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Legal *news*

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Contesting A Will

Author: Micah D. Ball, Attorney at Law

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 the 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. 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,” 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; and
4. The resulting Will indicates undue influence.

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.

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.

Collections: Attorneys v. Agencies

Author: Bradley D. Piner, Attorney at Law

With the current state of the economy, many businesses are now faced with an ever-growing volume of delinquent accounts receivable from other businesses or individuals. An important question that these businesses face is where to turn when their internal efforts to collect these accounts have proven unsuccessful. It is important that businesses understand the differences between using an attorney and a collection agency in order to make an informed decision as to the method that may work best in different situations.

The first consideration is what efforts will be undertaken to collect your accounts. A collection agency will conduct the same activities in which you have been engaged to collect your accounts - sending letters and making telephone calls - although this will most likely be done on a larger scale. However, an attorney can not only take these same actions, but can also bring the threat of legal action against the customer. In some cases, the threat of a lawsuit may be the encouragement needed to reach a resolution of the customer's account. Because of this, there are some customers that may respond more quickly to a demand letter from an attorney that would not have otherwise responded to a letter from a collection agency. Also, using an attorney will be the only way to collect from customers who will only respond to a lawsuit.

Another consideration is the cost associated with each collection method. Regardless of the amount of time necessary to collect the account, a collection agency will charge a percentage of the amount collected, based on the amount of the debt and volume of

accounts placed with the agency. On the other hand, attorneys typically handle these matters at an hourly rate. This means you could generate a greater net receivable on an easily collectible account by using an attorney. There are also court costs that may be incurred by using an attorney if you decide to file a lawsuit to collect on an account. Depending on the terms of your contracts with customers, any attorney fees and court costs may or may not be collectible in a lawsuit.

Tied closely to cost, the size and potential success of collecting a delinquent account will also be an important factor. It will likely be more cost-effective to use a collection agency for a small account due to the fees and costs involved as well as the potential that the account may remain uncollectible. However, a larger account may warrant using an attorney. In all cases, it will not be cost-effective to use an attorney if you feel strongly that no payment will be forthcoming, unless there are internal reasons that would require you to obtain a judgment prior to writing off the account as uncollectible.

There are certainly pros and cons to consider with every account in deciding whether to use an attorney or a collection agency to assist with the collection process. If you have questions regarding the legal process used to collect accounts receivable or to have a discussion regarding which method may be best for you in a particular situation, we would be happy to talk to you.

ALIMONY BASICS

Author: W. Lee Allen, III, Attorney at Law

By statute, "alimony" means an order (or agreement) for payment for the support and maintenance of a spouse or former spouse, periodically or in a lump sum, for a specified term."

Under North Carolina law, only a "dependent spouse" can receive alimony. A "dependent spouse" is a spouse, either husband or wife, who is "actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse."

Since 1995, marital fault can be a factor in determining whether, how much, and for how long, a supporting spouse shall pay alimony, but fault is no longer required, nor is it absolute bar, except that, illicit sexual behavior by a supporting spouse means that spouse "shall" pay alimony to the dependent spouse. Likewise, illicit sexual behavior during the marriage and before the date of separation by a dependent spouse is an absolute bar to an award of alimony. Illicit sexual behavior is defined to include adultery. If both spouses each participated in an act of illicit sexual behavior during the marriage and prior to the date of separation, then alimony shall be denied or awarded at the discretion of the court after considering all of the circumstances.

Only acts committed during the marriage and before separation can be considered marital fault. Other types of marital fault include involuntary separation due to a criminal act; abandonment; maliciously turning a spouse of doors; cruel or barbarous treatment endangering the life of the other spouse; indignities rendering the other spouse's condition intolerable or life burdensome; reckless spending, wasting, concealing, or diverting assets; and willful failure to provide necessary subsistence according to one's means and condition.

There are no guidelines under the law for a court to use in determining when alimony is appropriate, in what amount, and for what duration it should be paid. The statute lists 16 factors that should be considered by the court, and these include marital misconduct of either spouse; relative earnings and earning capacities; age, mental, and physical condition of each spouse; amount and source of either spouse's unearned income; duration of the marriage; standard of living of the parties established during the marriage; and the relative needs of the spouses.

Except for instances when illicit sexual behavior occurs, North Carolina courts have discretion in deciding on alimony. Even in instances of illicit sexual behavior, the amount and duration are within the court's discretion.

In all alimony claims, there is a necessary economic analysis. In some matters, a determination of fault is also needed.

Whether you are a supporting spouse or dependent spouse, specific facts regarding you and your spouse as individuals are key to prosecuting or defending your alimony claim. Please discuss your situation with an experienced family law practitioner as early as you can in the separation process.

This Edition's FEATURED ATTORNEYS

Only five percent of the lawyers in the state are named by *Super Lawyers*.

Michael A. Colombo and Dallas C. Clark, Jr. Named 2012 Super Lawyers

Michael A. Colombo was named by *North Carolina Super Lawyers* magazine as one of the top 100 attorneys in North Carolina. Dallas C. Clark, Jr. was named by *North Carolina Super Lawyers* magazine as a top attorney in North Carolina.



Michael A. Colombo was named in the area of Estate Planning and Probate. Mr. Colombo is a past president of the North Carolina Bar Association and founding partner of Colombo, Kitchin, Dunn, Ball & Porter, L.L.P. He is a North Carolina Board Certified Estate Planning and Probate Specialist, and also practices in the areas of business planning and taxation law.



Dallas C. Clark, Jr. was named in the area of Family Law. Mr. Clark is a North Carolina Board Certified Family Law Specialist and is a past Board Member and Chair for the North Carolina Board of Legal Specialization. With more than forty years of experience, Mr. Clark practices exclusively in the area of family law.

Each year, the research team at *Super Lawyers* undertakes a rigorous multi-phase selection process that includes a statewide survey of lawyers, independent evaluation of candidates by the attorney-led research staff, a peer review of candidates by practice area, and a good standing and disciplinary check. The top 100 attorneys listing is based on the highest point totals in the North Carolina nomination, research, and blue ribbon process.

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On April 5, 2011, the Federal Department of Labor published clarifications to compliance and overtime regulations. These regulations were effective May 5, 2011.

One of the clarifications relates to tip pooling. Employers may take a “tip credit” under the FLSA against minimum wages paid to tipped employees. The revised regulations impose additional requirements. If tips are placed in a common pool for disbursement (a “tip jar”), then the pool can only include those employees who “customarily and regularly receive tips.” If non-tipped employees are included in the pool, the employer cannot take a tip credit but must pay full minimum wage.

The biggest change is that the employer must inform its employees in advance of certain things: (1) the amount of the cash wage that is to be paid to the tipped employee; (2) the additional amount by which the wages of the tipped employee are increased on account of the tip credit claimed by the employer, which may not exceed the value of the tips actually received by the employee; (3) that all tips received by the employee must be retained by the employee, except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and (4) that the tip credit shall not apply to any employee who has not been informed of these requirements. See 29 C.F.R. § 531.59 (2011).

A clarification to the overtime regulations pertains to certain uses of company vehicles. The employee is “on the clock” and the workday begins only when the individual first engages in principal activities. If he is engaged in activity for company benefit, he must be paid for the time. However, the use of an employee’s vehicle for travel and activities that are incidental to the use of such vehicle are not considered principal activities. During commuting, “communication between the employee and employer to obtain assignments or instructions, or to report work progress or completion” is not a principal activity, and is, therefore, non-compensable as overtime. Unfortunately, the Department of Labor did not provide any further examples in the regulation. See 29 C.F.R. parts 785 and 790 (2011).

While these FLSA revisions do not impose vast new requirements, employers should review the regulations to ensure they comply with the latest changes.

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