

## LIFE ESTATES AND PRECATORY TRUSTS

A. Creation of Life Estate upon Passing of Decedent. According to the Official Code of Georgia Annotated (O.C.G.A.) § 44-6-80, estates that “extend during the life of a person but terminate at the death of the person are deemed life estates.”<sup>1</sup> A life estate may be created by “deed or will” so long as the life estate does not exist in property that “will be destroyed [upon] being used.”<sup>2</sup> Additionally, the life estate may last for the life of the tenant or for the life of some other person.<sup>3</sup> Thus, the tenant of the life estate is entitled to the “full use and enjoyment of the property” so long as the life tenant is alive.<sup>4</sup>

When the life tenant passes, the life estate terminates and the right to present use or possession of the property will pass to either the “estate in remainder” or the “estate in reversion.”<sup>5</sup> An estate in remainder is present if a party, other than the grantor and/or his heirs, receives the right to the use and the enjoyment of the property after termination of the the life estate.<sup>6</sup> An estate in reversion exists if the right to use or enjoyment reverts back to the grantor and his heirs.<sup>7</sup> Despite the legal distinction, the rights of the reversioner are the same as those of a vested remainderman in fee in Georgia.<sup>8</sup>

There is no technical requirement regarding what type of language is necessary for a testator to create a remainder. Any words that “show it was the intention of the creator to create, by one instrument, two or more estates, so that the possession incident to one is temporarily exclusive of the possession incident to another” will be treated as creating an estate in remainder.<sup>9</sup> If a grantor creates an estate in remainder, then the remainderman will hold an interest in property that is either vested or contingent.<sup>10</sup> A vested remainder is a remainder which is limited to a certain person at a certain time or which is dependent upon the happening of a necessary event.<sup>11</sup> A contingent remainder is a remainder which is limited to an uncertain person or which is dependent upon an event which may or may not happen.<sup>12</sup> In determining the type of remainder created, the courts in Georgia have consistently followed two common law principles: “(a) the law favors construing ‘conditions to be subsequent’ and (b) the law favors the ‘vesting of remainders in all cases of doubt,’ which is also called the ‘early vesting’ of remainders.”<sup>13</sup> Since the laws of Georgia favor the vesting of remainders in all cases of doubt, there is a presumption that words of survivorship in a Will refer to those survivors living at the time of the testator’s

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<sup>1</sup> O.C.G.A. § 44-6-80 (2010).

<sup>2</sup> *Id.* § 44-6-82 (2010).

<sup>3</sup> *Id.* § 44-6-81 (2010).

<sup>4</sup> *Id.* § 44-6-83(2010).

<sup>5</sup> *Id.* § 44-6-60(2010).

<sup>6</sup> *Id.* § 44-6-60(a).

<sup>7</sup> *Id.* § 44-6-60(b).

<sup>8</sup> *Id.* § 44-6-60(c).

<sup>9</sup> *Smith v. Smith*, 200 Ga. 373, 378, 37 S.E.2d 367, 370 (1946).

<sup>10</sup> O.C.G.A § 44-6-61.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Swanson v. Swanson*, 270 Ga. 733, 734, 514 S.E.2d 822, 824 (1999).

death so as to result in the vesting of a remainder interest.<sup>14</sup> However, this presumption can be overcome if the Will manifests an intention by the testator to the contrary.<sup>15</sup>

Typically, a remainderman will hold his interest in property in fee simple absolute after the life tenant passes. An absolute fee simple estate is “one in which the owner is entitled to the entire property with unconditional power of disposition during his life and which descends to his heirs and legal representatives upon his death intestate.”<sup>16</sup> Furthermore, the word “heirs” is no longer required to create an absolute estate.<sup>17</sup>

*B. Precatory Language and Construction of Testator’s Intent.* Precatory language in a will includes those words “whose ordinary significance imports entreaty, recommendations, or expectation rather than any mandatory direction.”<sup>18</sup> While precatory words alone do not direct the distribution of property in a testator’s will, they can affect the distribution of property. The cardinal rule for constructing such words when present in the will of a decedent is “to ascertain and give effect the testator’s intent.”<sup>19</sup> Thus, precatory words can create an enforceable obligation if the intention of the testator is expressed so as to sufficiently create a condition.<sup>20</sup>

Under the common law of Georgia, precatory words were treated as creating a “precatory trust” if the words were: (a) sufficiently imperative to show that it is not left to the discretion of the party to act or not; (b) defined the subject matter of the trust with sufficient certainty; (c) and defined the object with certainty and the mode in which the trust was to be executed.<sup>21</sup> The courts generally found a precatory trust to exist in equity when the following conditions were present: (1) the maker of the instrument expressed words of entreaty, wish, or recommendation in a manner sufficiently imperative to show that he intended that his wishes be observed by the person to whom he has conveyed the legal title to property; (2) the testator devised or bequeathed property to a person, and in so doing used words of wish or entreaty (e.g., precatory words) in relation to some other person or object; (3) the intention of the testator was to make the wish, entreaty, or request so imperative that the legatee or devisee has no option as to whether he will observe the testator's wishes or not; (4) the beneficiaries are sufficiently designated so as to be ascertainable; (5) the subject matter, which is the trust property, is clearly designated; and (6) the instrument expresses the manner in which the trust is to be administered.<sup>22</sup>

Section 53-12-21 of the Official Code of Georgia Annotated codifies this common law remedy in equity.<sup>23</sup> Under this section, “words otherwise precatory in nature will create a trust only if they are sufficiently imperative to show a settlor's intention to impose enforceable duties on a trustee and if all other elements of an express trust are present.”<sup>24</sup> The editors of *Redfearn’s*

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<sup>14</sup> *Id.* § 44-6-66 (2010).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* § 44-6-20 (2010).

<sup>17</sup> *Id.* § 44-6-21 (2010).

<sup>18</sup> *Raines v. Duskin*, 247 Ga. 512, 523, 277 S.E.2d 26, 34 (1981).

<sup>19</sup> *Id.*; see also *Kale v. Wilson*, 284 Ga. 536, 537, 668 S.E.2d 729, 730 (2008).

<sup>20</sup> *Id.*; see also *Glore v. Scroggins*, 124 Ga. 922, 53 S.E.2d 690, 692 (1906).

<sup>21</sup> *Bell v. Watkins*, 104 Ga. 345, 30 S.E. 756, 759 (1806).

<sup>22</sup> *Marshall v. Cozart*, 94 Ga. App. 614, 619, 95 S.E.2d 729, 732 (1956).

<sup>23</sup> O.C.G.A. § 53-12-21 (2010).

<sup>24</sup> *Id.* § 53-12-21(b).

*Wills and Administration in Georgia* note that the term “precatory trust” is actually a “misnomer.”<sup>25</sup> Rather, the words must be sufficiently imperative to impose enforceable duties on a trustee. If it can be determined that “the testator intended to leave it optional or discretionary with the beneficiary of a testamentary gift as to whether certain expressed wishes are carried out, then there is only a moral obligation resting on the person to comply with the testator’s wishes.”<sup>26</sup> Consequently, no trust or legal obligation arises until it appears that the testator intended to impose an obligation that is imperative.<sup>27</sup>

*C. Income Tax Consequences: Exclusion of Gifts or Devises.* Under Section 102 of the Internal Revenue Code (the “Code”), “gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.”<sup>28</sup> Thus, if property is received as a gift, or received under a will or under statutes of descent and distribution, the value of such property is generally not includible in gross income, although the income from such property is includible in gross income.<sup>29</sup>

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<sup>25</sup> MARY F. RADFORD, REDFEARN’S WILLS AND ADMINISTRATION IN GEORGIA § 14:6 (7ed. 2008).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* For further information on precatory trusts, see Frank L. Schiavo, *Does the Use of “Request,” “Wish,” or “Desire” Create a Precatory Trust or Not?*, 40 REAL PROP. PROB. & TR. J. 647 (2006).

<sup>28</sup> I.R.C. § 102(a) (1954).

<sup>29</sup> Treas. Reg. § 1.102-1(a) (1956).