Mercer Law Review

Volume 3 | Number 1 Article 27

12-1951

Wills and Administration of Estates

Floyd M. Buford

WILLS AND ADMINISTRATION OF ESTATES

By FLOYD M. BUFORD*

Most of the recent Georgia cases dealing with this subject adhere to age-old rules. The manner in which such rules are applied to new factual situations, is the significance of these cases. An attempt has been made to treat and classify the cases according to their respective descriptive headings.

CONTRACT TO MAKE A WILL

A person may obligate himself to make his will in a certain way, or to give specific property to a particular party, so as to bind his estate. But the courts are strict in examining the circumstances of such contracts, and require full and satisfactory proof of the justness and fairness of the transaction.[1] The requisites to the validity of an ordinary contract are necessary to make valid a contract to make a will, such as capacity of parties to contract, legal consideration, acceptance, and good faith.[2] Usually, the method of enforcing such a contract is by a bill in equity for specific performance of the same or for damages, or an action at law for damages for breach of contract.[3] Heirs or personal representatives of the deceased are sometimes sued on such a contract on a trust theory.[4]

Savannah Bank & Trust Co. v. Hanley[5] is a case where a mother surrendered possession of her infant child to a third person for the purpose of having the child adopted by him. The consideration for such action of the mother was a promise by the wife of said third person to leave to the mother and other children their entire estate by will. A suit was filed against the executor for specific performance of the oral contract to make a will. General demurrers of the defendant were overruled by the trial court. On appeal, the Supreme Court reversed the trial court on the basis that the contract was void as against public policy. This court felt that to hold otherwise would "open the door to the unlimited barter of children." *Savannah Bank & Trust Co. v. Wolff*[6] was distinguished by the court in the instant case even though the two cases are in some respects similar. In the *Wolff* case the agreement was to leave the property to the adopted child, whereas the contract in the instant case provided that the property was to go to the mother, brother and sisters of the adopted child.

MENTAL CAPACITY AND UNDUE INFLUENCE

If a testator has sufficient intellect to enable him to have a decided and rational desire as to the disposition of his property, he has sufficient mental

*Member Macon Bar; LL.B., 1950, Walter F. George School of Law, Mercer University; Member Georgia Bar Association.

1. COSTIGAN, CASES ON WILLS 127, n. 14 (3d ed. 1941).
2. REDFEARN, WILLS AND ADMINSITRATION OF ESTATES, § 15 (Rev. ed. 1938).
3. Banks v. Howard, 117 Ga. 94, 43 S.E. 438 (1903).
4. Morris v. Shumate, 207 Ga. 652, 63 S.E.2d 664 (1951).
5. 208 Ga. 34, 65 S.E.2d 26 (1951).
6. 191 Ga. 111, 11 S.E.2d 776 (1940).

capacity to execute a will.[7] The fact that a person has a weak intellect on account of disease is insufficient to deny him the right of disposing of his property in the manner he may desire.[8] An insane person, during a lucid interval, may make a valid will.[9] Incapacity at the time of the execution of the will may be shown under the presumption arising from proof that on a previous lunacy hearing a decedent was adjudged insane. While this is a rebuttable presumption, it is a question for the jury under conflicting evidence as to whether the incapacity existed at the time the will was executed.[10]

The undue influence necessary to invalidate a will must destroy the free agency of the testator and force him to do what is against his will but what he is unable to refuse. In other words, such undue influence must make the will the mental offspring of some other person.[11] In *Adler v. Adler*[12] a codicil to a will was set aside on the basis of undue influence. Our Supreme Court upheld the verdict and judgment of the lower court in this case. The caveator, a son of the testator, in the trial of the instant case introduced evidence as to the physical and mental condition of the testator, as to various instances of complete control and domination of the testator by his daughter which covered a long period of time up to and through the date of the execution of the codicil, and as to the embittered feeling of the daughter towards the caveator which was expressed to the testator. It seems that there was no direct evidence that the daughter participated in the execution or preparation of the codicil. However, on this point the court ruled that undue influence exercised prior to the execution of the codicil may continue to operate on the mind of the testator at the time of its execution.

Revocation

The Georgia Code[13] provides: "An express revocation may be effected by any destruction or obliteration of the original will or a duplicate, done by the testator or by his direction with an intention to revoke; such intention will be presumed from the obliteration or canceling of a material portion of the will; . . . " It is elementary law that the burden is on a person attacking a paper for probate as a will to sustain the grounds of his attack.[14] However, by express provisions of our Code,[15] where a will has been obliterated or cancelled in a material part, a presumption of revocation arises, and the burden is on the propounder to show that revocation was not intended. In this connection, the case of *Langan v. Cheshire*[16] involved a proceeding for probate of a will. A codicil to the will stated that the testator desired to make changes in his will as shown by use in

7. Leventhal v. Baumgartner, 207 Ga. 412, 61 S.E.2d 810 (1950); Manley v. Combs, 197 Ga. 768, 30 S.E.2d 485 (1944).
8. Leventhal v. Baumgartner, *supra* note 7.
9. Ga. Code § 113-204 (1933).
10. Belk v. Colleas, 207 Ga. 328, 61 S.E.2d 464 (1950).
11. Galloway v. Hogg, 167 Ga. 502, 146 S.E. 156 (1928).
12. 207 Ga. 394, 61 S.E.2d 824 (1950).
13. Section 113-404 (1933).
14. McIntyre v. McIntyre, 120 Ga. 67, 47 S.E. 501 (1904).
15. Ga. Code § 113-404 (1933).
16. 208 Ga. 107, 65 S.E.2d 415 (1951).

the will of the word "eliminate" and his signature. On the body of the will there was in several places the word "eliminate" and the testator's signature. However, there also appeared on the face of the will a notation which consisted of the words "put back" with lines leading to encircled words, the effect of which was apparently to replace a son as trustee under the will. This notation was on a portion of the will beside the word "eliminate" and the testator's signature. Among other contentions, the caveators contended that the notation "put back" showed an intent and had the effect of revoking the codicil. The trial court admitted the will to probate and the caveators appealed. On appeal, the Supreme Court reversed the lower court and held that since there was no evidence regarding the interlineations and obliterations, the presumption of revocation of the codicil stood unrebutted. Also, if the alterations and obliterations were not intended as a revocation of the codicil, the burden was on the propounders to show that fact.

Our statute[17] provides that either the marriage of the testator or the birth of a child to him subsequently to the making of his will, operates as a complete revocation unless provision is made in the will in contemplation of such an event. A void marriage will not revoke a will.[18] However, the birth of a child or even the adoption of a child will operate as a revocation unless a provision is made in the will in contemplation of such an event.[19] In the case of *Thornton v. Anderson*[20] the majority court ruled that an antecedent will which did not have a provision in contemplation of an adoption was revoked by implication by the legal adoption by the testatrix of a minor child. It was the opinion of the majority that the act of adopting a child under the provisions of the adoption statute, as amended,[21] is the equivalent in law of the birth of a child. Chief Justice Duckworth, who dissented, was of the opinion that the amendment of the adoption law[22] deals solely with rights of adopted children and to their rights of inheritance and does not have any relation to the right of a person to make a will. He treated the revocation statute as a statute dealing solely with the question of the right of a person to make a will.

CONSTRUCTION

"Every will is a thing to itself. It is emphatically not only *sui juris* but *sui generis*. Its terms are its own law, . . . "[23] For these reasons, precedents or adjudged cases are of little help in determining the intention of the testator.[24] In construing a will the court is required to examine it as a whole and to seach diligently for the intention of the testator.[25] In *Budreau v. Mingledorff*[26] a will provided that a son's share of certain property was to be held by named trustees and was "to be held by them for the use and

17. GA. CODE § 113-408 (1933).
18. Graves v. Carter, 207 Ga. 308, 61 S.E.2d 282 (1950).
19. Thornton v. Anderson, 207 Ga. 714, 64 S.E.2d 186 (1951).
20. *Ibid.*
21. Ga. Laws 1949, pp. 1157, 1158, amending GA. CODE ANN. § 74-417 (Supp. 1947).
22. *Ibid.*
23. Olmstead v. Dunn, 72 Ga. 850 (1884).
24. Stringfellow v. Harmon, 207 Ga. 62, 60 S.E.2d 139 (1950).
25. GA. CODE § 113-806 (1933).
26. 207 Ga. 538, 63 S.E.2d 326 (1951).

benefit of said John Miller Budreau for and during his life." Then the will provided further that if the son should die without leaving any child or children, his portion of the estate should revert to the testator's estate but if the son should die leaving any child or children, his share would vest in his child or children. Also, the trustees were authorized to pay the son such portion of the corpus of the estate as they deemed fit. The Supreme Court was called upon to decide what was the nature of the interest that the son had in this estate. An express executory trust was created by the testator for the son, was the decision of the court.

In another case,[27] a will gave the testatrix' son a life estate and made the son executor. Also, there was a provision to the effect that upon the death of the son, the remainder would go to other relatives. Another item of the will provided as follows: "provided nevertheless, that my said son shall have from my estate, either from the income or the corpus, the sum of twenty-five ($25) dollars per month for his support and maintenance during his natural life." The court reasoned that it was the intention of the testatrix that the son was to take from the corpus of the estate twenty-five dollars each month irrespective of the amount of income the son received as life tenant.

Wilson v. Ingram[28] is a case where the court had to decide whether the testator intended to include within the term "children" the petitioner, either as an adopted child or as an illegitimate child of the testator. The will in the instant case was executed prior to the enactment of the 1949 statute[29] which provides that adopted children should be considered as natural children for inheritance purposes, therefore, this statute was not applicable to the will. In ruling against the petitioner, the court decided that the term "children" as used by the testator in this will meant natural or blood relationship and not an adopted or illegitimate child.

COURT OF ORDINARY—PROBATE—YEAR'S SUPPORT

The Code[30] gives the court of ordinary exclusive jurisdiction over the probate of wills. A judgment of a court of ordinary cannot be collaterally attacked after it has assumed jurisdiction and granted probate of a will.[31] However, a court of equity may set aside a judgment of the court of ordinary where such judgment was procured by fraud.[32] *Foster v. Foster*[33] represents a case wherein the plaintiffs filed an equitable petition seeking to set aside the judgment of a court of ordinary allowing the probate of a will on the ground that such judgment was void. The evidence indicated that one of the testatrix' heirs, at the time of probate of the will in solemn form, was in the armed forces of the United States. Since this plaintiff was not served with personal notice of the probate proceedings, the court ruled that equity could entertain a direct proceeding to set aside the probate of the will. The court also ruled that it was not necessary for the plaintiff

27. Patterson v. Patterson, 208 Ga. 17, 64 S.E.2d 585 (1951).
28. 207 Ga. 271, 61 S.E.2d 126 (1950).
29. Ga. Laws 1949, p. 1157.
30. GA. CODE § 113-603 (1933).
31. Wash v. Dickson, 147 Ga. 540, 94 S.E. 1009 (1918).
32. Lester v. Reynolds, 144 Ga. 143, 86 S.E. 321 (1915).
33. 207 Ga. 519, 63 S.E.2d 318 (1951).

to attack such judgment in the court of ordinary before resorting to a court of equity.

A testator may require his widow to elect between provisions in a will and her right to year's support.[34] If the widow claims year's support, it is the duty of the ordinary to appoint five appraisers in order that a sufficient amount of the estate may be set aside for the support and maintenance of the widow and minor children, if any, for the space of twelve months.[35] It is the duty of the appraisers to set apart all of the estate as a year's support, if the estate does not exceed the sum of five hundred dollars in value.[36] If the estate exceeds the sum of five hundred dollars in value, the appraisers may set apart an amount, more or less than five hundred dollars, but in no event less than one hundred dollars.[37] When the estate exceeds the sum of five hundred dollars in value, the amount to be allowed for a year's support is to be estimated according to the circumstances and standing of the family previous to the death of its head, keeping in view the solvency of the estate.[38] Where the deceased and his wife had not spent more than $1,800 per year for living expenses for many years and a jury set aside $50,000 as a year's support, the trial court's decision in granting the executor a new trial was affirmed by the Court of Appeals.[39] In this case, the evidence indicated that the amount necessary to support and maintain the widow according to the circumstances and the standing of the family previous to the deceased's death could not exceed $3,500.

When property is set apart as a year's support, the beneficiaries acquire no greater title than the deceased held.[40] The interest which minor children take under a year's support is not divested upon reaching majority, therefore, after a widow's death such children are entitled to their proportionate interest in the unconsumed property.[41] In order to divest the title of decedent by allowance of a year's support to his widow and minor children, it is essential that the land be so described by the appraisers as to indicate that a particular tract was intended to be set apart.[42] *Gilbert v. Fowler*[43] re-establishes this rule of law. In the *Gilbert* case the plaintiff brought an action seeking the reformation of a deed on the basis of mutual mistake. The deed had been executed by the defendant to the deceased husband of the plaintiff. Plaintiff's right to maintain her suit was based upon a year's support proceeding in which the land was purportedly set aside to her. A judgment for the plaintiff was rendered by the trial court and the defendant appealed. On appeal, this judgment was reversed because the description of the land in the report of the appraisers in the year's support proceeding was insufficient to pass title to the decedent's widow, plaintiff in this case.

---

34. GA. CODE § 113-1007 (1933).
35. GA. CODE ANN. § 113-1002 (Supp. 1947).
36. *Ibid.*
37. *Ibid.*
38. Cheney v. Cheney, 73 Ga. 66 (1884).
39. Dorsey v. Georgia R. Bank & Trust Co., 82 Ga. App. 237, 60 S.E.2d 828 (1950).
40. Dix v. Dix, 132 Ga. 630, 64 S.E. 790 (1909).
41. Ennis v. Ennis, 207 Ga. 665, 63 S.E.2d 887 (1951).
42. *Ibid.*
43. 207 Ga. 720, 64 S.E.2d 55 (1951).

EXECUTORS AND ADMINISTRATORS

In Georgia we have specific rules which govern ordinaries in granting letters of administration.[44] This article will not permit a complete discussion of these rules but it may be well to note several of the important ones. The surviving husband or wife shall be first entitled to an appointment as an administrator, then the next of kin is eligible for the appointment. A creditor may be appointed where application for appointment has not been made by the next of kin. "As a general rule, to cover all cases not specially provided for, the person having the right to the estate shall be appointed administrator."[45] The latter rule was applied in *Roe v. Pitts*.[46] In this case, the main issue revolved around the right for an appointment as an administrator of a person who was solely entitled to the estate after payment of debts as against the right of a creditor to be appointed. Judgment was for the former and the court noted that our Code makes no specific provision between a creditor and the person entitled to the estate, but who claims neither as an heir or legatee under a will.

The right to offer a will for probate belongs to the executor and in the event the executor is dead or nonresident or if none is named, or if named he refuses to act, any person interested may offer the will for probate.[47] Either the executor should present the will to the ordinary having jurisdiction for probate or renounce the executorship. "An executor who has, either formally or by operation of law, voluntarily renounced his trust, may not afterwards relieve himself from the effect of renunciation."[48] The executor is not required to file his renunciation with the ordinary in term time. Nor is it necessary that the ordinary act upon the matter in term time. A different rule is applicable when an executor has qualified and functioned and wishes to resign or ask for dismissal because he has duly administered the estate as directed by the will and the law.[49] An executor in Georgia is not required to qualify at once upon the probate of a will in common form.[50] In *Wheeler v. Wheeler*[51] a mother brought suit against her son for injuries sustained when she was struck by his automobile. After suit was filed, the plaintiff died and left a will in which the defendant and a brother were named as co-executors. The defendant and his brother were made parties plaintiff in the suit and the question arose on demurrer as to whether the defendant made a renunciation as executor at an illegal time. The court held that the allegations of the petition that the will was probated in common form between January 8, 1950, and January 18, 1950, after the testatrix died on January 8, 1950, and that the defendant as executor renounced his nomination on January 18, 1950, were sufficient as against a demurrer, and that the renunciation was not made at an illegal time.

An administrator occupies a position of highest trust and confidence to

44. GA. CODE § 113-1202 (1933).
45. GA. CODE § 113-1202 (9) (1933).
46. 82 Ga. App. 770, 62 S.E.2d 387 (1950).
47. GA. CODE § 113-614 (1933).
48. GA. CODE § 113-1228 (1933).
49. Wheeler v. Wheeler, 82 Ga. App. 831, 62 S.E.2d 579 (1950).
50. *Ibid.*
51. *Ibid.*

the heirs at law, and is required to act in good faith in performing the duties of the trust.[52] When an administrator obtains a discharge by means of fraud practiced on the heirs or the court, such discharge may be set aside.[53] In *Harris v. Birnbaum*[54] certain heirs did not discover the death of the deceased until two days prior to filing of application by an administrator with will annexed for his discharge. These heirs notified the administrator that they were heirs at law of the deceased and were entitled to distribution of the estate. However, the following month the administrator received his discharge without informing the ordinary of the existence of the heirs. Since the above facts were alleged in the petition and the defendant was relying on his demurrer, it seems that the court was correct in holding that the administrator had fraudulently procured his discharge.

If an administrator or an executor of an estate purchases at his own sale of land, directly or indirectly,[55] he has committed prima facie fraud.[56] Such representative holds the property so purchased subject to the rights of parties having an interest in the estate to set aside the sale,[57] however, the purchase is not void but voidable at the option of the parties interested.[58] On the contrary, an adiministrator who is an heir at law of his intestate may purchase at the sale of property of the estate provided he is guilty of no fraud and the property is sold in the ordinary manner to command the best price.[59] Recently, the Supreme Court applied this doctrine in holding that an administrator was not guilty of any fraud in purchasing land of the estate in which he was an heir at law, and as such had an interest in the land.[60] In this case, there was no evidence of any fraud and it seems that the jury was justified in rendering a verdict for the administrator.

In the sale of land of the estate by a representative, it is his duty to get the highest price possible.[61] It is the right and the duty of an administrator to withdraw property of the estate from sale when it is manifest that the property is about to be sold at a grossly inadequate price.[62] However, it is too late for the administrator to make such a withdrawal after the property is knocked off to the highest bidder.[63] Georgia does not have a statute which requires a confirmation of an administrator's sale, therefore, the bidder's offer becomes a contract when the administrator, clothed with authority to sell, accepts the bid.[64]

An administrator can make the necessary contracts for labor or service for the benefit of the estate. However, such contracts must be approved by the ordinary in order to bind the estate.[65] To the contrary, a representa-

52. REDFEARN, WILLS AND ADMINISTRATION OF ESTATES, § 280 (Rev. ed. 1938).
53. GA. CODE § 113-2303 (1933).
54. 82 Ga. App. 653, 62 S.E.2d 204 (1950).
55. Wicker v. Howard, 126 Ga. 119, 54 S.E. 821 (1906).
56. Gormley v. Askew, 177 Ga. 554, 170 S.E. 674 (1933).
57. Moore v. Carey, 116 Ga. 28, 42 S.E. 258 (1902).
58. Tyson v. Bray, 117 Ga. 689, 45 S.E. 74 (1903).
59. Arnold v. Arnold, 154 Ga. 195, 113 S.E. 798 (1922).
60. Goldin v. Smith, 207 Ga. 734, 64 S.E.2d 57 (1951).
61. Lowery v. Idleson, 117 Ga. 778, 45 S.E. 51 (1903).
62. Rogers v. Dickey, 117 Ga. 819, 45 S.E. 71 (1903).
63. Smith v. Tippins, 207 Ga. 262, 61 S.E.2d 138 (1950).
64. *Ibid.*
65. GA. CODE § 113-1524 (1933).

tive of an estate may not contract debts for the estate.[66] In absence of authority conferred by a will, an executor cannot contract debts for the estate even though the money is borrowed for the benefit of the estate.[67]

STATUTES

Until this year, a court of ordinary has not had the authority to authorize an administrator to continue the business of an estate beyond the expiration of the current year.[68] This rule was applicable to both temporary[69] and permanent administrators until 1935, at which time the legislature provided that a temporary administrator could carry on the business of the deceased if he obtained the approval of the ordinary.[70] Where an administrator operates the business after the first calendar year and such operation results in a loss to the estate, the administrator is individually liable for such loss.[71]

Provisions[72] were made this year by our legislature which allow an administrator to carry on the business of an intestate from year to year, provided that the ordinary approves such action. Under this statute, the administrator who desires to carry on the business of the deceased from year to year, will have to obtain the approval of the ordinary each year. Also, this statute requires that before an administrator can file his petition with the ordinary for permission to carry on the business, he must give ten days notice to the heirs of the intestate unless such heirs waive notice.

The legislature this year amended Code Section 113-1706, relating to an administrator's petition to sell land.[73] This Code Section prior to the amendment provided that an administrator could apply to the ordinary for permission to sell land of the estate if it was necessary for the payment of debts or for the purpose of distribution. Also, there is a provision allowing the ordinary to pass an order granting permission to sell the land after proper notice has been published in the newspapers.

The amendment does not change the law as it is stated in this section but certain additions were made to the provisions therein. It requires that the order of the ordinary granting permission to sell land of the estate shall be binding, final and conclusive as to all devisees under a will. This is true regardless of any prior assent of the executor to any devise in the will. However, there is specific provision in the amendment allowing a devisee the right to make an appeal on the order of the ordinary and to file a claim to the land prior to the actual sale by the executor. The amendment specifically provides that nothing therein shall prevent a bona fide purchaser or mortgagee of the land from claiming title to the same on the basis that the executor had assented to the devise prior to the order of the ordinary. However, such purchaser or mortgagee would have to show that the purchase was made prior to the ordinary's order and the deed or mortgage was duly recorded prior to such order.

66. Bank of Newton County v. American Bonding Co., 141 Ga. 326, 80 S.E. 1003, 50 L.R.A. (N.S.) 1089 (1914); Taunton v. Taylor, 37 Ga. App. 695, 141 S.E. 511 (1928).
67. Graves v. Carter, 207 Ga. 308, 64 S.E.2d 450 (1951).
68. Harris v. O'Quinn, 66 Ga. App. 226, 17 S.E.2d 758 (1941).
69. Irvine v. Wiley, 145 Ga. 867, 90 S.E. 69 (1916).
70. Ga. Laws 1935, p. 326, GA. CODE ANN. § 113-1527 (1935).
71. Lokey v. Lokey, 82 Ga. App. 171, 60 S.E.2d 569 (1950).
72. Ga. Laws 1951, p. 823, amending GA. CODE § 113-1523 (1933).
73. Ga. Laws 1951, p. 476.