 Ga. App. at 335, 474 S.E.2d at 251-52.
34. Id. at 336, 474 S.E.2d at 252.
35. O.C.G.A. § 53-6-140.
36. Id.
38. 222 Ga. App. at 356, 474 S.E.2d at 252.
39. Id.
40. Id.
41. Id. (citing O.C.G.A. § 29-2-43).
42. Id.
B. Problem of Nonprobate Assets

The estate of a decedent consists of all property interests owned by the decedent at death that survived the death. The personal representative is technically responsible only for "probate assets." All other assets owned immediately prior to death, but which cease to exist at the moment of death, are the "nonprobate assets." With reference to these, the personal representative technically has no duties. It is hornbook law that one of the first duties of the personal representative is to ascertain and take control of all assets in the probate estate. That this task of classification of assets is not an easy one is made obvious by the number of cases that have reached the appellate courts of Georgia, as well as of every other state, in which a court had to deal with this issue. Two cases decided during this survey period are good illustrations.

The assets in dispute in Wilig v. Shelnut\(^\text{43}\) were two joint accounts—a certificate of deposit and a checking account. Each bore the names of the decedent and one of her granddaughters as joint tenants with right of survivorship. The other granddaughter, as administratrix of their grandmother's estate, sued the one named as joint tenant, claiming that the accounts were estate assets. The evidence established that in her subsequently executed will, the decedent made no mention of these accounts but left the remainder of the estate to four named relatives including plaintiff and defendant in this case.\(^\text{44}\)

The superior court relied primarily on affidavits of bank officials and relatives of the decedent. None of these affidavits dealt with circumstances existing at the time of the opening of the disputed accounts; they dealt with statements made or actions occurring at other times. Some of this evidence tended to be favorable to one side of this case; some was favorable to the other. The superior court's grant of summary judgment in favor of the granddaughter named as co-owner in the two accounts was affirmed by the court of appeals.\(^\text{45}\) The statute governing survivorship rights in joint accounts\(^\text{46}\) requires clear and convincing evidence of a different intention at the time the account was created in order to rebut the statutory presumption in favor of survivorship rights. Even assuming the admissibility of the affidavits, the evidence was insufficient to rebut the presumption.\(^\text{47}\) None of the affidavits provided evidence that the decedent told the affiants at the time these joint

\(^{44}\) Id. at 530, 480 S.E.2d at 925.
\(^{45}\) Id.
\(^{46}\) O.C.G.A. § 7-1-813(a) (1997).
\(^{47}\) 224 Ga. App. at 532, 480 S.E.2d at 926.
accounts were created that she did not want the accounts to belong to the surviving cotenant. Because there was no evidence, the summary judgment in favor of the surviving party to the accounts was justified.46

The form of the account also prevailed in Jordan v. Stephens49 despite additional factual complications. In this case, the deceased testator had executed a general power of attorney in favor of an official in her bank, authorizing him to manage her affairs and to provide her with ample funds for her support. Later, as payment for his help, she transferred money to a joint and survivor account with him. After her death a few months later, her executor and others sought these funds as estate assets, claiming fraud, conversion, and breach of fiduciary duty. Plaintiffs also challenged the decedent’s transfer of one hundred shares of bank stock originally held by her and one of the plaintiffs as joint tenants with right of survivorship. The transfer was from decedent to herself and the holder of the power of attorney as joint tenants with right of survivorship. The jury verdict was in favor of the surviving joint tenant with regard to both the joint survivor account and the one hundred shares of bank stock.50

With regard to the joint and survivor account, the court of appeals again relied on Georgia’s multiple-party accounts statute51 in holding for the surviving party to the account.52 The statutory presumption in favor of the surviving party was not rebutted by any evidence.53 Instead, there was evidence that the decedent wanted the surviving party to have these assets at her death and that she knew that a lot of people were going to be surprised after she died.54 As for the one hundred shares of bank stock that had been transferred, by the decedent’s signature only, from herself and one of the plaintiffs to herself and the surviving party, the court affirmed that it also belonged to the surviving party.55 Because there was evidence that the decedent wanted to remain the owner of this stock until her death, she remained the only party with a present right to withdraw or change the account; hence, the signature of her nominal cotenant was not necessary to change the terms of the account.56

48. Id.
50. Id. at 8, 470 S.E.2d at 734.
51. O.C.G.A. § 7-1-813(a).
52. 221 Ga. App. at 8, 470 S.E.2d at 735.
53. Id. at 9, 470 S.E.2d at 735.
54. Id.
55. Id. at 10, 470 S.E.2d at 735-36.
56. Id. (citing O.C.G.A. §§ 7-1-812(a), -816 (1997)).
Although this case was an 8 to 1 decision, the opinion of the lone dissenter\textsuperscript{57} deserved and received attention in the majority opinion itself.\textsuperscript{63} The majority believed that the cases cited by the dissent were factually distinguishable.\textsuperscript{69} While the majority did not elaborate on this point, it does appear that the dissent overlooked the fact that the multiple-party accounts section of the Uniform Probate Code\textsuperscript{60} is designed as a part of Georgia's banking law, specifically a part of Title 7, captioned "Banking and Finance."\textsuperscript{61} Thus, it is Georgia's banking law that strives to assure that the form of an account will show the actual rights of ownership in the absence of clear and convincing evidence of a contrary intent. It may be that the dissent put the emphasis on the general principles of guardianship and trust law when it should have been on the later and more specific provisions of banking law.

C. Guardian and Ward

The fiduciary nature of the relationship of guardian and ward, particularly as to nonprobate assets, was carefully examined in two cases. In Moore v. Self\textsuperscript{62}, a mother and her daughter jointly opened two bank accounts and one stock investment account and jointly purchased some real estate, all funded with the mother's money. The mother was later declared an incompetent adult, and the daughter was appointed guardian of her person and property. After the mother's death in 1994, her other two children sued the daughter to have a constructive trust declared of all property to which the daughter claimed title as surviving joint tenant.\textsuperscript{63} A summary judgment in favor of the daughter was, on appeal, affirmed in part and reversed in part.\textsuperscript{64}

The court of appeals carefully addressed the property interests, legal and equitable, in the assets held by the daughter as guardian at the time of the death of the ward, her mother. First, the legal title to the assets in the accounts and in the realty was not affected by the subsequent incapacity of the mother.\textsuperscript{65} The declaration of the mother's

\textsuperscript{57.} Id., 470 S.E.2d at 736 (McMurray, P.J., dissenting).
\textsuperscript{58.} Id. at 71-72, 473 S.E.2d at 508.
\textsuperscript{59.} Id. at 75, 473 S.E.2d at 510.
\textsuperscript{60.} O.C.G.A. § 7-810 to -821.
\textsuperscript{61.} O.C.G.A. § 7-1-813 leaves title to a joint account in the surviving party to the account; O.C.G.A. section 14-5-8 (1994) leaves title to jointly held corporate shares or securities to the surviving joint tenant; and O.C.G.A. section 44-6-
incapacity did not affect the legal title to the accounts, the stocks, or the
realty because a guardian, unlike a trustee, takes no legal title to the
ward's estate but holds it instead as a custodian whose possession is
deemed to be that of the ward. 66 Second, the beneficial interests, as
distinguished from the legal title, in those assets were affected by the
creation of the guardianship. 67 When the daughter filed her petition
for appointment as guardian, she listed the disputed property as
belonging to the mother. 68 Guardians owe undivided loyalty to their
wards and must not place themselves in positions in which their
individual interests conflict with that of their wards. 69 The daughter
breached this duty upon acceptance of the guardianship because from
that time a potential conflict of interest existed. 70 She stood to gain
personally by preserving these assets and the real property and
ultimately taking them as survivor. Because this loyalty rule is
preventative in nature, it is immaterial whether the guardian gained
from the transaction. 71 By applying for and accepting appointment, she
knowingly placed herself in this conflict of interest situation, which
thereafter estopped her from asserting any claim to the property as
surviving joint tenant because such a claim would be adverse to the
estate of the ward. 72 The court noted, though, that this estoppel
operated only in the guardianship context; it did not affect any interest
she might have in her mother's estate as heir, legatee, or devisee. 73

Bacon v. Smith 74 also concerned the rights of various persons to the
assets of a deceased ward. On the same day that the probate court
authorized settlement of a large tort claim in favor of their fifteen-year-
old adopted son, the adoptive parents were appointed his guardians.
They then successfully petitioned the probate court for approval of
investment of much of the settlement funds in certain annuity plans.
With this court approval, the investments were made, naming the
adoptive parents as primary beneficiaries. The ward's half-brother (from
his mother's previous marriage) was not named as a beneficiary. The
designation of beneficiaries was done by the fifteen-year-old ward in the

190 (Supp. 1997) leaves title to jointly owned realty to the surviving tenant.
66. 222 Ga. App. at 72-73, 473 S.E.2d at 508-09.
67. Id. at 72, 473 S.E.2d at 508.
68. Id. at 73, 473 S.E.2d at 509.
69. Id.
70. Id. at 74, 473 S.E.2d at 509-10.
71. Id.
72. Id.
73. Id. at 74-75, 473 S.E.2d at 510.
presence of the probate judge and out of the presence of the guardians, his adoptive parents.\textsuperscript{75}

Near the end of the following year, the ward was killed in an accident, and his guardians administered his estate and were granted letters of dismission. Thereafter, the ward’s half-brother filed for an accounting and distribution of the estate, claiming that he was entitled, as an heir, to a one-fifth share of the annuities and of the estate. The probate court set aside the grant of letters of dismission, finding that the guardians’ final return did not show distribution of all the estate and that the half-brother was entitled to a one-fifth share of all annuity payments.\textsuperscript{76} The superior court approved the setting aside of the letters of dismission of the guardians but held that the half-brother had no interest in the annuities, which were properly disposed of pursuant to the ward’s designation of beneficiaries.\textsuperscript{77}

In affirming the probate court’s decision, the court of appeals pointedly dealt with each of the disputed issues. First, the fifteen-year-old had the capacity to make a will\textsuperscript{78} and, by analogy, the capacity to designate beneficiaries of annuities, which operate as will substitutes.\textsuperscript{79} Second, the guardians did not put themselves in a conflict of interest situation when they were named as beneficiaries of the annuity contracts because that was done with the guidance of the probate court and outside the presence of the guardians.\textsuperscript{80}

Third, while investments such as these annuities were not specifically authorized guardians’ investments when they were made, they were specifically approved by the probate court on May 14, 1990; on July 1, 1990, this type of settlement arrangement was specifically codified.\textsuperscript{81} Furthermore, the statutory approval of trust fund investments by a superior court also states that “any other investments of trust funds shall be made under the order of the superior court or shall be at the risk of the trustee.”\textsuperscript{82} This authorization of approval of trust fund investments by a superior court has also been applied by the Georgia Supreme Court to the guardians’ investments.\textsuperscript{83}

\textsuperscript{75} Id. at 542-43, 474 S.E.2d at 730-31.
\textsuperscript{76} Id., 474 S.E.2d at 730.
\textsuperscript{77} Id. at 543, 474 S.E.2d at 730.
\textsuperscript{78} Id. (citing O.C.G.A. § 53-2-22 (1995)).
\textsuperscript{79} Id.
\textsuperscript{80} Id., 474 S.E.2d at 730-31.
\textsuperscript{81} Id. at 543-44, 474 S.E.2d at 731 (citing O.C.G.A. § 29-2-16(b) (1997)).
\textsuperscript{82} Id. at 544, 474 S.E.2d at 731 (quoting O.C.G.A. § 53-12-280 (1996)).
\textsuperscript{83} Id. (citing Cochran v. Spinks, 180 Ga. 623, 180 S.E. 221 (1935)).
Finally, the court agreed with the probate court's holding that the half-brother was not entitled to a share of the annuities. They were not assets of the decedent's estate but passed instead by virtue of the annuity contract, operating as a will substitute. The half-brother was entitled, though, along with his half-brother and with the ward's parents, to share in whatever assets remained in the ward's estate.

D. Probate Problems

1. Testamentary Capacity and Undue Influence. The issues of testamentary capacity and undue influence often reach the appellate courts after a lower court has directed a verdict, necessarily bringing up the question of whether there was any conflict in the evidence as to any material issue. Andrews v. Rentz was this type of a case. The evidence indicated that the testator in his first will executed in 1988 left most of his estate to his granddaughter and two hundred dollars to his daughter. The later will, executed in 1991, left nothing to the granddaughter, two hundred dollars to the daughter, and the residue of an estate of about $250,000 to his caretaker, whom he also named as executrix. He died in 1993 at the age of eighty-three. The daughter appealed from the direction of a verdict for the caretaker.

A divided court (seven to two) affirmed. Undue influence must amount to deception, force, or coercion that destroys the free agency of the testator. A presumption that influence is undue arises when it is shown that the will was made at the request of one who receives a substantial benefit, who is not a natural object of the testator's bounty, and who was in a confidential relationship with the testator at the time of the will's execution. However, one standing in a confidential relationship to another is not prohibited from exercising any influence

84. Id.
85. Id. The court analogized the investment of a ward's funds received in a tort judgment to the investment of funds received in a workers' compensation settlement. The latter funds have been held to be nonprobate assets. Id. (citing King v. Travelers Ins. Co., 202 Ga. App. 568, 415 S.E.2d 176 (1992)).
86. Id. at 545, 474 S.E.2d at 731-32 (citing O.C.G.A. § 53-4-2(5), (6) (1995)).
88. Id. at 783, 470 S.E.2d at 670.
89. Id. at 784, 470 S.E.2d at 671.
90. Id. at 783, 470 S.E.2d at 671 (citing Sims v. Sims, 265 Ga. 55, 452 S.E.2d 761 (1995)).
91. Id. at 783-84, 470 S.E.2d at 671 (citing Bryan v. Norton, 245 Ga. 347, 348, 265 S.E.2d 282, 283 (1980)).
over him. The majority found that there was no evidence that the caretaker had any discussions with the testator as to the contents of his will, that the caretaker participated in any way in the testamentary planning, or that the testator felt in any way coerced at the time of execution. The majority was also influenced by the fact that the contested will left the caveatrix the same amount (two hundred dollars) that the earlier will had left her.

The dissenting justices felt that because of the inherently circumstantial nature of the evidence on undue influence, a finding of undue influence over the elderly and dependent testator was not demanded. Still, the court could have authorized such a verdict and, consequently, should have precluded a grant of a directed verdict in favor of the will.

2. Mutual Wills. Smith v. Turner serves as an example of the unanticipated and often unfortunate consequences of the use of mutual wills. There, the husband and his wife of forty-five years each executed a will in the presence of each other and two witnesses. Each spouse left the entire estate to the other if he or she survived the testator; otherwise the estate would go to any surviving child or children of the husband. (The wife, a second wife of the husband, had no children of her own.) The husband died in 1991 and was survived by several children. Three months later, the wife executed a new will that left nothing to these children. The husband's will was admitted to probate, and the children sued the wife for specific performance of an agreement to make mutual wills pursuant to O.C.G.A. section 53-2-51. The court of appeals affirmed the trial court's finding that the wills were not mutual and that the grant of summary judgment in favor of the estate of the wife was correct.

The court discussed the 1967 amendment to the statute on mutual wills, stating that the purpose of the amendment was to eliminate a series of ad hoc decisions finding wills to be mutual by implication. Because there was no express statement in the wills of the husband and

92. Id. at 784, 470 S.E.2d at 671 (citing Ehlers v. Rheinberger, 204 Ga. 226, 230-31, 49 S.E.2d 535, 539 (1949)).
93. Id.
94. Id.
95. Id. at 785, 470 S.E.2d at 671-72.
98. 223 Ga. App. at 373, 477 S.E.2d at 664.
wife that they were mutual, the remaining issue was whether there was an express contract to make or to refrain from revoking a will. The court defined “express contract” to include oral as well as written utterances or declarations. The only remaining question was whether there was any evidence of a contract in this case. There certainly was no positive evidence. While the testimony of some of the children seemed to imply an agreement, the evidence was not sufficiently certain, definite, and clear to find an express contract.

It is noteworthy that Georgia's new Revised Probate Code, effective January 1, 1998, goes a long way toward clarification of these issues. It provides: “A contract made after January 1, 1998, that obligates a person to make a will or a testamentary disposition, not to revoke a will or a testamentary disposition, or to die intestate shall be express and shall be in a writing that is signed by the obligor.”

3. Mistake. The only issue on appeal in Shore v. Malloy was whether an alleged mistake of fact on the part of the testatrix that she owned certain property, which her will purported to leave to her son, had the effect of invalidating the will. Whether she in fact owned that property was a contested issue in a five-day jury trial in probate court. The court directed a verdict in favor of the will. The Georgia Supreme Court affirmed.

A mistake in the inducement for the making of a will is an error of fact outside the will itself. Courts generally do not invalidate a will because of a mistake in the inducement, the accepted logic being that almost every testator is mistaken about some of the collateral facts that entered into the making of a will. Litigation of every one of the facts would create an intolerable situation. The Georgia statute, however, did make one exception. It provided that a mistake of fact as to the existence or the conduct of an heir would make the will inoperative as to that heir. That statutory provision, though, did not apply to the facts of this case. Even assuming that the disputed property did

100. Id. (quoting BLACK'S LAW DICTIONARY 323 (6th ed. 1990)).
101. Id. at 373, 477 S.E.2d at 665.
104. Id. at 44-45, 472 S.E.2d at 304.
105. Id. at 46, 472 S.E.2d at 305.
106. Id. at 45, 472 S.E.2d at 304.
107. Id.
108. Id.
110. 267 Ga. at 45, 472 S.E.2d at 304.
belong to the son at the death of the testatrix, that would not show mistake as to the existence or the conduct of an heir.\textsuperscript{111}

4. Conditional Wills. \textit{Brown v. Cronic},\textsuperscript{112} is a good example of the problems raised by an allegation that a will was “conditional.” The testator and his fiancee planned to marry at Christmas of 1990, and in August of that year, each executed a will leaving a substantial portion of the estate to the other. The testator’s will left real and personal property “to Wife to Be.”\textsuperscript{113} Then he named her son as executor, identifying him as “my stepson.” Two days before Christmas, the “Wife to Be” died in an automobile collision; she and the testator never married. Following her death, the testator instructed the son to “leave everything just as it is.”\textsuperscript{114} Shortly thereafter, the testator died, and the son offered the will for probate. The testator’s daughter filed a caveat and offered for probate a 1985 will of the testator, in which he left everything to his two daughters. The stepson-to-be argued that the 1990 will was valid and that it revoked the 1985 will. The superior court held that the 1990 will was invalid because it was conditioned upon the testator’s marriage to his wife-to-be, and this condition did not occur.\textsuperscript{115}

The Georgia Supreme Court reversed on this point, holding that the 1990 will remained valid because the language of the will showed only that the testator executed that will in contemplation of marriage, not that he made the contemplated marriage a condition of the validity of the will.\textsuperscript{116} The court appeared impressed by the total absence from the will of such words as “if,” “on condition that,” “in the event of,” or other words that might suggest that the will was conditional.\textsuperscript{117}

5. Revocation of Wills. The revocation issue was raised in two different ways—in one case by acts committed on the will itself and in the other by an inability to find a will that was known to have been executed by the testator. In the first case, \textit{Havird v. Schlachter},\textsuperscript{118} the instrument offered for probate had material cancellations and alterations that would clearly raise a presumption of revocation.\textsuperscript{119} The testator’s

\begin{footnotes}
\item 111. \textit{Id.}
\item 112. 266 Ga. 779, 470 S.E.2d 682 (1996).
\item 113. \textit{Id.} at 779, 470 S.E.2d at 683. The will named the fiancee as his wife to be. \textit{Id.}
\item 114. \textit{Id.} at 780, 470 S.E.2d at 683.
\item 115. \textit{Id.}
\item 116. \textit{Id.} at 781, 470 S.E.2d at 683-84.
\item 117. \textit{Id.}
\item 118. 266 Ga. 718, 470 S.E.2d 657 (1996).
\item 119. \textit{Id.} at 718, 470 S.E.2d at 658 (citing O.C.G.A. § 53-2-74 (1995)).
\end{footnotes}
sole heir claimed that the will was revoked and that, therefore, he should take the entire estate by intestacy. The only claim of the propounder was that the doctrine of dependent relative revocation was sufficient in this case to rebut the presumption of revocation. A summary judgment in favor of the heir's claim was affirmed by the Georgia Supreme Court. It noted that this doctrine is one of presumed intent that the testator planned to make a new will. If that intent was not effectuated, the will, though actually canceled and obliterated, would still be admissible to probate. Here, the propounder offered no evidence that the testator intended to make a new will; hence, that prerequisite for the application of the doctrine was not shown. There was no evidence that the testator intended to attach any condition to his act of cancellation and alteration.

A troublesome issue of revocation was presented in Horton v. Burch. The testator executed the will in triplicate, each of the three copies (original and two duplicates) being executed with the same formality and containing the original signatures of the testator and the witnesses. The testator retained the original and one duplicate, leaving the remaining duplicate with her attorney. Following her death in 1994, her duplicate was found in her safety deposit box, but the original and a codicil were not found. When the duplicate was offered for probate, her son caveted on the ground that the offered will was not the original. Probate was denied, and on appeal the superior court denied the son's motion for summary judgment. The court relied on the statute that authorizes express revocation by destruction or obliteration and on King v. Bennett for the proposition that there must first be evidence of the "condition of the [original] will" before the presumption arises that the testator destroyed the original will with the intent to revoke it.

120. Id.
121. Id. at 719, 470 S.E.2d at 658.
122. Id.
123. Id. at 720, 470 S.E.2d at 659.
124. Id. (relying strongly on two of the leading cases on this doctrine—Carter v. First United Methodist Church, 246 Ga. 352, 271 S.E.2d 493 (1980), and McIntyre v. McIntyre, 120 Ga. 67, 47 S.E. 501 (1904)).
126. Id. at 1, 471 S.E.2d at 879.
129. 267 Ga. at 2-4, 471 S.E.2d at 880-81 (quoting King, 215 Ga. at 348, 110 S.E.2d at 775).
The Georgia Supreme Court reversed and remanded the case, holding that the lower court erred in relying on the statute governing express revocation by destruction and obliteration. The applicable statute governing lost wills provides that when a will has been lost during the testator's lifetime, or lost or destroyed after his death, a copy of the will may be admitted upon proper proof. When, however, a will is uncontrovertedly lost, as in this case, it followed that the trial court erred in holding that there must first be evidence of the condition of the will before the presumption of revocation can arise. Because the case came up on a summary judgment ruling, the supreme court did not address the merits of the parties' arguments of whether a material issue of fact remained that might rebut the presumption of revocation. That will be a matter for the trial court to consider on remand.

E. Construction Problems

The construction problems reaching the Georgia Supreme Court during the survey period involved two real (or alleged) inter vivos trusts and two very real testamentary trusts.

1. Constructive Trust. This type of trust, the very existence of which is implied long after the occurrence of the facts allegedly giving rise to the implication, is designed to remedy the situation in which legal title to property, through fraud or other wrongdoing, has come to be vested in a person not rightfully entitled to it. Delay in the assertion of a constructive trust may bar one's right to assert it and thus render immaterial the abstract merits or demerits of the original claim. This was the fate of the claim in Troup v. Loden. That claim arose, if at all, in 1974 when a mother conveyed land to one of her sons and two other sons signed the deed as witnesses. In 1983 the mother died, and in 1985 and 1988, the witnessing sons died, neither apparently having asserted any claim to the land. In 1994, twenty years after the execution of this deed, heirs of the witnessing sons sued to establish a constructive trust in the land. They claimed that when the deed was executed, the grantee-son promised to divide the land with the other two brothers after their mother's death. The supreme court

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130. Id. at 2-3, 471 S.E.2d at 880-81 (citing O.C.G.A. § 53-2-74).
131. Id., 471 S.E.2d at 880 (citing O.C.G.A. § 53-3-6 (1995)).
132. Id. at 4, 471 S.E.2d at 881.
133. Id.
affirmed the trial court's direction of a verdict in favor of the grantee-
son. 136

Equity may bar a claim when the lapse of time and the claimant's
neglect in asserting his rights have caused prejudice to the other party.
In determining whether the doctrine of laches should apply, a court
should consider things such as the length of the delay, the sufficiency of
the excuse for it, the loss of material evidence, and the opportunity of
the claimant to have acted sooner. 137 The burden is on the defendant
to prove that he was prejudiced by the delay. The record in this case
showed that neither the brothers who witnessed the deed in 1974 nor
their heirs ever challenged the defendant's title; nor did they assert any
claim when the defendant sold timber off the land. 138 This delay
prejudiced the defendant because it forced him to dispute claims based
on conversations with persons now dead. 139

The supreme court noted that because laches is a factual defense, the
better practice would have been for the judge, as chancellor, to hold an
evidentiary hearing rather than to act on a motion for summary
judgment. 140 Still, depositions in the record showed clearly that the
claimants' long delay in asserting the claim had rendered ascertainment
of the truth difficult. 141

2. Abatement of Legacy. The disposition of a $500,000 bequest
was controlled by the application of some general maxims of construction
to some very precise language in the will in Timberlake v. Munford. 142
As is often the case, the problem was complicated by the terms of a
property settlement agreement that was incorporated into the divorce
decree of the testator and the legatee. The agreement provided that the
husband's estate would pay $500,000 within ninety days after his death
in full discharge of his obligation to his former wife. He remarried in
1980 and she in 1990, at which latter time the alimony payments ceased.
In 1992 he executed a new will in which one clause stated that his
former wife was to receive $500,000 in full satisfaction of his obligations
under the 1977 settlement agreement. 143

136. Id. at 650, 469 S.E.2d at 665.
137. Id. at 651, 469 S.E.2d at 665 (citing Johnson v. Sears, 199 Ga. 432, 435, 34 S.E.2d
541, 543 (1945)).
138. Id., 469 S.E.2d at 666.
139. Id.
140. Id.
141. Id.
143. Id. at 632, 481 S.E.2d at 218.
After his death in 1993, she sued the estate for payment of the $500,000 legacy. The superior court ruled that the plain meaning of the settlement agreement was that she would be entitled to the legacy only if she were receiving alimony at the time of his death. Because that was not the situation, the legacy abated. The supreme court, however, reversed, reinstating the legacy and stressing the language of the subsequently executed will rather than that of the property settlement. That will expressly stated: "I give Five Hundred Thousand Dollars ($500,000) to my former wife . . .," suggesting an intention to make this bequest even though his obligation to pay alimony had ceased prior to his death.

3. Encroachment in Favor of Life Beneficiary. Kicklighter v. Woodward contained an interesting issue of encroachment on behalf of a life beneficiary. The estate, consisting mostly of realty, was devised in trust to the widow, a son, and the bank. It turned out that the son predeceased his father, and the bank withdrew as a trustee, leaving the widow as sole trustee. Under the terms of the will, the trustees were to manage the trust and to pay the net income to the widow for life and the remainder to the grandson of the testator. The trustees had the power to invade the corpus if in their discretion the net income proved insufficient to maintain the widow in her accustomed standard of living.

After probate of the will, it was determined that the estate owed more than $103,000 in federal and state estate taxes. Because all liquid assets were in joint tenancy with, and were received by, the widow upon the testator's death, the widow paid the estate taxes from her personal funds in 1980. She also paid $7,500 in commissions to the co-executor. The 604 acres of timberland owned by the testator at death went into the testamentary trust.

In 1993 with the consent of the co-executor, the widow sold timber from the tract for $306,000. In 1994 she petitioned the probate court for a final accounting, for repayment to her of the amounts of the debts of the estate that she had personally paid, and for a final distribution of

144. Id. at 631, 481 S.E.2d at 217.
145. Id. at 633, 481 S.E.2d at 219.
146. Id. at 632, 481 S.E.2d at 218.
147. It is interesting that both the trial court, in construing the agreement, and the reversing court, in construing the will, purported to apply the "plain meaning" rule. See id. at 631, 481 S.E.2d at 218.
149. Id. at 157, 476 S.E.2d at 249.
150. Id.
the assets. She also claimed that she, as income beneficiary, was entitled to all of the net proceeds from the sale of the timber. The probate court ruled in her favor, but the superior court held that her claim for reimbursement of her payment of estate obligations from her personal funds was time-barred and that the will itself classified the proceeds from the timber-cutting as corpus rather than as income. The Georgia Supreme Court agreed that the widow's only right of encroachment would have been if trust income proved inadequate to maintain her in her accustomed standard of living. Only then would an encroachment on the remainderman's interest have been justified.

4. Modification of Trusts. While administrative deviation from the precise terms of a private trust has been allowed by statute in Georgia at least since 1991, the courts are zealous in the protection of the substantive property rights created by a settlor. Barnes v. Nationsbank is a recent example. In Barnes the will created a trust for the benefit of the testator's son, identifying him as the "primary beneficiary." It provided that the son be supported in the style to which he was accustomed and that his dependents be similarly supported to the extent that the trustee could reasonably do so. Another provision provided for distribution of the corpus to the son's two children after his death.

Later, after the son filed a bankruptcy petition, the trustee proposed to disburse to him $6,368 a month from the trust to enable him to continue in his accustomed standard of living. The son's two children, both now emancipated, objected, and a declaratory judgment action was filed in which the trustee sought permission either to make this proposed distribution or to divide the trust between the son and the children pursuant to terms of the 1991 modification statute.

The trial court's grant of the requested division of the trust was reversed by the supreme court. It held that because the son, the primary beneficiary, was still alive, the children had only remainder

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151. Id. at 158, 476 S.E.2d at 250 (citing O.C.G.A. § 9-3-25 (1982) (barring enforcement of an obligation on an open account more than four years after the cause of action accrues)).
152. Id. at 160, 476 S.E.2d at 251.
153. Id.
156. Id. at 234, 476 S.E.2d at 563.
157. Id. at 235, 476 S.E.2d at 564.
158. Id. at 234, 476 S.E.2d at 563-64 (citing O.C.G.A. § 53-12-152(b) (1997)).
159. Id. at 236, 476 S.E.2d at 565.
interests. Being emancipated children, they were no longer dependents. The modification statute allows a division of a trust only if it “is not inconsistent with the intent” of the creator of the trust. Here, a division would have been inconsistent with that intention. The status of the son as primary beneficiary, coupled with the trustee’s duty to hold the entire trust estate for the primary purpose of his support, left the entire trust estate subject to the trustee’s power to encroach and left the remainder interest subject to defeasance to the extent that encroachment might be necessary.

II. LEGISLATION

The first phase in a comprehensive revision of Georgia fiduciary law ended in 1991 with the adoption of the Georgia Trust Act. Then, following several years of study and drafting, the Probate Code Revision Committee of the Fiduciary Law Section of the State Bar of Georgia presented a Revised Probate Code, a comprehensive revision of chapters 1 through 11 of Title 53 of the Official Code of Georgia. This probate code was adopted with an effective date of January 1, 1998. The 1997 session of the Georgia General Assembly made a few changes and approved the amended code, leaving the effective date unchanged.

III. CONCLUSION

Guardianship law remains in the process of revision. The 1996 session of the General Assembly approved a resolution creating the Joint Guardianship Rewrite Committee. That committee, finding it impossible to complete its task by its expiration date, was re-created and will file its report on or before December 1, 1997, on which date the re-created committee shall stand abolished.

160. Id. at 235-36, 476 S.E.2d at 564.
162. 267 Ga. at 235, 476 S.E.2d at 564.
164. Whether or not that is the official title, it is the one used by the publisher of the definitive work in Georgia on the subject. See, e.g., LOVE, supra note 9.