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## WILLS, TRUSTS, AND ADMINISTRATION OF ESTATES Wills: Effect of a Will Lost Before the Death of the Testator

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## WILLS, TRUSTS, AND ADMINISTRATION OF ESTATES

### *Wills: Effect of a Will Lost Before the Death of the Testator*

CODE SECTIONS:	O.C.G.A. §§ 15-9-36 (amended), 53-3-6, -14 (amended), 53-6-24, -29 (amended)
BILL NUMBER:	SB 41
ACT NUMBER:	294
SUMMARY:	The Act ensures that wills lost during the testator's lifetime will be treated in the same manner as wills lost after the testator's death. The Act also conforms the service of process on minors for probate in solemn form to the personal service specified in the Civil Practice Act. Finally, the Act creates a new procedure for choosing an administrator with the will annexed based on a majority in interest of the beneficiaries.
EFFECTIVE DATE:	April 4, 1991, O.C.G.A. § 53-3-14; July 1, 1991, O.C.G.A. §§ 15-9-36, 53-3-6, 53-6-24, -29

### *History*

The initial impetus for legislation concerning wills lost during the lifetime of a testator came as a result of the Georgia Supreme Court's decision in *Woods v. Giedd*.<sup>1</sup> The court interpreted former Code section 53-3-6 as not applying to wills lost before the death of a testator.<sup>2</sup> The impact of this ruling was that if a will was lost, but not destroyed, a copy could not be probated.<sup>3</sup>

The Fiduciary Law Section of the Georgia Bar proposed a bill to "plug this legislative hole in the law"<sup>4</sup> during the 1990 session of the General Assembly, but it did not pass.<sup>5</sup> During the 1991 session, two

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1. 356 S.E.2d 211 (Ga. 1987).

2. Telephone Interview with John M. Sheftall, Chairman, Legislative Committee of the Fiduciary Law Section of the Georgia Bar (Apr. 1, 1991) [hereinafter Sheftall Interview].

3. Interview with the Honorable Floyd E. Propst, Judge, Fulton County Probate Court, in Atlanta (Apr. 3, 1991) [hereinafter Propst Interview]. Judge Propst stated that "usually when a will cannot be found, it is lost. It is unusual for a third party to destroy a will or for a will to be lost after death." *Id.*

4. Sheftall Interview, *supra* note 2.

5. *Id.*

similar bills were introduced to take care of this problem, HB 440 and SB 41.<sup>6</sup>

### SB 41

The bill that ultimately passed, SB 41, was introduced at the behest of the Fiduciary Law Section.<sup>7</sup> The purpose of the bill was to make clear that a will lost during the testator's life was to be treated the same as one lost after death.<sup>8</sup> In the House, SB 41 was amended by the Judiciary Committee in a substitute bill that changed the language, but not the effect of the original bill.<sup>9</sup> Subsequently, SB 41 was amended at the request of the probate judges, with the consent of the sponsors of HB 440 and SB 41,<sup>10</sup> to include a number of additional sections.<sup>11</sup>

One major purpose of the floor amendment was to correct two problems created by the holding in *Dismuke v. Dismuke*<sup>12</sup> "concerning appointment of an administrator with will annexed."<sup>13</sup> The first problem results from the court's construing the word "beneficiaries" in Code section 53-6-24(11)<sup>14</sup> to mean a majority in number of beneficiaries, rather than a majority in interest, has the right to choose an administrator with the will annexed.<sup>15</sup> The second problem concerns the effect of this construction of "beneficiaries" on the requirements for notice of appointment of an administrator with will annexed.<sup>16</sup> Because Code section 53-6-29<sup>17</sup> allowed the beneficiaries to waive all publication and

6. HB 440 was introduced by Rep. Ray Holland, House District No. 136, and SB 41 by Sen. Michael J. Egan, Senate District No. 40. HB 440, SB 41, as introduced, 1991 Ga. Gen. Assem.

7. Telephone Interview with Sen. Michael J. Egan, Senate District No. 40 (Apr. 1, 1991) [hereinafter Egan Interview].

8. *Id.*

9. SB 41 (HCS), 1991 Ga. Gen. Assem.

10. Propst Interview, *supra* note 3.

11. SB 41 (HCSFA), 1991 Ga. Gen. Assem. In fact, so many sections were added that Sen. Egan said, "I sent a Christmas tree to the probate judges, then that tree got sent to the House and the House added ornaments." Egan Interview, *supra* note 7. This version became the final one. See Final Composite Status Sheet, Mar. 16, 1991.

12. 394 S.E.2d 371 (Ga. Ct. App. 1990).

13. The Honorable Floyd E. Propst, Explanation of Proposed Floor Amendment to S.B. 41 (unpublished memorandum, available in Georgia State University College of Law Library) [hereinafter Explanation]. An administrator with the will annexed (or administrator c.t.a.) is the "person originally appointed when the decedent dies testate but no executor is named in the will or the executor named in the will fails to qualify." See JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 34 (3d ed. 1984).

14. 1986 Ga. Laws 200 (formerly found at O.C.G.A. § 53-6-24 (Supp. 1990)).

15. *Id.* The *Dismuke* holding allowed heirs with only a three-eighths interest in an estate to choose an administrator with the will annexed. *Dismuke v. Dismuke*, 394 S.E.2d at 373.

16. See Explanation, *supra* note 13.

17. 1984 Ga. Laws 937 (formerly found at O.C.G.A. § 53-6-29 (Supp. 1990)).

notice requirements,<sup>18</sup> the *Dismuke* holding meant that a majority in number could waive notice, "and the rest of the beneficiaries would get no notice at all."<sup>19</sup>

The Act solves the first problem by striking Code section 53-6-24 completely and adding a new Code section that removes subsection (11) and replaces it with subsections (b)(1)–(4) that entitle the majority in interest of the beneficiaries to select an administrator with the will annexed.<sup>20</sup> The second problem is solved by replacing Code section 53-6-29 with a new Code section requiring that the citation concerning the appointment of the administrator with the will annexed must be published unless all the beneficiaries agree to the selection.<sup>21</sup>

Another effect of the Act that originated with the floor amendments to SB 41 is that subsection (f) of Code section 53-3-14 is replaced by a new subsection (f) that clarifies the necessity for personally serving notice of petition for probate in solemn form on minors and incapacitated adults.<sup>22</sup> This change makes service in probate consistent with service under the Civil Practice Act.<sup>23</sup>

Finally, the Act accomplishes the original purpose of SB 41, ensuring that wills lost before death are treated the same as those lost or destroyed after the testator's death, by striking Code section 53-3-6<sup>24</sup> and replacing it with a section rewritten to eliminate this disparity in treatment.<sup>25</sup> Under the Act, a copy of a will lost during a testator's

18. See Explanation, *supra* note 13.

19. *Id.*

20. O.C.G.A. § 53-6-24 (Supp. 1991). If the majority in interest cannot agree on an administrator, then the majority in number may choose, or the court may choose if neither majority agrees to an administrator. *Id.*

21. *Id.* See also Explanation, *supra* note 13. Beneficiaries who do not agree to the appointment are to be notified of the appointment by first class mail. *Id.*

22. O.C.G.A. § 53-3-14(f) (Supp. 1991). See also Explanation, *supra* note 13. O.C.G.A. § 53-3-13(a) (Supp. 1991) defines probate in solemn form as follows:

(a) Probate by the witnesses, that is, probate in solemn form, is the proving of the will, *after due notice to all the heirs at law and the propounders and beneficiaries under any other purported will . . .*, by all witnesses in life . . ., or by proof of their signatures and that of the testator if the witnesses are dead, blind, incompetent, or inaccessible . . .

*Id.* (emphasis added).

23. Propst Interview, *supra* note 3.

24. Code 1933 § 113-611 (formerly found at O.C.G.A. § 53-3-6 (1982)).

25. See *Woods v. Giedd*, 356 S.E.2d 211 (Ga. 1987).

The new section provides as follows:

(a) If a will is:

- (1) Lost during the testator's lifetime;
  - (2) Destroyed without the consent of the testator during the testator's lifetime; or
  - (3) Lost or destroyed subsequent to the death of the testator,
- a copy of the will, clearly proved to be such by the subscribing witnesses and other evidence, may be admitted to probate and record in lieu of the

lifetime may now be admitted to probate, provided the more stringent evidentiary requirements added by subsection (b) are met.<sup>26</sup>

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original.

(b) In every such case described in subsection (a) of this Code section, the presumption is that the will was revoked by the testator, and that presumption must be rebutted by clear and convincing proof.

O.C.G.A. § 53-3-6 (Supp. 1991).

26. O.C.G.A. § 53-3-6 (Supp. 1991). The House added this higher "clear and convincing" standard of proof to ensure that the will was indeed lost in life, rather than revoked by the testator. Egan Interview, *supra* note 7.