Wills, Trusts, and Administration of Estates

James C. Rehberg
The aim of this Article is to summarize judicial and legislative developments in fiduciary law within the past year. Its organization reflects an intention to discuss the particular issues somewhat in the chronological sequence in which they are likely to appear.

I. RECENT DECISIONS—WILLS AND ADMINISTRATION

A. Preliminary Issues

1. Inheritance by a Child Born Out of Wedlock. Sharp v. Varner\(^1\) is the sequel to Varner v. Sharp,\(^2\) in which a daughter born out of wedlock claimed to be the sole heir of her intestate father. The claim was opposed by the intestate's brother, who also claimed to be sole heir.\(^3\) The court of appeals ruled in the latter case that the daughter had offered clear and convincing evidence that she was the intestate's daughter, but that she had not offered similar evidence that he intended for her to inherit his estate to the exclusion of the intestate's brother.\(^4\) On remand, the probate court heard testimony which it found sufficient to show both that the daughter was her father's natural child and that he intended for her to take his estate as sole heir.\(^5\) The brother

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\(^1\) 226 Ga. App. 570, 486 S.E.2d 701 (1997).
\(^3\) Id. at 125, 464 S.E.2d at 388.
\(^4\) Id. at 127, 464 S.E.2d at 389.
\(^5\) 226 Ga. App. at 571, 486 S.E.2d at 702. See also O.C.G.A. § 53-4-4(c)(1)(E) (1995) which required both types of clear and convincing evidence. It is worthy of note at this point that this code section has since been substantially rewritten in the Revised Probate
appealed, claiming evidence that the father loved both his brother and his daughter and that he wanted to benefit both of them could not be clear and convincing because it supported two different conclusions—either that she alone inherit the estate, or that she be provided for by the one joint account with her name on it.\textsuperscript{6}

The court of appeals affirmed, stating that the clear and convincing evidence test does not eliminate all but one possible conclusion.\textsuperscript{7} Instead, it sets an intermediate standard of proof, one greater than the preponderance of evidence, but less than beyond a reasonable doubt.\textsuperscript{8}

Further explanation by the court of the results of this case indicates that a person may die intestate and still do some valid "estate planning," however ill-advised. The court stated that this decedent was favorably disposed to both the child born out of wedlock and the brother, wanting to bestow his bounty upon both, and that he appeared to have accomplished both objectives.\textsuperscript{9} The evidence showed that the brother's name appeared on several of the decedent's bank accounts, including at least one joint account which the brother took as survivor, and that the brother was also the beneficiary of the decedent's three life insurance policies. This combination of will substitutes and the rules of intestacy carried out the decedent's intention to provide for both his brother and his daughter. The daughter got the intestate assets and the brother got the benefit of the will substitutes.\textsuperscript{10}

2. Inheritance by Virtual Adoption. When the decedent in Franklin v. Gilchrist\textsuperscript{11} married in 1961, his wife brought into the marriage two minor children by a previous marriage, which had ended in divorce, and in which she was awarded custody of the children. The decedent and his wife had no children of their own, and while there was undisputed evidence that he had been a good stepfather, he never formally adopted the children. The children kept their natural father's surname, but they seldom saw him before his death. Their mother predeceased the decedent, and when he died he left no will.\textsuperscript{12}

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\textsuperscript{6} 226 Ga. App. at 571, 486 S.E.2d at 702.
\textsuperscript{7} Id. at 572, 486 S.E.2d at 703.
\textsuperscript{8} Id.
\textsuperscript{9} Id.
\textsuperscript{10} Id.
\textsuperscript{11} 268 Ga. 497, 491 S.E.2d 361 (1997).
\textsuperscript{12} Id. at 498, 491 S.E.2d at 362.
When the decedent's sister applied for appointment as administratrix of the estate, the two children filed a caveat, claiming that they were the virtually adopted children of the decedent, that they were, therefore, the sole heirs, and that one of them should be appointed to administer the estate. The probate court denied the caveat and issued letters to the sister of the decedent appointing her as administratrix. The superior court, after a jury trial, directed a verdict for the decedent's sister on the ground that virtual adoption is a matter of contract, and that there was insufficient evidence of an agreement to adopt the children.

The supreme court affirmed, emphasizing that an essential element of a virtual adoption claim is the existence of an adoption agreement entered into by parties competent to contract for the disposition of the child. Here the children presented no evidence that the natural father ever agreed to an adoption by the decedent, no evidence as to why such agreement was not obtained prior to the natural father's death, and no evidence of any agreement between the mother and the decedent for their adoption. At most the evidence showed that these children came to live with the decedent because they were his wife's children and she was their custodial parent.

3. **Year's Support.** The precise place of year's support in Georgia's laws of succession to property was clarified considerably in this survey period by three opinions of the court of appeals.

   a. **Effect of Failure to Notify an Interested Party.** In Scott v. Grant, a widow filed an application for twelve months support naming only two persons as interested parties, and after no objections were filed, the probate court granted the application. Later, one of the named interested parties moved for a new trial on the ground that there were other interested parties, specifically a bank, a church, and a granddaughter. The probate court granted the new trial on the ground that the failure to name these other interested parties rendered the grant of the application void ab initio. A grandson, to whom the widow had conveyed a tract of land, objected on the ground that the granting of the

13. Id.
14. Id.
15. Id.
16. Id.
17. Id.
19. Id. at 1, 487 S.E.2d at 627.
20. Id.
21. Id.
motion for new trial placed a cloud on the title to that tract. The grandson appealed from the probate court's denial of his motion to vacate that order.\textsuperscript{22}

The court of appeals reversed, holding that even if there were interested parties who were not listed on the application, this would not automatically render the grant of the application a nullity.\textsuperscript{23} The statute\textsuperscript{24} requires only that the affidavit of the applicant list all interested parties known to the applicant and that he or she make reasonable inquiry as to the names and addresses of all interested parties. There is no authority declaring such an application void simply because there may be interested parties who are not listed. The court noted that in this case none of the complaining persons claimed not to have received notice.\textsuperscript{25}

\textit{b. Effect of Other Resources of the Applicant.} In Richards v. Wadsworth,\textsuperscript{26} the husband filed for a year's support out of the estate of his deceased wife. A jury awarded him $40,000, but the probate court entered a judgment notwithstanding the verdict, reducing the award to the statutory minimum of $1,600.\textsuperscript{27} The court of appeals affirmed and explained the effect of the existence of other resources available for the support of an applicant.\textsuperscript{28} The applicable statute spelling out how the amount of the award was to be ascertained, directed that consideration be given to the support available to the applicant from sources other than "year's support."\textsuperscript{29} The specificity of the facts made this a good case for the court to use in the interpretation of the present statute. For example, the husband's waiting for over one year after the wife's death to file his application allowed the use of precise figures to show both his support needs for the year and the exact amount, independent of his resources, available to him during that year. This undisputed evidence showed the amount needed to maintain his standard of living during the year after her death was approximately $140,000. His independent resources during that year amounted to $334,000, not including the right given him in the will to live in their home the rest of his life free of any

\begin{itemize}
\item \textsuperscript{22} Id. at 2, 487 S.E.2d at 627.
\item \textsuperscript{23} Id., 487 S.E.2d at 628.
\item \textsuperscript{24} O.C.G.A. § 53-5-8 (1997).
\item \textsuperscript{25} 227 Ga. App. at 3, 487 S.E.2d at 628.
\item \textsuperscript{26} 230 Ga. App. 421, 496 S.E.2d 535 (1998).
\item \textsuperscript{27} Id. at 421-22, 496 S.E.2d at 536.
\item \textsuperscript{28} Id. at 423, 496 S.E.2d at 537.
\item \textsuperscript{29} At the death of the applicant's wife in 1995, the controlling statute was O.C.G.A. § 53-5-2(c). That section, now in the Revised Probate Code, is O.C.G.A. § 53-3-7(c) (Supp. 1996). It no longer provides for a minimum award. Id.
\end{itemize}
expenses of maintenance, insurance, and repairs.\textsuperscript{30} These facts led the court to the inescapable conclusion that the most the husband was entitled to was the $1,600 minimum based on status alone.\textsuperscript{31} No support needs were shown.

c. Year's Support and Bankruptcy. In \textit{McClure v. Mason},\textsuperscript{32} a husband died while his Chapter 11 bankruptcy action was pending. His wife applied for a year's support and was duly awarded some cash, personal property, and realty. A bankruptcy creditor of the deceased husband appealed, claiming that the award was an unlawful award of property vested in the bankruptcy estate, and consequently, the awarded assets did not belong to the decedent's estate and could not be awarded as year's support.\textsuperscript{33}

The court of appeals affirmed the award but admitted that the probate court could only award the wife property belonging to the husband's estate, and that it had no jurisdiction to decide whether the property was vested in the wife, her husband's estate, or the bankruptcy estate.\textsuperscript{34} However, these limitations did not prevent the probate court from including the property in the year's support award. If any property awarded did not in fact constitute a part of the husband's estate, then the probate court's judgment simply would not attach to such property and would be void as applied to it. Even if no legal title to any property remained in the decedent's estate at his death, any equitable estate owned by him may be included in a year's support award. Any enforcement of that award (a point not yet reached) would require a determination of the nature and existence of that title or interest by a court with jurisdiction of that issue.\textsuperscript{35} The court interpreted the award as that of whatever interest in the listed assets the husband had at death.\textsuperscript{36}

4. Will Substitutes. A valid will substitute, by definition, removes the subject property from the decedent's probate estate. Whether it is a valid substitute, however, is often a vigorously disputed issue. Two cases in this survey period illustrate how will substitutes work and what pitfalls are often encountered if they are used in estate planning.

\textsuperscript{30} 230 Ga. App. at 423, 496 S.E.2d at 537.
\textsuperscript{31} Id. at 424, 496 S.E.2d at 537.
\textsuperscript{32} 228 Ga. App. 797, 493 S.E.2d 16 (1997).
\textsuperscript{33} Id. at 798, 493 S.E.2d at 16.
\textsuperscript{34} Id., 493 S.E.2d at 17.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
Caldwell v. Walraven concerned the estates of a husband and wife who married in 1936 and lived together until his death in 1985. They never had children. The husband's will left his entire estate to the wife for life, giving her the power to dispose of any or all of it as she deemed necessary. His will also provided that any of his property remaining in her estate at her death was to be divided equally among two of his and three of her nieces and nephews.

Nine months before her death, in partial exercise of her power, she sold the family home for $180,000. With the proceeds she purchased a condominium for $72,000 (taking title in her own name) and a certificate of deposit for $108,000 (taking title to it in the names of herself and a niece, whom she named as executrix of her estate). Shortly after the wife's death in 1996, two of the nephews, who were remaindersmen under the husband's will, filed for an accounting and for final settlement of his estate, contending that they were entitled under his will to a pro rata share of the proceeds that resulted from the sale of the home. The niece, as representative of the wife's estate, filed for an accounting as to the husband's estate. She claimed that there were no assets left in his estate because the condominium passed under the wife's will and the funds in the certificate of deposit already belonged to the niece, either because the wife had made an inter vivos gift of the funds to her or because she was the surviving party to the joint account set up by the wife after the sale of the home. The trial court agreed that the condominium was an asset of the wife's estate that would pass under her will, and that the funds in the certificate of deposit should pass to the niece as surviving party to the joint account. The two nephews appealed.

In reversing and remanding the case, the supreme court said that the controlling issues were, first, the extent of the power held by the wife, and second, whether the wife made a valid inter vivos gift of the proceeds of the sale by the wife of the condominium when she invested it in the certificate. The wife clearly could dispose of the proceeds of the sale under the terms of the power given her, but she did not do so. As to her property interest, Georgia law provides that, absent a provision in the will to the contrary, the proceeds of an authorized sale by a life tenant stand in the place of the property sold, and are therefore subject

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38. Id. at 444-45, 490 S.E.2d at 385.
39. Id.
40. Id. at 445, 490 S.E.2d at 385-86.
41. Id., 490 S.E.2d at 386.
42. Id. at 449, 490 S.E.2d at 387.
43. Id. at 448, 490 S.E.2d at 387.
to the same life estate, including the power of disposition, and to the same remainders.\textsuperscript{44} The life tenant had an extremely broad and general power, but it was exercisable only during her life, not by her will.\textsuperscript{45}

Prior to 1976, when Georgia adopted the Uniform Probate Code provisions on multiple-party accounts,\textsuperscript{46} Georgia cases rigidly applied the law of inter vivos gifts to the creation of joint accounts, including the intention to give and the requirement of delivery.\textsuperscript{47} The same result is reached under the present statute,\textsuperscript{48} which provides that a joint account is presumed to belong, during the lives of the parties, to the parties in proportion to the net contributions of each. Here the wife furnished the entire cost of the account, and there was no evidence that she made a gift of the proceeds when she purchased the certificate.\textsuperscript{49}

Despite the value of their flexibility in estate planning, the use of will substitutes carries an even greater risk when they are used shortly before death. In \textit{Bradshaw v. McNeill},\textsuperscript{50} that risk was heightened by the decedent giving the joint tenant a broad power of attorney over the affairs of the decedent, who created the joint account. After the decedent's death in 1984, the surviving wife converted several accounts and certificates of deposit which she had held in joint tenancy with him into joint accounts in her name and in that of a niece, who resided in Florida. Years later, when her health began to fail, another niece who lived nearby began helping her. She then executed a will in which she left her estate in equal shares to these two nieces.\textsuperscript{51}

A month before her death, she and the niece caring for her went to her attorney, and she executed a power of attorney in favor of this niece. A week later, again accompanied by this niece, she conveyed her home to the niece, reserving to herself a life estate.\textsuperscript{52}

Two days before the decedent's death, this niece admitted her to a convalescent home. The next day, after examining the will and learning that she and the niece in Florida were to share equally in the estate, this niece used her power of attorney to liquidate most of the joint accounts, which totaled over $70,000. With this money she opened new

\textsuperscript{45} 268 Ga. at 447, 490 S.E.2d at 387.
\textsuperscript{48} O.C.G.A. § 7-1-813(a) (1997).
\textsuperscript{49} 268 Ga. at 449, 490 S.E.2d at 388.
\textsuperscript{50} 228 Ga. App. 653, 492 S.E.2d 568 (1997).
\textsuperscript{51} Id. at 653, 492 S.E.2d at 569.
\textsuperscript{52} Id.
accounts in the names of the decedent and herself. Withdrawal penalties cost several hundred dollars.53

When the Florida niece learned of these transactions, she sued the Georgia niece, alleging fraud and undue influence (1) in the liquidation of the accounts which had been in the names of the decedent and plaintiff and (2) in the use of funds to open accounts in the names of the decedent and defendant. The Florida niece also alleged fraud in the execution of the deed conveying the decedent's house to defendant. Appeal was taken by defendant based on the trial court's actions on various motions for summary judgment, some of which were granted and some denied.54

The court of appeals held that the trial court correctly denied defendant's motion for summary judgment on the joint account issue.55 The court stated that the power of attorney, pursuant to O.C.G.A. section 7-1-812(a), permitted defendant to close out any checking or savings accounts and to open new ones. Because the niece in Florida did not contribute to those accounts, either the decedent or defendant (acting under the power of attorney) had authorization to close these accounts at any time prior to the decedent's death.56 However, the specific terms of the power of attorney complicated this issue. The power specified that any action taken be on behalf of the principal (the decedent). Thus factual questions remained on whether defendant, as donee of the power, acted in self-interest or acted on behalf of the decedent on the latter's actual intent regarding ownership of the joint accounts and of the certificates of deposit.57

Both the transfer of the house to defendant and the creation of the power of attorney in her happened within the last month of decedent's life. The confidential relationship between the donor and donee of the power of attorney thus created a presumption of undue influence. This fact, coupled with an affidavit in the record stating that the decedent was not herself during the last six months of her life, precluded summary judgment.58

53. Id. at 653-54, 492 S.E.2d at 569.
54. Id. at 654, 492 S.E.2d at 570.
55. Id.
56. Id. (citing O.C.G.A. § 7-1-812(a) (1997), specifying ownership rights during the lifetime of all of the parties).
57. Id. at 654-55, 492 S.E.2d at 570.
58. Id. at 655, 492 S.E.2d at 571.
B. Problems Encountered During Administration

1. Jurisdiction of Superior Court During Administration. In Dismer v. Luke, the probate court, after a caveat had been filed and dismissed, admitted the will to probate. It then assessed attorney fees and costs against the caveatrix and her attorney for filing a meritless and frivolous caveat. The caveatrix and her attorney appealed to the superior court, arguing that the statute on frivolous actions and appeals contemplated a final judgment and that, in this case, the administration of the estate was ongoing at the time the caveat was filed. The appellants also argued that whether sanctions should be awarded is a jury question. They appealed from an adverse judgment in the superior court on that issue.

The court of appeals set aside the superior court’s award, ruling that the award of sanctions was part of the final judgment in which the will was admitted to probate and testamentary letters issued. These and other issues were resolved by that judgment, regardless of whether the administration of the estate remained open. The superior court erred in holding that whether sanctions should be assessed was an issue for the jury. That, the court of appeals said, directly contradicted the clear language of the statute. This error demanded a remand of the case.

2. Partition of Estate Realty During Administration. In Clay v. Clay, a mother’s will left a piece of realty (the sole asset) to two sons, whom she named as coexecutors. During probate proceedings one son petitioned for statutory partition of the realty. The partitioners duly filed their return, dividing the property into two parcels deemed of equal value. The other son objected, claiming the first son had no
standing to bring the partition action because he was not the “owner,” the entire estate was still in probate, and it still owed debts. The supreme court affirmed the partition. Under the applicable statute, one of two executors can validly give assent to a devise unless another is in possession (which was not the case here).

That there were estate debts did not preclude the bringing of the partition action and the assenting to the devise. Even if there were still unpaid estate creditors, they could follow the estate assets (the land) into the hands of a distributee.

3. Removal of Executor. Georgia’s removal statute gives the probate court broad powers to remove an executor upon a showing of waste or mismanagement, or upon a showing that he is unfit for the position. The will in Nesmith v. Pierce named plaintiff and the testatrix’ eighty-nine-year-old mother as coexecutors. Plaintiff, an experienced real estate attorney, offered to sell the estate realty himself without charging a commission. Plaintiff produced two appraisals, one for $130,000 and one for $145,500. Defendant, the coexecutor, refused to agree, insisting that plaintiff list the realty at $170,000. Plaintiff testified that he showed the property to eighteen prospects and received two offers, one for $126,850 and the other for $155,000. He stated his fear that a counter-offer would cause withdrawal of the higher offer. He also stated that there were other problems; namely, that defendant wanted to distribute the estate immediately even though she had little understanding of tax problems, wanted to keep the estate invested in low-yielding accounts, and wanted to leave estate jewelry in a safe in her apartment rather than in a safety deposit box. Defendant executor did not testify; her only evidence was the testimony of a niece and a granddaughter that she was alert and capable of handling money.

The court of appeals affirmed the probate court’s order removing the elderly executor. The evidence showed she did not fully understand the duties and responsibilities of an executor and may have already acted in a manner detrimental to the estate. The court of appeals

69. 268 Ga. at 41, 485 S.E.2d at 206.
70. Id.
72. See Lewis v. Patterson, 191 Ga. 348, 12 S.E.2d 593 (1940).
73. See Morrison v. Fidelity & Deposit Co., 150 Ga. 54, 102 S.E. 354 (1920).
76. Id. at 851-52, 487 S.E.2d at 688.
77. Id. at 852, 487 S.E.2d at 688.
78. Id.
concluded that the probate court acted within its discretion in removing this executor.\textsuperscript{79}

There was one other issue. Defendant complained of the probate court’s award to plaintiff of extra compensation for extraordinary services in the attempted sale of the property despite plaintiff’s original offer to handle the sale without a commission. The facts showed that defendant’s actions made plaintiff’s additional services necessary. Plaintiff could have employed an agent to sell the property, as provided by statute,\textsuperscript{80} and had he done so, that agent would have been entitled to a commission.\textsuperscript{81}

4. Successor Executor. The will in \textit{Robbins v. Vanbrackle}\textsuperscript{82} named the testatrix’ mother as executor and then provided that “in the event my mother should predecease me” the testatrix’ daughter should serve. When the testatrix died, her mother was alive but was incompetent.\textsuperscript{83} The trial court construed the will as not naming a successor executor and thus appointed as administrator with the will annexed a person selected by the heirs.\textsuperscript{84}

The supreme court affirmed, holding that the only contingency for the appointment of the daughter was that the mother predecease the testatrix.\textsuperscript{85} This contingency did not occur; hence the procedure under O.C.G.A. section 53-6-29 was appropriately followed. Two dissenting justices felt that the majority was being overly technical.\textsuperscript{86} They were convinced that the testatrix’ use of the word “predecease” was intended to refer to any circumstance in which the primary nominee should be unable to serve and that this intention should be carried out.\textsuperscript{87}

5. Guardianship and Suretyship. \textit{Osborne Bonding & Surety Co. v. Glaze}\textsuperscript{88} examined the effectiveness and enforceability of a guardian’s bond. A mother was appointed guardian of the property of her minor son who had inherited money from his deceased father. Upon her appointment, she entered into an agreement with defendant, a bonding company, which issued bonds in the amount of $80,000 to secure her

\textsuperscript{79} \textit{Id.}
\textsuperscript{80} O.C.G.A. § 53-6-149 (1997).
\textsuperscript{81} 226 Ga. App. 852-53, 487 S.E.2d at 689.
\textsuperscript{82} 267 Ga. 871, 485 S.E.2d 468 (1997).
\textsuperscript{83} \textit{Id.} at 871, 485 S.E.2d at 468.
\textsuperscript{84} \textit{Id.} at 872, 485 S.E.2d at 469.
\textsuperscript{85} \textit{Id.} at 872-73, 485 S.E.2d at 469.
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{Id.}
faithful performance as guardian. After she failed to file court-ordered annual returns for 1994 and 1995 and failed to appear at a "show cause" hearing, the probate court revoked her guardianship and appointed another guardian. In May 1996 the mother filed for bankruptcy. The new guardian then obtained a bankruptcy court order lifting the automatic stay pursuant to the federal statute, which allowed the new guardian to proceed in probate court to determine whether there had been such mismanagement as would render the former guardian and her surety liable.

Undisputed evidence showed that there had in fact been mismanagement, causing a loss of over $52,000 to the minor son's estate. The new guardian asked the probate court to enter a judgment in that amount, jointly and severally, against the mother and her surety on the guardianship bond. The surety asked the court to release it from liability for the mother's mismanagement prior to her discharge as guardian. The probate court refused and, instead, held the mother and her surety jointly and severally liable.

The court of appeals affirmed, stating that the surety's argument was without merit. The court recognized that the statute provided that, in a case of mismanagement, the court may discharge the surety from liability for breaches prior to the guardian's removal. But the statute also expressly stated that the probate judge's decision in the matter is purely discretionary. Also, even if such a discharge were granted, it would only relieve the surety from liability for acts of misconduct committed after the discharge. Any other conclusion, the court said, would be illogical in that it would defeat the very concept of a surety—to afford protection during a suretyship. The court also stated that there was no merit in the surety's argument that the pending bankruptcy filing tied the hands of the probate court because the new guardian had sought and obtained permission of the bankruptcy court to proceed in the probate court.

89. Id. at 895, 497 S.E.2d at 612.
90. Id.
93. Id., 497 S.E.2d at 612-13.
94. Id., 497 S.E.2d at 613.
95. Id. at 896, 497 S.E.2d at 613.
97. 230 Ga. App. at 896, 497 S.E.2d at 613.
98. Id.
99. Id.
100. Id.
C. Probate of Wills

The will in *Hickox v. Wilson*\(^{101}\) appears to have been homemade and home-executed. When the testatrix asked a friend to witness the signing of the will, the friend told her that she believed that two witnesses and a notary public were required. Arrangements were then made for another witness and a notary to join them. According to an affidavit of the friend, the testatrix again explained to them that they were to witness her will. After the testatrix signed the will, the friend and another witness signed, and it was then notarized by the notary. The other witness testified that the testatrix signed in the presence of the two witnesses and the notary.\(^{102}\)

The instrument itself consisted of three pages, all printed in the same type and stapled together. Pages one and two contained all of the dispositive provisions, and the third page was a self-proving affidavit,\(^{103}\) as defined by statute.\(^{104}\) The two witnesses signed on page two, and the notary signed on the line intended for the testatrix' signature. The signature of the two witnesses also appeared on page three, along with the notarization. The signature of the testatrix appeared only above the word “Testator” on page three (the self-proving affidavit).\(^{105}\)

After the testatrix' death, her stepdaughter filed the three pages for probate, and a caveat was filed by the testatrix' next of kin (some nephews and nieces), which alleged that the document was not signed by the testatrix and, therefore, was invalid. The issue was whether the testatrix' signature on the self-proving affidavit satisfied the statutory requirement that all wills shall be “signed by the person making the will.”\(^{106}\) After the probate court ordered the three pages admitted as the will, an appeal to the superior court resulted in summary judgment in favor of the caveators.\(^{107}\) Thus, the case was ripe for the supreme court.

The supreme court reversed the superior court's decision and held that it was merely an oversight that the signature of the testatrix appeared on the wrong page.\(^{108}\) The court stated that its ruling in *Estate of*
Brannon applied to this case. In Brannon it appeared that all the pages were, in fact, pages of the will. The only issue was whether the testator's signature had to appear on the same page as the signatures of the witnesses. There was no self-proving affidavit involved in Brannon. In fact, a reading of the self-proved will statute suggests a will and a self-proving affidavit are two separate instruments, and that the latter only attests that the former has previously been executed.

It appears to the writer that a more direct and convincing approach to this case would have been to treat the issue solely as one of the integration of the three pages into a single will. That approach would have led to the result reached by the court and would have avoided any implication that the self-proved will statute had any relevance in this case.

D. Will Construction—Ambiguities

Legare v. Legare offered a classic example of the effect of a misnomer of a legatee in a valid will. The testatrix' will left the residue of her estate to her nephew, John Houston Legare. It was discovered, though, that she had no nephew by that name; instead, she had two nephews, one named John Edward Legare and the other James Houston Legare. In a declaratory judgment action brought to ascertain who was the true legatee, a motion in limine was filed seeking to limit extrinsic evidence to the circumstances that surrounded the ceremonial execution of the will. The trial court granted this motion but certified the case for immediate review. The successor in interest of John Edward Legare appealed, arguing that the court's evidentiary rule was too restrictive.

In reversing the case, the supreme court agreed that the ruling was too restrictive and proceeded to identify the evidentiary rules applicable in such cases. Starting with the premise that the primary guide in construing a will is the intention of the testator as gathered from its four corners, the court noted that here one has to go outside those four corners.

110. 269 Ga. at 181, 496 S.E.2d at 712.
111. 264 Ga. at 84, 441 S.E.2d at 249.
114. Id. at 475, 490 S.E.2d at 371.
115. Id.
116. Id.
117. Id.
corners in order to identify the correct legatee. The only remaining question was how far it should go. While the general rule is that parol evidence is inadmissible to explain a will, there are two statutory exceptions. The first of these exceptions allows parol evidence on the circumstances surrounding the testator at the time of execution of the will—for example, the recipients of the testator’s bounty, their relations with him, and his affection, or lack thereof, for them. The other exception allows the admission of parol evidence for the purpose of explaining any latent or patent ambiguities in the will. In *Legare*, a latent ambiguity existed on which of the nephews was the intended beneficiary. Each was specifically named, but when one goes outside the will it is discovered that the testatrix did not name either of them completely and accurately. Her actual intention, then, must be resolved on the basis of parol evidence when the case goes back to the probate court.

II. RECENT DECISIONS—TRUSTS

A. Integration of Lifetime and Testamentary Estate Plans

*Otwell v. First National Bank of Gainesville* related to the interplay of a settlor's inter vivos trust and his will. In 1984 he set up the inter vivos trust, naming the bank as trustee and providing for payment of any part of the income to his son, with power in the trustee to accumulate income and to encroach upon the principal for the son's benefit. Any remaining principal at the son's death was to go to the son's two children. In 1987 the settlor executed his will, in which he directed that one-fourth of his estate be placed in a testamentary trust for his son, with the remaining three-fourths to go outright to his three daughters.

After the death of the father in 1988, the son and his two children (the latter not mentioned in the will) filed a caveat to the will. This resulted in a consent order being agreed upon by all parties, which modified the will in very substantial ways. It modified the testamentary trust to authorize the trustee bank (1) to expend testamentary trust income for the (now incompetent) son's benefit when his income from other sources

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118. *Id.*
120. See Olmstead v. Dunn, 72 Ga. 850 (1884).
122. 268 Ga. at 476, 490 S.E.2d at 372.
124. *Id.* at 547-48, 491 S.E.2d at 787.
proved inadequate, and also (2) to expend large amounts of such income for the upkeep of the home and support of the son and his two children. At the son's death, the home would go to his two children. The elaborate consent order also provided that the testamentary trust principal should remain constant unless and until the principal of the inter vivos trust should be depleted. Lastly, the order provided that at the son's death any remaining corpus of the testamentary trust should be divided equally among the son's two children and his three sisters.\footnote{128}

In the five years following the testator's death in 1988, the bank expended $225,000 on renovation of the house, which had fallen into disrepair. These expenditures were paid by the bank directly from the portion of the testator's estate intended to fund the testamentary trust, but the trust was not in fact established either at the testator's death (as directed by the will) or during the five years immediately thereafter. The bank stated in its petition that these expenditures paid from the estate exceeded the income of the testamentary trust assets, based on one-fourth of the estate's value, and thus had to be charged against assets designated for the testamentary trust principal. In order to rectify this depletion of testamentary trust principal, the bank sought approval of a transfer from the principal of the inter vivos trust to the principal of the testamentary trust. The son's two children opposed this depletion of the principal of the inter vivos trust (of which they were remainder beneficiaries).\footnote{126}

In 1993 the testamentary trust was finally funded, and in 1995 the bank filed a declaratory judgment action.\footnote{127} The trial court granted partial summary judgment in favor of the bank, authorizing the transfer of these funds from the inter vivos trust to the testamentary trust to cover the expenditures made from estate funds that were eventually to be used to fund the testamentary trust.\footnote{129} The son's two children, individually and as guardians of the son, appealed.\footnote{129}

By a four-to-three decision the supreme court affirmed.\footnote{130} The court noted that the trial court reserved ruling on whether the bank breached any of its fiduciary duties; the only issue was the propriety of the transfer of funds from the inter vivos trust to the testamentary trust to cover those expenditures made from the estate funds that were eventually to be used to fund the testamentary trust.\footnote{131} The majority

\footnotesize{125. \textit{Id.} at 548-49, 491 S.E.2d at 787.  
126. \textit{Id.} at 549, 491 S.E.2d at 787-88.  
127. \textit{Id.}, 491 S.E.2d at 788.  
128. \textit{Id.}  
129. \textit{Id.}  
130. \textit{Id.} at 552, 491 S.E.2d at 790.  
131. \textit{Id.} at 549-50, 491 S.E.2d at 788.}
felt that the son's best interest was the dominant objective of both trusts; by paying funds for a proper purpose from a secondary source, the testamentary trust, and then reimbursing that source from the inter vivos trust, the bank had not taken from the son's two children anything to which they were otherwise entitled. The majority felt that ordering the bank to reimburse the testamentary trust out of its own funds would result in an enormous windfall to the son's children, the beneficiaries of the inter vivos trust. The bank may not have followed precisely the testator's direction, but the court found no hint of abuse of discretion or bad faith.

The dissenting justices stressed the fact that there were two separate and independent trusts of which the bank was trustee, and that ordinarily it is the duty of a trustee to keep trust assets of one trust separate from those that it holds under other trusts.

B. Removal of Trustees

In Moring v. Moring, the two trustees disagreed on the sale of a building owned by the trust. On a petition by one trustee for permission to sell, the other was personally served with notice but did not appear. Before the sale, though, he objected and filed a notice for dismissal of the petition. The order of sale did not address the effect of this attempt to dismiss. There was on record, however, a 1994 probate court order removing him as a trustee. On appeal, the objecting trustee challenged the order of sale for the first time, alleging that the probate court lacked jurisdiction to remove him as a trustee and that the 1994 record of a probate court order purporting to remove him as a trustee was void ab initio.

The court of appeals reversed and remanded the case, but solely on the ground of the trial court's failure to address the removed trustee's attempt to dismiss the petition. As for the more substantive issue of jurisdiction of courts, the opinion pointed out that even though a probate court has concurrent jurisdiction with the superior court to appoint new trustees and to accept resignation of trustees, it has no jurisdiction to remove a trustee. The principal code section on the
subject of removal of trustees mentions only the superior court as having such power.\textsuperscript{140}

C. Modification of Trusts

Georgia law has recognized the inherent power of a court of equity to modify a trust,\textsuperscript{141} but it was not until 1991 that the power appeared in statutory form.\textsuperscript{142} Under that statute, modification may be allowed, but only if clear and convincing evidence establishes that, due to circumstances not known or anticipated by the settlor, compliance with the terms of the instrument would impair the purposes of the trust.\textsuperscript{143} *Friedman v. Teplis*\textsuperscript{144} afforded the supreme court its first opportunity to interpret the statute. The trial court made no specific finding on the dominant trust objective, but did find that the intention of the settlors (the two children of the insured) was for the trust to receive the proceeds of a life insurance policy on their parent. As soon as the trust received the proceeds, it was to put them into separate spray trusts for the benefit of the settlors and their descendants.\textsuperscript{145}

The settlors (the insured parents), the trustees, and the living beneficiaries sought modification because the trust instrument permitted distribution only upon the last of the settlors’ parents to die, and that event had not yet occurred. The guardian ad litem, appointed to represent the interests of any unborn beneficiaries, consented to the modification. An estate and tax planning attorney testified that if the trust was unable to distribute the proceeds to the spray trusts until the death of the settlors’ mother, who was still alive, the trust would suffer serious tax consequences that could not logically have been anticipated by the settlors.\textsuperscript{146} The supreme court affirmed the trial court’s refusal of a modification.\textsuperscript{147}

While evidence of adverse tax consequences is a relevant consideration, it was not alone sufficient to justify a modification.\textsuperscript{148} The supreme court also pointed to other possible reasons why the evidence

\textsuperscript{140} O.C.G.A. § 53-12-176 (1997).
\textsuperscript{141} See Bedgood v. Thomas, 220 Ga. 262, 138 S.E.2d 313 (1964), in which the court, by dictum, recognized the inherent power but still found that the facts did not justify its exercise.
\textsuperscript{142} O.C.G.A. § 53-12-153 (1997).
\textsuperscript{143} Id.
\textsuperscript{144} 268 Ga. 721, 492 S.E.2d 885 (1997).
\textsuperscript{145} Id. at 721, 492 S.E.2d at 886.
\textsuperscript{146} Id. at 721-22, 492 S.E.2d at 885-86.
\textsuperscript{147} Id. at 721, 492 S.E.2d at 885.
\textsuperscript{148} Id. at 723, 492 S.E.2d at 886-87.
failed to show that the trial court abused its discretion in this case. The opinion specifically addressed the fact that the guardian ad litem was a tax lawyer who consented to the modification, but gave his reasons “in the briefest form.” Instead, the court said, such a guardian should have fully considered the matter and then should have given articulate reasons for his decisions. Here there was no evidence that the modification would not adversely affect the interests of the unborn contingent beneficiaries.

III. LEGISLATION

A. Revised Probate Code

The now officially designated “Revised Probate Code of 1998” became effective on January 1, 1998, along with numerous corrective and refining amendments added by the 1998 session of the General Assembly. A debt of gratitude is owed to the Probate Code Revision Committee of the Fiduciary Law Section of the State Bar and to all who contributed to the success of this project.

B. Wrongful Death Act

Georgia’s wrongful death statute was amended to increase the amount that a surviving spouse is entitled to in a wrongful death recovery from one-fourth to one-third of the amount recovered.

149. Id., 492 S.E.2d at 887.
150. Id.
151. Id.
152. Id.