the will & the way

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The Chair's Comments

Edward Griggs

Spring may be my favorite time of year. I enjoy seeing beautiful new growth emerge in my neighborhood and alongside passageways across North Carolina. Springtime is also a time to recognize the "fruits of our labor," and significant "labor" occurred during the past fall and winter, particularly for the Estate Planning and Fiduciary Law Section.

Your section council and committees have been hard at work for the last several months. The accomplishments of all section committees are too numerous to list, so I will take this opportunity to highlight a few activities and events undertaken for the benefit of the members of our section and the Bar Association.

EP&FL Section Annual Meeting from July 27–29, 2017: Your Annual Meeting Committee has organized and scheduled an outstanding program to be held on Kiawah Island on July 27, 28 and 29. The lineup of speakers is fantastic. Please make your reservations for the CLE program and accommodations as soon as possible. We hope to see you there.

Pro Bono: Multiple pro bono opportunities have arisen this year, including more recent opportunities to serve the immigrant community. Pay close attention to the listserv emails for updates regarding pro bono events and initiatives or contact Stephanie Daniel for opportunities (stephanie.daniel@smithmoorelaw.com; 704.384.2641).

CLE: The 2017 Survey Course is being planned for the fall of this year. If you have an interest in speaking on a Survey Course topic, please contact Beth Wood (beth-wood@mvalaw.com; 704.331.1020).

Council Meetings: Our next council meeting is scheduled for July 26 in Kiawah. If you have any topics or

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Wrongful Interference With the Making of a Will

By David T. Lewis and Kimberly J. Kirk

Unfortunately, it is an all too familiar narrative: The old and infirm relative becomes coddled, adored, and ultimately manipulated during his last days, months, and in some cases, years of life. During this period, the new "favorite" relative helps the older relative update or replace his estate planning documents. The fact pattern often results in a caveat proceeding in which the decedent's will is challenged by the disinherited relatives. That said, a caveat is not the only mechanism by which an aggrieved beneficiary may recover. Recently, the North Carolina Court of Appeals published two opinions addressing the rights of aggrieved beneficiaries both before and after the death of the testator. In doing so, the Court of Appeals narrowed the remedies available to an aggrieved expectant beneficiary prior to a testator's death, while nonetheless confirming the viability of claims brought in a civil action after the testator has died.

With respect to pre-death remedies, the North Carolina Court of Appeals held in **Hauser v. Hauser,** No. COA16-606 (N.C. App. Feb. 21, 2017), that a beneficiary's claim for tortious interference with expected inheritance was not legally viable while the testator was still alive. In so holding, the court narrowed the class of plaintiffs who may utilize the long-recognized tort action of wrongful interference with the making of a will. Just months before **Hauser** was published, the Court of Appeals published its opinion in **Finks v. Middleton,** No. COA16-630 (N.C. App. Dec. 30, 2016). The **Middleton** court held that claims for breach of fiduciary duty, fraud and conversion could be maintained by an aggrieved beneficiary while the related caveat proceeding was held in abeyance.

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This article evaluates these recent decisions through a discussion of the claims available to an aggrieved beneficiary both before and after the testator's death and outlines the key issues for practitioners to consider when counseling clients regarding whether, when, and how to pursue such claims.

Proactive or Premature? Claims Available Before a Testator's Death

For years, North Carolina courts have acknowledged that an expectant beneficiary can maintain a claim where his inheritance does not come to fruition as the result of another's wrongful interference with the making of a will. *See, e.g.*, **Bohannon v. Wachovia Bank & Trust Co.**, 210 N.C. 679, 188 S.E. 390 (1936) (allowing decedent's grandson to maintain action for malicious and wrongful interference with the making of a will where, but for defendants' wrongful acts, grandson would have received a share of the estate); **Murrow v. Henson**, 172 N.C. App. 792, 616 S.E.2d 664 (2005) (reversing dismissal of aggrieved step-grandchildren's claim for tortious interference with prospective economic advantage). Until recently, however, our courts had not addressed whether such claims were appropriate during the testator's life. On the one hand, it could seem that a claim for wrongful interference with the making of a will would be purely speculative. On the other hand, allowing such claims to proceed during the testator's lifetime might reduce the number of disputed estates by allowing litigation to ensue while the most compelling evidence of all—the testimony of the testator—is still available. *Compare* **Harmon v. Harmon**, 404 A.2d 1020 (Maine Sup. Ct. 1979) (explaining that an expectant heir has an immediate economic value associated with his interest, the interest could therefore be conveyed for value and is accordingly subject to legal protection); N.C.G.S. § 28A-2B-1, *et seq.* (a testator in North Carolina can petition during his lifetime for a judicial declaration that his will or codicil is valid). In the Court of Appeals' recent decision, the court opted not to allow such claims to proceed. *See* **Hauser**, No. COA16-606 (N.C. App. Feb. 21, 2017).

The Plaintiff in **Hauser** was the daughter of the testator ("Mrs. Hauser"). Mrs. Hauser had two children—a daughter and a son. *Id.* at *1. In 1998, Mrs. Hauser executed a will in favor of her husband, and if he were to predecease her, then her children. *Id.* In 2005, Mrs. Hauser executed a power of attorney naming her son's wife as attorney-in-fact. *Id.* In 2011, Mrs. Hauser began regularly withdrawing funds from her accounts, and shortly thereafter, executed a new will primarily benefitting her son. *Id.* In 2015, Mrs. Hauser conveyed property to an irrevocable trust of which she had named her son as trustee. *Id.* at *2. The daughter filed a lawsuit against her brother and his wife alleging constructive fraud, breach of fiduciary duty, tortious interference with expected inheritance, and undue influence. At the time the lawsuit was filed, Mrs. Hauser was still alive. *Id.*

In response to plaintiff's claims, the brother and his wife moved to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. *Id.* The trial court granted the motion, and the plaintiff appealed. *Id.* The key inquiries on appeal were (i) whether claims based on a prospective inheritance could be brought during the lifetime of the testator and (ii) whether plaintiff had standing to assert claims for breach of fiduciary duty and constructive fraud.

As to the first issue, the court held that an expectant beneficiary cannot bring a claim for tortious interference with expected inheritance while the testator is still alive. *Id.* at *3. The court reasoned that only the General Assembly and North Carolina Supreme Court had the authority to expand the cause of action for tortious interference with contract to enable plaintiffs to proceed under these circumstances. *Id.* at *4. As to the second issue—standing—the Court of Appeals held that defendants did not have a fiduciary duty to plaintiff, but rather to Mrs. Hauser. Accordingly, so long as Mrs. Hauser was alive, claims "arising out of a fiduciary relationship between [Mrs. Hauser] and Defendants could only be brought by [Mrs. Hauser] or someone legally authorized to act on her behalf." *Id.* at *5.

Hauser stands in stark contrast to published cases where parties have claimed interference with a prospective economic advantage. *See, e.g.,* **Radcliffe v. Avenel Homeowners Ass'n, Inc.**, 789 S.E.2d 893, 913 (N.C. Ct. App. Aug. 2, 2016) (reversing the trial court's dismissal of tortious interference with prospective economic advantage claim). Typically, a tortious interference with prospective economic advantage claim requires a showing of three elements: (1) defendant induced a third party to refrain from entering into a contract with plaintiff; (2) the contract would have been entered absent defendant's interference; and (3) the defendant acted without justification. *Id.* at 912. The **Hauser** court did not explain how a beneficiary's prospective economic advantage differs from the loss of a prospective economic advantage in any other context; nonetheless, **Hauser** clearly precludes an expectant beneficiary from pursuing an action for tortious interference with expected inheritance during the testator's life. Interestingly, both **Hauser** and **Radcliffe** were authored by Judge Davis in 2016.

Hauser does, however, leave open a window for a plaintiff to bring a claim for breach of fiduciary duty and constructive fraud where a plaintiff can show that the defendant owed a fiduciary duty to her personally, as opposed to the testator. This limited circumstance might arise where, for example, the plaintiff is a beneficiary of a trust administered by the defendant as trustee. In the absence of such unique circumstances, it is now clear in North Carolina that actions cannot be maintained by an expectant beneficiary during the lifetime of the testator.

Identifying the Proper Actions, Forum and Timing of Post-Death Claims

An aggrieved beneficiary may respond to the probate of an invalid will by filing a caveat under N.C.G.S. Section 31-32. While this is an appropriate response, an aggrieved beneficiary may benefit—both in terms of the remedies available and leverage created—by filing an action in Superior Court as well. The decision as to whether to file in Superior Court and when such filing should occur requires a clear understanding of what a caveat proceeding is and what it is not.

A caveat is the method of challenging a writing offered for probate and purporting to be the decedent's last will. *See* **Brittian v. Brittian**, No. COA15-139 (N.C. App. Sept. 15, 2015) (citing to **Rogel v. Johnson**, 114 N.C. App. 239, 241, 441 S.E.2d 558, 560 (1994)). The caveat prompts the court to determine whether the will admit-

ted to probate is in fact the last will and testament of the decedent, and if not, whether another paper writing is the last will and testament. *Id.* (*citing to* **In re Spinks's Will**, 7 N.C. App. 417, 423, 173 S.E.2d 1, 5 (1970)); *compare* **In re Will of Beane**, 189 N.C. App. 209, 657 S.E.2d 447 (2008) (unpublished) (*citing to* **In Will of Hester**, 320 N.C. 738, 360 S.E.2d 801 (1987) for the proposition that "[A] caveat action requires the parties to proffer all documents that may constitute a decedent's will; and if they fail to offer all scripts in the caveat trial, they cannot file a later action to probate them.").

That said, a caveat proceeding is limited in scope. It does not allow an aggrieved party to recover compensatory or punitive damages resulting from a manipulative third-party's influence over a decedent. It also is not the forum for an individual to challenge pre-death transfers with the goal of recouping those assets on behalf of the estate. An aggrieved beneficiary can seek these remedies by filing a complaint in Superior Court alleging claims sounding in fraud, constructive fraud, wrongful interference with expected inheritance, conversion, and, potentially, a claim to establish a constructive trust over assets wrongfully transferred from the decedent and his estate. The propriety of such claims was recently affirmed by the Court of Appeals in **Fink v. Middleton**, No. COA16-630 (N.C. App. Dec. 30, 2016).

In **Middleton**, the Court of Appeals considered a dispute between siblings arising from their mother's estate. In 2009, the mother ("Mrs. Middleton") executed a will naming one of her two daughters and her son as co-executors. *Id.* The will devised Mrs. Middleton's assets evenly among her three children. *Id.* In 2012, Mrs. Middleton executed a power of attorney naming the son as attorney-in-fact and a new will naming the son as co-executor. *Id.* The 2012 will purported to leave Mrs. Middleton's entire residuary estate to a newly created trust of which the son would serve as trustee upon Mrs. Middleton's death. *Id.* Thereafter, Mrs. Middleton conveyed real property to the trust, to her son, and to an entity owned by her son. Around the same time, she was admitted to a nursing home due to advanced dementia. *Id.* She died two years later in 2015. *Id.* In the six years leading up to her death, Mrs. Middleton's estate had diminished in value from $800,000 to $0.00. *Id.*

What makes **Middleton** unique is that the civil action was filed by the sister *prior* to the submission of the will to probate. The lawsuit sought punitive damages and alleged fraud, constructive fraud, conversion, and unjust enrichment. It was not until several months after the complaint was filed that the son submitted the 2012 will to probate. Presumably, neither party had promptly submitted either the 2009 will or the 2012 will at Mrs. Middleton's death because the estate had no assets. By submitting the will to probate, however, the son crafted the basis for his argument that the sister's lawsuit should be dismissed because the Superior Court no longer had jurisdiction and the sister lacked standing. The trial court rejected this argument, and ultimately, the Court of Appeals agreed.

In holding that the sister could maintain her action against her brother, the Court of Appeals identified the "general rule that once jurisdiction attaches, 'it will not be ousted by subsequent events.'" *Id.* (quoting **Metcalf v. Black Dog Realty, LLC**, 200 N.C. App. 619, 625, 684 S.E.2d 709, 714 (2009)). Applying this rule to **Middleton**, the court explained that no caveat proceeding was pending at the time the sister filed her lawsuit, and as such, the court had subject matter jurisdiction. Further, the sister had standing to challenge inter vivos conveyances because the caveat proceeding would not have provided the sister with adequate relief: that is, it would allow her to set aside the will but not recover the assets she claimed should have been part of the estate but for her brother's wrongful conduct. Thus, the court affirmed the denial of the brother's motion to dismiss and elected to stay the caveat proceeding pending the outcome of the civil action. The decision to stay the caveat was based on the court's observation that "the parties and the subject matter to be decided in the caveat proceeding may be closely related, if not identical, to the parties and the subject matter to be decided in a portion of [the sister's] civil action." *Id.*

Middleton is consistent with the 2012 decision of the Court of Appeals in **Shoaf v. Shoaf**, 219 N.C. App. 471, 727 S.E.2d 301 (2012). In **Shoaf**, the aggrieved beneficiaries sought compensatory and punitive damages for conversion, breach of fiduciary duty, and constructive fraud by filing a lawsuit against the grandson who allegedly had improperly influenced the testator. *Id.* Unlike **Middleton**, the caveat associated with the decedent's estate in **Shoaf** was filed prior to the initiation of the Superior Court action. Nonetheless, the Court of Appeals held the action did not constitute an impermissible collateral attack on the validity of the decedent's will. *Id.*at 480-81, 727 S.E.2d at 307.

Together, **Middleton** and **Shoaf** strengthen the position of the aggrieved beneficiary by allowing claims to proceed in a civil action whether or not the claims are filed prior to or subsequent to the filing of a caveat. In some circumstances, however, there may be strategic advantages associated with the timing of filing.

The first consideration to make when deciding whether the caveat or civil action should be filed first involves attorneys' fees. Under N.C.G.S. Section 6-21.2, the court may award a caveator's attorneys' fees to be paid out of the estate when the claim is found to have substantial merit. In contrast, a plaintiff who sues in his own right to recover for damages incurred by virtue of a third-party's tortious interference with the making of a will may very well end up responsible for his own attorneys' fees. That said, if the caveator were to proceed with a successful caveat, the likelihood of the estate bringing claims directly against the wrongdoer would often increase, thereby shifting the burden of attorneys' fees from the individual to the estate. Thus, the ability to minimize an individual's responsibility for attorneys' fees may be one consideration weighing in favor of first proceeding with the caveat.

Second, counsel should evaluate the client's best set of facts. For example, is the client well-positioned to show that the will admitted to probate was procured by undue influence and that the circumstances satisfy the seven **Seagraves** factors? *See* **Seagraves v. Seagraves**, 206 N.C. App. 333, 698 S.E.2d 155 (2010). Alternatively, does the evidence tend to lend itself more to showing a fiduciary relationship existed between the decedent and the wrongdoer wherein the wrongdoer benefited himself at the decedent's expense? If the former, consider using a caveat as your first filing; if the later, your client may benefit from initially pursuing his constructive fraud claim. Putting your best case first may help create the strategic advantage necessary to secure a favorable settlement. In making this assessment, practitioners may find it useful to review the applicable pattern jury instructions and the elements of each claim they intend

to ultimately assert or pursue. Of course, the decision regarding sequencing should always be made with attention to the applicable statute of limitations and statutory filing deadlines. *See, e.g.*, N.C.G.S. § 31-32 (caveat must be filed within three years after application for probate of a will); N.C.G.S. § 1-52(9) (actions based on fraud must be filed within three years after the aggrieved party discovered the facts constituting fraud); N.C.G.S. § 1-52(5) (three year limitations period applicable to claims for tortious interference).

The Effect of the Elective Share

When representing the surviving spouse, it is critical to preserve the client's right to his or her elective share, regardless of whether representation is of the propounder or the caveator, and irrespective of whether a caveat or civil action is filed first. The elective share claim creates the floor for your client's recovery and provides the baseline for your client's worst day in court. Petitions for an elective share must be filed within six months after the issuance of letters testamentary or letters of administration. N.C.G.S. § 30-3.4(b); *compare* **In re Will of Shepherd**, 235 N.C. App. 298, 761 S.E.2d 221 (2014) (petition for elective share and simultaneously filed caveat proceeding were not inconsistent).

Conclusion

While the rules governing caveat proceedings may be well established, the legal parameters for claims asserted by aggrieved beneficiaries outside of the will caveat are still in the process of formation under North Carolina law. Within the last few months alone, the North Carolina Court of Appeals in **Hauser** distinctly limited the ability to bring claims for tortious interference with expected inheritance during the life of the testator and reaffirmed in **Middleton** the viability of the claims and breadth of redress available to an aggrieved beneficiary following a testator's death. As this body of law continues to grow, it is important for counsel to understand there are options outside of the caveat proceeding that may effectively help clients achieve their objectives, and the best manner in which to sequence those options may vary from case to case.

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