WILL CAVEATS

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Contents

Note: This guide incorporates 2011-2012 legislative changes. The procedural provisions discussed below apply to caveats in estates of decedents dying on or after January 1, 2012.

I. Introduction. A will caveat is a challenge to the validity of a will that has been submitted for probate to the clerk of superior court. "The purpose of a caveat is to determine whether the paper- writing purporting to be a will is in fact the last will and testament of the person for whom it is propounded." Wilder v. Hill, 175 N.C. App. 769, 772 (2006); In re Spinks, 7 N.C. App. 417, 423 (1970). A caveat proceeding is not a typical civil action, but is instead a special proceeding *in rem*. The will itself – not the property devised by the will – is the *res* at issue. In re Will of Mason, 168 N.C. App. 160, 162 (2005). The superior court presides over caveat proceedings before a jury, and the issue for the jury is the question of *devisavit vel non* – "he devises or not."

There are many potential grounds for a caveat. Most commonly the challenger ("caveator") alleges that the will was procured by undue influence or that the testator did not have testamentary capacity. In some cases, only one writing will be in issue; in other cases, the caveator may present another writing as the purported valid will. It is also possible for three or more writings to be in issue. The jury may decide that one of the wills is valid. If not, the estate will be administered by intestate succession. Whatever the scenario, there may be multiple questions of fact for the jury.

II. General Order of Caveat Proceeding.

- Testator dies. Will submitted (by "propounder") to clerk of court for probate.
- Interested party ("caveator") files caveat with clerk of court.
- Clerk transfers case to superior court civil docket for trial by jury.
    - ♦ Clerk also orders testator's personal representative to suspend estate

administration pending outcome of caveat. *See* G.S. 31-36.

- Interested parties are given notice of hearing and opportunity to participate in trial of action. Judge may require bond.
- Jury trial in superior court on issue of *devisavit vel non.*
- Court enters judgment reflecting jury verdict or approved settlement.
- Estate administration resumes under clerk's jurisdiction. Estate is administered according to the judgment.

III. Commencement of Action.

A. Filing.

1. Caveats Filed With Clerk. Caveats are filed ("entered") with the clerk of superior court. G.S. 31-32(a).

2. Filing is Jurisdictional Requirement. Filing with the clerk is a jurisdictional requirement. Casstevens v. Wagoner, 99 N.C. App. 337, 339 (1990) (ordering dismissal of caveat proceeding initiated in the superior court rather than with the clerk).

3. Caveats Filed in Estate File. The caveat is filed in the decedent's estate file, and the clerk makes a proper notation of the caveat in the court's electronic recording system (VCAP). G.S. 31-32(b).

4. Fee. Upon filing a caveat, the caveator must pay a filing fee of $200. G.S. 7A-307(a)(5).

B. Time for Filing.

1. Generally. At time of probate or within three years thereafter. G.S. 31-32(a).

2. Where Caveator is Minor or Incompetent. If caveator is less than 18 years old or is incompetent (as defined in G.S. 35A-1101(7) or (8)) then within three years of removal of disability. *Id.*

C. Transfer.

Upon filing, the clerk transfers the matter to the superior court for trial by jury. G.S. 31-33(a).

D. Service.

The caveat must be served on all interested parties in accordance with Rule 4 of the Rules of Civil Procedure. G.S. 31-33(a).

E. Administration of Estate.

G.S. 31-36(a). Clerk orders suspension of estate administration pending outcome of caveat and orders the personal representative, among other things, to:

- Continue to pay fees and file accountings as required by law;
- Pay certain debts and fees of the estate with leave of the clerk after notice to interested parties; and
- Preserve estate assets. If questions arise regarding estate assets that the parties cannot resolve, the clerk may hold a hearing and make an order regarding the dispute. The clerk's order is appealable to superior court as an estate proceeding pursuant to G.S. 1-301.3. G.S. 31-36(c).

IV. Standing: Who May File a Caveat?

A. Party Interested in the Estate. "[A]ny party *interested in the estate*, may appear in person or by attorney before the clerk of the superior court and enter a caveat to the probate of such will." G.S. 31-32(a) (emphasis added).

B. "Interested in the Estate."

1. Definition. Having "some pecuniary or beneficial interest in the estate that is detrimentally affected by the will" that is the subject of the caveat. In re Will of Calhoun, 47 N.C. App. 472, 475 (1980); Sigmund Sternberger Found. v. Tannenbaum, 273 N.C. 658 (1968).

2. Includes.

- Heirs at law. If no will is held to be valid, the estate passes by intestacy. Heirs are therefore "interested" by the very nature of the proceeding.
- Next of kin
- Those who claim under an earlier or later purported will
  - Example:

    In re Will of McFayden, 179 N.C. App. 595, 601 (2006), affirming trial court's subject matter jurisdiction over caveat action filed by testator's neighbors challenging 1995 will, of which they were not beneficiaries, in favor of 2002 will in which they were listed as devisees.

  - Where earlier purported will exists only as a copy.

    The trial court had jurisdiction over action filed by beneficiaries of purported will that only existed as a copy. The potential presumption of revocation of the will created by absence of the original did not defeat standing of those who presented it in challenge to the probated will. In re Will of Barnes, 157 N.C. App. 144, 164–68 (2003), *rev'd for reasons stated in the dissenting opinion*, 358 N.C. 143 (2004) (per curiam).

C. Preservation of Right to File Caveat.

1. No Notice. If a person entitled to notice does not receive notice and opportunity to participate in the caveat proceeding, that person generally is not estopped to file a later caveat (assuming the person has standing and is within the statutory timeframe).

2. "Proper" Parties Not Always "Necessary" Parties. Persons who would be proper parties to a caveat action, such that they should have received statutory notice of the action, are not automatically to be considered "necessary" parties for purposes of the court's subject matter jurisdiction. Thus, if the court determines that a particular person should have been notified of the proceedings but was not, the court is not required to suspend or dismiss the proceedings in order to allow notice. Whether to do so is within the court's discretion. In re Will of Brock, 229 N.C. 482, 487–88 (1948); In re Will of Hester, 84 N.C. App. 585, 593, *rev'd on other grounds*,

320 N.C. 738 (1987).

3. **Prior Probate in Solemn Form.** If the disputed will was probated in solemn form by petition before the clerk (G.S. 28A-2A-7), no properly-served, interested party who failed to contest that probate may thereafter file a caveat of the will. G.S. 31-32(c).

V. Alignment of Parties.

A. "Caveators" and "Propounders." Because caveat proceedings are *in rem*, there are no "plaintiffs" or "defendants" (nor "petitioners" or "respondents"). Instead, the person who files the challenge is the "caveator", and the person defending the will's validity is the person who submitted the will for probate, the will's "propounder." Other interested persons must align themselves as parties either with the caveator or the propounder according to their respective interests in the outcome.

B. Alignment Hearing. G.S. 31-33(b).

- After service, the caveator must notify all parties of a hearing to align the parties.
- Notice must be served in accordance with Rule 5 of the Rules of Civil Procedure.
- All of the interested parties who wish to be aligned must appear and be aligned by the court.
  - Each party will be aligned either with the caveator (in support of the caveat) or with the propounder (in support of the will that has been submitted to the clerk for probate).
  - In cases involving more than one alleged will, it may be that the caveator of one alleged will is also the propounder of the other alleged will, and vice versa.
- If an interested party does not appear to be aligned or chooses not to be aligned, the judge must dismiss that interested party from the proceeding. The party is bound by the proceeding.

VI. Responsive Pleadings.

Any aligned party may file a responsive pleading within 30 days after entry of the alignment order. Failure to respond, however, shall not be considered an admission of averments or claims in the caveat. Extensions of time to respond may be granted under Rule 6 of the Rules of Civil Procedure. G.S. 31-33(c).

VII. Bond.

G.S. 31-33(d). Upon motion of an aligned party, the superior court judge *may* require the caveator to provide security in a sum considered proper by the court to pay costs and damages of the estate if it is found to have been "wrongfully enjoined or restrained." In determining whether to require bond and in setting the amount, the court may consider relevant facts, including but not limited to:

- Whether the estate may suffer irreparable injury, loss, or damage as a result of the caveat; and
- Whether the caveat has substantial merit.

Provisions related to filing *in forma pauperis* apply to the setting of a bond.

VIII. Complete and Adequate Remedy.

No collateral attack is allowed. A will caveat is a complete and adequate remedy when the basis for the action is invalidity of the will in

question. Mileski v. McConville, 199 N.C. App. 267, 273 (2009) (court appropriately dismissed caveator's separate action for fraud, conversion, and breach of contract because the caveat provided complete remedy for the alleged wrong of undue influence); Wilder v. Hill, 175 N.C. App. 769, 772–73 (2006); Baars v. Campbell Univ., 148 N.C. App. 408, 419 (2002).

IX. Grounds for Caveat.

A. Undue Influence.

1. General Definitions:

- "[S]omething operating upon the mind of the person whose act is called into judgment, of sufficient controlling effect to destroy free agency and to render the instrument, brought in question, not properly an expression of the wishes of the maker, but rather the expression of the will of another." In re Will of Jones, 362 N.C. 569, 574 (2008) (citation omitted).
- "[T]he fraudulent influence over the mind and will of another to the extent that the professed action is not freely done but is in truth the act of the one who procures the result." In re Will of Smith, 158 N.C. App. 722, 726 (2003); In re Will of Priddy, 171 N.C. App. 395, 399 (2005) (citation omitted).

2. Elements.

- Decedent is subject to influence;
- Beneficiary has opportunity to exert influence;
- Beneficiary has a disposition to exert influence; and
- The resulting will indicates undue influence. *Smith,* 158 N.C. App. at 726 (citation omitted).

3. Factors. There is no required set of factors to be considered by a jury in making its determination. The Supreme Court has stated,

> "It is impossible to set forth all the various combinations of facts and circumstances that are sufficient to make out a case of undue influence because the possibilities are as limitless as the imagination of the adroit and the cunning. The very nature of undue influence makes it impossible for the law to lay down tests to determine its existence with mathematical certainty."

Jones, 362 N.C. at 575 (citation omitted).

a. *Andrews* Factors. The Supreme Court, however, has identified a number of factors that *may be considered* in supporting a finding of undue influence:

- Old age and physical and mental weakness;
- That the person signing the paper is in the home of the beneficiary and subject to the beneficiary's constant association and supervision;

- That others have little or no opportunity to see the signer;
- That the will is different from and revokes a prior will;
- That it is made in favor of one with whom there are no ties of blood;
- That it disinherits the natural objects of the signer's bounty;
- That the beneficiary has procured its execution. In re Will of Andrews, 299 N.C. 52, 55 (1980).

b. Application. A jury should "apply and weigh each factor in light of the differing factual setting of each case." *Jones*, 362 N.C. at 575.

- A "caveator" need not demonstrate every factor named in *Andrews* to prove undue influence. *Id.* at 576.
- For a thorough discussion of the application of the *Andrews* factors in a caveat alleging undue influence of a wife over her husband, see the Supreme Court's analysis in *Jones*, 362 N.C. at 575–83.

4. N.C.P.I. – CIVIL 860.20.

B. Lack of "Testamentary Capacity" (Lack of Capacity to Make a Will).

1. Elements of "Testamentary Capacity." Testator:

- Comprehends the natural objects of his bounty;
- Understands the kind, nature and extent of his property;
- Knows the manner in which he desires his act to take effect; and
- Realizes the effect his act will have upon his estate. In re Estate of Whitaker, 144 N.C. App. 295, 298 (2001); In re Will of Priddy, 171 N.C. App. 395, 397 (2005).

2. Presumption of Capacity. The law presumes that a testator possessed testamentary capacity. Caveators have the burden of proving by the preponderance of the evidence that the testator lacked such capacity. In re Will of Jarvis, 334 N.C. 140, 146 (1993).

3. Necessary Proof. To establish lack of testamentary capacity, a caveator need only show that one of the essential elements of testamentary capacity is lacking. In re Will of Kemp, 234 N.C. 495, 499 (1951). It is *not* enough, however, to present "general testimony concerning testator's deteriorating physical health and mental confusion in the months preceding the execution of the will." In re Will of Smith, 158 N.C. App. 722, 725 (2003) (citation omitted). A caveator needs to present specific evidence "relating to testator's understanding of his property, to whom he wished to give it, and the effect of his act in making a will at the time the will was made." *Id.*

4. Testimony as to Capacity. Evidence of the testator's general capacity may be presented by anyone with opportunity to observe the testator. The witness may not, however, testify to or give opinion as to the ultimate issue of the testator's capacity to make a will. In re Will of Cromartie, 64 N.C. App. 115, 117 (1983).

5. N.C.P.I. – CIVIL 860.15.

C. Other Potential Grounds (not exclusive): Duress (*See* N.C.P.I. – CIVIL 860.22); Fraud; Forgery; Mistake; Revocation

X. Trial

A. Trial by Jury. The issue of *devisavit vel non* is for a jury to determine. G.S. 31-33(a). The parties may not waive a jury trial, consent to a bench trial, or consent to have the case determined by a jury on a set of stipulated facts. In re Will of Hine, 228 N.C. 405, 410 (1947).

B. Burden of Proof. The burden of proof is first upon the propounder to prove the instrument in question was executed with proper formalities required by law. The burden then shifts to caveator(s) to prove by greater weight of evidence that the instrument is invalid (due to undue influence, lack of testamentary capacity, or other stated basis). In re Will of Parker, 76 N.C. App. 594, 597 (1985).

C. Evidence Issue: Application of Dead Man's Statute. Testimony by an interested person is not admissible if it regards oral communications about the will transaction that occurred between that interested person and the deceased.

1. The Rule (G.S. 8C-1, Rule 601(c) of the Rules of Evidence):

"Disqualification of interested persons.

Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event . . . shall not be examined as a witness in his or her own behalf . . . concerning any oral communication between the witness and the deceased [] person . . . ."

2. Applicable to Propounders and Caveators. Both propounders and caveators may be considered interested persons. In re Will of Hester, 84 N.C. App. 585, 595, *rev'd on other grounds*, 320 N.C. 738 (1987).

3. Executor Not Interested Person. The named executor is not an interested person under the meaning of Rule 601(c). *Id.* at 595–96.

4. Effect of Rule. The rule prevents interested persons from testifying as to:

- Oral communications between themselves and the decedent about the will;
- Oral communications regarding the decedent's intent, desire or plan to make a new will; and
- Oral communications with regard to specific bequests to be contained therein, *i.e.*, the decedent's desired disposition of the decedent's properties.

In re Will of Lamparter, 348 N.C. 45, 50 (1998) (reversing jury verdict where caveators were allowed to testify that decedent stated a desire to change his will to include caveators); Godwin v. Wachovia Bank & Trust Co., 259 N.C. 520, 528 (1963).

5. Notable Exceptions.

a. For Holographic Wills (very limited exception). Interested parties' testimony is permissible where it relates to three material elements of such a will: (1) the testator's handwriting; (2) the testator's signature; and (3) what the testator considered to be a place for keeping valuable papers. *Lamparter*, 348 N.C. at 50; G.S. 31-10(b).

b. When Testimony is Against the Interest of the Witness. When a witness is a beneficiary under the will in caveat, but takes less under it than under another will that is before the court, the witness' testimony, if it is against the interest of the witness' greater benefit, should be allowed. In re Will of Barnes, 157 N.C. App. 144, 152-53 (2003) (upholding trial court's admission of testimony that testator tore up 1967 will in fit of rage because witness would have taken greater share under 1967 will than 1989 will subject to caveat), *rev'd on other grounds*, 358 N.C. 143 (2004) (per curiam).

D. Evidence Issue: Affidavit of Subscribing Witness. G.S. 31-35. Whenever the subscribing witness to a will dies, or is mentally incompetent, or is absent from North Carolina, it shall be competent upon any issue of *devisavit vel non* to present into evidence the affidavits and proofs taken by the clerk upon admitting the will to probate in common form. Such affidavits and proceedings before the clerk shall be prima facie evidence of the due and legal execution of the will.

E. Dispositive Motions.

1. Summary Judgment. Summary judgment is traditionally disfavored in caveat proceedings because of the *in rem* nature of the proceeding. In recent decades, however, courts have held that the standard for granting summary judgment ("no genuine issue of material fact") can be applied in a caveat proceeding to dispose of a caveator's allegations. In re Will of Campbell, 155 N.C. App. 441, 450–51 (2002). Because of the highly factual nature of some of the grounds for caveat proceedings – particularly undue influence – judges should be cautious when granting summary judgment in these cases. See, for example,

- In re Will of Jones, 362 N.C. 569, 575–583 (2008), in which the Supreme Court reversed the trial court's grant of summary judgment, analyzing several factors contributing to a potential jury finding of undue influence and finding ample evidence in the record that could support each.
- In re Will of Priddy, 171 N.C. App. 395, 398 (2005), in which the Court of Appeals reversed the trial court and held that genuine issues of material fact existed as to testamentary capacity and undue influence where a man signed his will shortly before death and left all assets to his estranged wife.

2. Directed Verdict. In general, court should not grant a directed verdict in a caveat proceeding. However, courts have carved out three exceptions where a directed verdict *may* be appropriate:

- In favor of propounders *after the close of all evidence* on issue of validly executed will;

- In favor of caveators *after propounder's evidence* as to the issue of a validly executed will; and
- In favor of propounders *after the close of all evidence* on issues caveators raise (lack of testamentary capacity, etc.).

In re Will of Jarvis, 334 N.C. 140, 145–47 (1993); In Re Will of Smith, 159 N.C. App. 651, 655–56 (2003); In re Will of Sechrest, 140 N.C. App. 464 (2000).

F. Bifurcation/Separation of Issues. It is within the court's discretion to bifurcate the trial as necessary to present the questions to the jury in an orderly way. In re Will of McFayden, 179 N.C. App. 595, 602 (2006) (holding it was not error to submit issues of validity of 1995 and 2002 wills separately to same jury). The issues, however, should be presented to the same jury. In re Will of Hester, 320 N.C. 738, 744–45 (1987) (holding that court did not err in submitting issues of validity of 1983 will at a separate time from issues of validity of 1982 and 1981 will where the jury and judge were the same); In re Will of Dunn, 129 N.C. App. 321, 325–26 (1998) ("[T]he trial court is vested with broad discretion to…sever the issues and submit them separately to the same jury . . .. ").

G. Jury Charge.

1. Pattern Instructions. *See* N.C.P.I. – CIVIL 860.00 (Wills – introductory statement (optional)); 860.05 (Attested Written Wills); 860.10 (Holographic Wills); 860.15 (Lack of Testamentary Capacity); 860.20 (Undue Influence); 860.22 (Duress); and 860.25 (*Devisavit Vel Non*).

2. Additional Issues. It is within the judge's discretion to submit additional issues where doing so would aid the jury in determining complex factual questions.

H. Judgment.

- Court enters judgment reflecting jury verdict as to *devisavit vel non*.
- Clerk:
  - Files the judgment in the estate file; and
  - Makes entry into VCAP (statute says "page of the will book") noting that final judgment has been entered either sustaining or setting aside the will. G.S. 31-37.1(b).
- Estate administration resumes according to the judgment.

XI. Costs and Attorney Fees.

A. Judge's Discretion. G.S. 6-21(2): In caveat proceedings, "[c]osts…shall be taxed against either party, or apportioned among the parties, in the discretion of the court."

B. Attorney Fees.

1. Generally. "Costs" under G.S. 6-21(2) "shall be construed to include reasonable attorneys' fees in such amounts as the court shall in its discretion determine and allow."

2. Limit on Attorney Fees for Caveator. G.S. 6-21(2) provides that "[i]n any caveat proceeding…the court shall allow attorneys' fees for the attorneys of the caveators only if it finds that the proceeding has substantial merit." A

caveat proceeding has substantial merit if there is sufficient evidence to support the claim. Dyer v. State, 331 N.C. 374, 377 (1992). The caveator's claim does not have to succeed before the jury for the court to determine that it had substantial merit. Matter of Ridge's Will, 302 N.C. 375, 381–82 (1981).

In practice, attorney fees are often taxed against the estate of the decedent, although it is not clear how this is reconciled with the language of G.S. 6-21, requiring they be paid by the "parties" (if they are awarded at all).

3. Attorney Fees Upon Settlement. Apparently there is no authority to award attorney fees upon the settlement of a caveat. In re Will of Baity, 65 N.C. App. 364, 368 (1983).

XII. Settlement Agreements.

A. Authority. G.S. 31-37.1(a)

B. Procedure. The parties may enter into a settlement agreement before entry of judgment by the superior court in the caveat action. The settlement agreement must be approved by the superior court.

- This provision requires approval by the superior court *judge*.
- The *clerk* has no authority to approve a settlement agreement "modifying the terms of a last will and testament or resolving a caveat of a last will and testament." G.S. 28A-2-10.

Upon approving a settlement, the court enters judgment sustaining or setting aside the contested will in accordance with the terms of the settlement agreement. The clerk files a copy of the court's judgment in the estate file and makes proper entry in VCAP noting that the will has been either sustained or set aside. G.S. 31-37.1(b)

C. Settlement by "Parties." The consent of an interested party who is not aligned as a party pursuant to G.S. 31-33 is not necessary for approval of a settlement agreement. G.S. 31-37.1(a). An heir or other potential interested party should become formally aligned with the caveator or propounder if that person wishes to participate in any settlement agreement.

1. No Voluntary Dismissal. Parties should not voluntarily dismiss their action upon approval of a settlement agreement. The statute requires that the judge enter judgment in accordance with the terms of the settlement agreement.

XIII. In Terrorem Clauses.

A. Explanation. Some wills contain provisions providing that a beneficiary who brings a caveat or otherwise challenges the will forfeits any inheritance under the will. These "*in terrorem*" clauses are aimed at "terrifying" away a would-be challenger.

B. Enforceability. *In terrorem* clauses in wills are enforceable unless the court finds the will caveat was brought in good faith and with probable cause. Haley v. Pickelsimer, 261 N.C. 293, 298–99 (1964); 30 STRONG'S N.C. INDEX 4TH *Wills* § 74. As with any other provision of a will, an *in terrorem* clause may be challenged as

invalid in a caveat proceeding (as a product of undue influence, lack of testamentary capacity, failure of formalities of execution, etc.).