

## CONTESTING A WILL

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Due to the merging of a variety of factors including: (1) an aging population, (2) the greatest transfer of wealth from one generation to the next in American history, and (3) the current difficult economic circumstances for most Americans; the legal community is experiencing a significant increase in Will Contests. A Will Contest, also known as a “Will Caveat,” is a legal proceeding in which the validity of the decedent’s Last Will and Testament (“Will”) is in question. In North Carolina, the right to contest a Will via a Caveat is granted by statute. The ultimate issue in any Caveat is whether or not the Will being offered for probate is the valid Last Will and Testament of the deceased.

An interested party may bring a Will Caveat to set aside the Will if they have a direct “pecuniary interest” in the estate that would be adversely affected if the Will is admitted to probate and held to be the valid Last Will of the decedent. For example, the decedent’s heirs at law, next of kin and persons taking under a prior Will typically would be viewed as interested parties who may Caveat a Will. Typical “Caveators” of a Will would include heirs who are not treated equally or given greater distribution of assets under a previous Will. Disinherited children or other heirs are usually the Caveators in these cases.

The Caveat must be filed within three (3) years of the probate of the Will to be contested. A Caveat is a direct attack on the validity of the instrument purporting to be the decedent’s Last Will. The issue in a Caveat case is always “Did the decedent make a Will?” The answer to that issue has to be resolved in Superior Court either by a jury verdict or a Family Settlement Agreement approved by a Superior Court Judge. Citations are issued by the Caveator to all interested parties with notice of the Caveat and a Citation to appear at an “Alignment Hearing,” which is a hearing to take sides with either the Caveator, who is challenging the validity of the Will, or the “Propounder,” who is asserting that the Will is valid.

The filing of the Caveat puts the brakes on the administration of the decedent’s estate. The presiding Judge will enter an Order advising the personal representative of the estate that while the Caveat is pending there will be no distributions of assets of the estate to any beneficiary and no commissions will be advanced or awarded to the personal representative. Technically a Will Caveat raises only one issue, that of *devisavit vel non*. In other words, did the

decedent make a valid Will? However, this one issue is often broken down into one or more sub-issues. The most common sub-issues in a Caveat proceeding are (1) failure to comply with the statutory requirements for the execution of a valid Will; (2) lack of testamentary capacity; (3) undue influence; (4) fraud or duress; and (5) mistake or revocation. When these sub-issues are present in a Caveat and their consideration would aid a jury in determining whether the decedent made a valid Will or not, these separate issues should be submitted to the jury by the Judge trying the Caveat.

The overwhelming majority of Caveats contain an allegation that the testator (the person making the Will) lacked “testamentary capacity” at the time he or she executed the challenged Will. In North Carolina, there is a presumption that every individual has a requisite capacity to make a Will and those challenging the Will bear the burden of proving, by the greater weight of the evidence, that such capacity was lacking. A person has the mental capacity to make a Will if he or she comprehends (1) the natural objects of their bounty (their heirs and beneficiaries); (2) understands the kind, nature and extent of their property; (3) knows the manner in which they desire their act to take effect (how they want their property distributed); and (4) understands the consequences that his or her Will has on their estate (how the Will distributes their assets).

The Caveator need only show that one of the essential elements of testamentary capacity is lacking in order to successfully contest the Will and have it declared invalid. Evidence regarding the testator’s capacity within a reasonable time before and after the execution of the Will is relevant and admissible. The more remote in time the evidence regarding capacity is, the less relevance it carries. A Caveator must introduce specific evidence relating to the testator’s understanding of his or her property, to whom he or she wishes to give the property and the effect of his or her act in making a Will at the time the Will was made. General testimony regarding the testator’s deteriorating physical and mental health and mental confusion in the months preceding the execution of the challenged Will does not alone prove lack of capacity. Lay witnesses can testify as to their opinion regarding the testator’s mental capacity, but stronger evidence from an expert witness such as a physician is often needed to rebut the presumption that the testator has capacity.

With the aging population, medical records become increasingly important to a Caveat involving an allegation of lack of testamentary capacity. Medical records showing that the

testator was suffering from memory loss, dementia, or Alzheimer's will bolster the Caveator's efforts in having the contested Will declared invalid.

Another common issue is "undue influence." Undue influence is defined as the "fraudulent influence over the mind and will of another to the extent that the professed act is not freely done, and was actually the act of the person who procures the result." The Caveator must prove four general elements of undue influence for a finding to prevail with an allegation of undue influence, as follows:

1. The decedent was subject to influence.
2. The beneficiary of the challenged Will had the opportunity to exert influence.
3. The beneficiary had a disposition to exert influence.
4. The resulting Will indicates undue influence.

However, mere persuasion, without more, is not undue influence. A person may use fair argument and persuasion to induce another to execute a Will in his favor. Further, influence gained by kindness and affection, without more, is not undue, even if it induces a person to make an unequal or unjust disposition of his property.

There is a presumption of undue influence in certain fiduciary relationships, such as trustee/beneficiary, attorney/client, guardian/ward and principal/agent. If a Will is executed after the existence of such a fiduciary relationship and the terms of the Will provide for new or more beneficial distributions to the fiduciary, undue influence is presumed to exist. The burden of proof then shifts to the propounder to show that no undue influence was exerted to procure the Will that benefitted the propounder/fiduciary.

North Carolina courts have consistently indicated that the following are relevant factors to consider when assessing whether or not undue influence exists in a given case.

1. Old age and physical and mental weakness in the testator.
2. That the person signing the Will or paper is in the home of the beneficiary and is subject to the beneficiary's constant association and supervision.
3. That others have little or no opportunity to see the testator.
4. That the Will is different from and revokes a prior Will.
5. That the Will is made in favor of one with whom there are no ties of blood.
6. That the Will disinherits the natural objects of the testator's bounty.
7. That the beneficiary has procured the execution of the Will.

Other claims typically seen in Caveat proceedings include: (1) duress, which is similar to undue influence, (2) revocation, in that a later Will has revoked the Will being propounded, and (3) mistake, in that the testator did not know that he or she was executing a Will.

As stated above, Caveats may be resolved by the execution of a "Family Settlement Agreement" among all of the interested parties. Most Caveats are settled outside of the courthouse and not by a jury verdict, but instead are achieved through Family Settlement Agreements whereby the interested parties agree to a division of the decedent's property rather than completing the litigation process and culminating in a jury trial. However, should the Caveat go to trial, evidence will be offered regarding *the validity of the Will* and sub-issues regarding the statutory requirements for execution of a Will, lack of testamentary capacity, undue influence, duress, revocation and mistake and arguments will be made before the jury at trial.

A Will Caveat can be quite complicated to navigate, and in most cases it consists of the full-blown litigation process. It is beneficial to seek the counsel of attorneys with years of experience in this area.

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