

THY WILL BE DONE

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The floodgate against acrimony and disagreement often remains secure until both Mom and Dad are gone. Then the family situation can vigorously erupt. This is an outline on a potentially costly aspect of insufficient estate planning - a Will contest. It includes a brief procedural outline of a Will contest with reference to difficult factors that quickly can become major hurdles in these disputes.

As discussed in more detail within this Outline, a Will contest is limited to the probate court determining whether a Will stands or falls in its entirety for purposes of controlling how a person's estate is to be distributed. A Will contest cannot address interpretative aspects of the Will or dealing with conflicting or ambiguous sections of the Will. These matters are generally addressed in a separate court proceeding (if necessary) after the Will is admitted as the valid Will.

Even where the Will situation is strong against attack, there often are disgruntled individuals who simply don't like the cards they are dealt under the terms of the otherwise valid Will. These individuals (often with a contingency fee lawyer) resort to using the Will contest procedure as a scorched-earth shakedown to force a settlement more favorable to themselves. The time, expense and cost-benefit considerations resulting from these types of shakedowns can be significant.

The best defense is prevention. This Outline touches also on preventive measures to help block the opportunity for a Will contest.

I. WHAT THE READER CAN GLEAN FROM THIS OUTLINE.

The key factors in this Outline are:

- Disputes and litigation involving estate planning documents can be very costly. Prevention is an imperative method of

helping reduce this expensive exposure.

- Using a revocable trust and the core estate planning document, typically called a Declaration of Trust, in lieu of the Last Will and Testament is a significant preventive measure.
- The formal steps for signing an estate planning document are rudimentary and straightforward, but are significant factors in helping prevent Will contests.
- The court-mandated temporary administrator status applicable to an estate during a pending Will contest realistically brings the estate administration to a halt. This burden can make a Will contest ripe for "shakedown settlement" exposure.
- *In terrorem* clauses with estate planning documents are typically not effective.
- Settlement agreements contrary to the terms of a Last Will and Testament are allowable under Georgia law without court approval. By contrast, a revocable trust (the above Declaration of Trust) is not easily changed by settlement and in all events requires court approval.

II. THE LETTERS TESTAMENTARY PROCESS.

In the absence of an objection to the Will, the probate court will issue a document to the named executor called Letters Testamentary. The term letters testamentary refers to the document issued by the probate court granting authority to the executor.¹ Three types of letters testamentary are discussed below.

A. Propounder of the Will.

The executor named in the Will has the responsibility of administering the estate as instructed by the provisions of the Will. Typically the executor named in the Will files the Will

¹ There are also other letters issued by the probate court involving, for example, estates where there is no Will (intestacy) or appointments of an administrator with the Will annexed. These are not addressed in this Outline.

with the probate court to begin the estate administration process. However, anyone who has an interest in the estate (including a creditor) can file the Will to begin this process.

The person who submits the Will to start the probate process is called the propounder of the Will.

B. Penalties for Not Filing a Known Will.

Georgia law requires that a known Last Will and Testament be filed with the probate court (even if not probated). O.C.G.A. § 53-5-5 mandates that any person having possession of a Will shall file it with reasonable promptness with the probate court of the county having jurisdiction. Penalties for failure to file a known Will can include a court order of contempt, fines and imprisonment for the person withholding a Will until it is delivered to the probate court.

C. Solemn Form.

Letters testamentary in solemn form gives the executor the fullest level of power and authority, including the authority to convey real estate on behalf of the estate. A petition to probate a Will in solemn form requires notice of the petition to all heirs of the testator and, if there is another purported Will with probate proceedings already pending, the petition in solemn form requires notice also to the beneficiaries and propounders of the pending purported Will. *See* O.C.G.A. § 53-5-22.

D. Common Form.

Letters testamentary in common form is a more limited degree of authority than solemn form. A common form probate ultimately becomes conclusive on all parties who have an interest in the estate four years after the date of the common form letters. *See* O.C.G.A. § 53-5-19. A probate in common form is not conclusive as to minor heirs until four years after the heir attains the age of majority.

E. Pendente Lite.

A third type of letters testamentary is referred to as “letters testamentary *pendente lite*” (pending litigation). This is the probate court’s letter of authorization for the propounder of a Will during a pending Will contest (called a caveat to the Will). This *pendente lite* status hits home directly on the significant problem created by a Will contest. That is, the *pendente lite* status gives the propounder of the Will no more powers for administering the estate than what a temporary administrator has over an estate. This is discussed further below under the “Will Contests as Shakedowns” heading.

F. Why Use Common Form?

The reason a propounder may prefer to obtain letters testamentary in common form is due to a need to obtain more immediate authority to act on behalf of the estate. To obtain common form letters, the probate court requires only the oath of one of the subscribing witnesses to the Will (or no oath if the Will includes a self-proving affidavit). No notice to anyone other than the probate court is required to obtain letters in common form, including no requirement of notice to the heirs of the decedent.

By contrast, a petition by the propounder to obtain letters testamentary in solemn form requires an oath from both subscribing witnesses (no additional oath if the Will includes a self-proving affidavit) and requires notice, acknowledgment, and consent by each of the heirs of the decedent.

As a practical matter the solemn form probate is essential. For estates that include real property, a purchaser of the real property from the estate will not agree and purchase the property under the authority of letters in common form unless the executor is operating under letters in solemn form, or alternatively all of the heirs consent to a petition and order from the probate court allowing the sale of the property.

III. WHAT IS A WILL CONTEST?

A Will contest is an attempt by a beneficiary or other interested party to have the probate court disregard the Will, with the result that the Will becomes invalid in its entirety. A Will contest is referred to as a caveat to the Will. If a Will is attacked and set aside, a prior version of the Will may possibly stand, assuming it meets all the necessary requirements for a valid Last Will and Testament.

If there is no valid previous Will, state law will apply to the administration and distribution of the estate under the laws of intestacy. [The term "intestate" means that a person dies without a Will; a person who dies "testate" dies with a Will.] A Will contest is an all-or-nothing attack. Either the Will stands or fails in its entirety.

A. The "Caveator" and "Caveat".

The person who files court papers in the probate court to try and set aside a Will is called the Caveator. The procedure is called a caveat to the Will.

B. Who Can File a Caveat to a Will?

The courts generally address the question of who has standing to caveat a Will on a case-by-case basis, with the general rule being that a Will may be contested by any person interested in the estate of the deceased, but cannot be contested by strangers.

An interested person is one who will be injured by probate of a Will, or who will benefit by its not being probated. *Lavender v. Wilkins*, 237 Ga. 510, 512(1), 228 S.E.2d 888, 890 (1976); *see also Doughty v. Futch*, 219 Ga. 677, 135 S.E.2d 286 (1964).

Can the executor named in a Will challenge an interested party's effort to file a later purported Will? No. *Melican v. Parker*, 283 Ga. 253, 657 S.E.2d 234 (2008).

Can a testamentary trustee named within a Will file a Caveat? Yes. Under the above *Melican* opinion, a testamentary trustee has standing as an interested party to file a caveat against a later purported Will. *Id.*

C. **Prima Facie Evidence of a Valid Will.**

The propounder of a Will is required to submit the Will for probate by showing the following *prima facie* factors to support the validity of the Will (*see* the next section about self-proving affidavits):

- (a) that the Will was executed with the formalities required by Georgia law;
- (b) that at the time the Will was signed the testator had sufficient mental capacity to make it; and
- (c) that as to the Will the testator acted freely and voluntarily.

D. **A Self-Proving Affidavit Attached to the Will.**

A self-proving affidavit signed by the testator, two witnesses, and a notary public, all in one another's presence, creates a *prima facie* presumption of the validity of the Will. *See Singelman v. Singelman*, 273 Ga. 894 (2001). Here is an excerpt from a self-proving affidavit with the key *prima-facie* elements underlined below:

[Being] duly sworn, the Testator declared to me [the notary public] and to the Witnesses in my presence that such instrument is the Testator's Last Will and Testament, and that the Testator willingly made and executed it as the Testator's free act and deed for the purposes therein expressed. The Witnesses, each on his or her oath stated to me, in the presence and hearing of the Testator, that the Testator declared to them that this instrument is the Testator's Last Will and Testament, and that the Testator executed same as such and wanted each of them to sign it as a witness; and upon their oaths each Witness stated further that they did sign the same as witnesses in the presence of the Testator and at the Testator's request; that the Testator was at that time 18 years of age or over and was of sound mind; and that each of the Witnesses was then at least 18 years of age.

E. Burden of Proof.

After the propounder files the above prima-facie showing with the probate court (can be nothing more the Will with an attached self-proving affidavit), the burden of proof in a Will contest shifts to the Caveator to come forward and prove undue influence, testamentary capacity or fraud.

Also, keeping in mind the above burden-of-proof requirements, Georgia courts have held that only evidence and testimony favorable to support an attack of the Will needs to be considered, as the sole question before the court is whether there is sufficient evidence from the Caveator to overcome the presumption of testamentary capacity. *See, for example, Ware v. Hill*, 209 Ga. 214, 71 S.E.2d 630 (1952); *Sullivan v. Sullivan*, 273 Ga. 130, 131, 539 S.E.2d 120, 121 (2004).

In other words, unlike most other civil litigation cases, the probate court in a Will contest is not weighing who - as between the propounder and the Caveator - has to present the preponderance of evidence, but rather what is the Caveator's evidence and is it evidence sufficient to overcome the *prima facie* validity of the Will.

F. Mere Allegations.

Again, keeping in mind the burden is on the Caveator to put forth credible evidence to overcome the *prima-facie* validity of the Will. Georgia law does not allow the Caveator to overcome this hurdle to set aside a Will based merely on allegations.

Thus, allegations alone also are not enough to continue or sustain a caveat proceeding. Georgia courts do not allow indulgence of mere suspicion of undue influence. *Hill v. Deal*, 185 Ga. 42, 45, 193 S.E. 858, 860 (1937); *Whitfield v. Pitts*, 205 Ga. 259, 273, 53 S.E.2d 549, 558 (1949).

G. Will Contest Versus Interpretation or Construction Issues.

The Will contest deals generally only with (i) the testamentary capacity of the decedent; (ii) the formalities for the signing and witnessing of the Will; and (iii) whether the decedent executed the Will without undue influence, fraud, or mistake. These factors are referred to as the issue of *devisavit vel non* (Latin for "did he devise or not?"). These factors also are sometimes collectively referred to as the "factum of the Will".

Thus, the sole issue before the probate court in a Will contest is *devisavit vel non*; that is, whether the document offered for probate is the valid Last Will and Testament of the testator.

A Will contest does not deal with interpretive or construction issues within the Will itself, nor with the validity of any particular terms or provisions within the Will. Interpretive or operational questions involving the Will can only be addressed after the Will is admitted for probate. See *Honeycutt v. Honeycutt*, 284 Ga. 42, 663 S.E.2d 232 (2008)(where a Will is properly executed by a person having testamentary capacity, the probate court should order it to probate and record, leaving all questions of construction and the fate of particular bequests for action of the parties or future direction in the proper court.)

IV. AREAS OF ATTACK FOR WILL CONTESTS.

The following items make up the general categories of ways in which a Will is often attacked in a Will contest. Typically the most preventable and also, unfortunately, one of the most frequent problem areas is the formality in the signing of the Will. This involves a fairly objective set of requirements and the failure to meet these requirements can be an extremely difficult (if not impossible) hurdle to overcome.

On the other hand, one of the most frequent and subjective avenues of attack is in assertion by the Caveator of undue influence. This can be a difficult issue, as it requires the probate court (or a jury) ultimately to decide where on the spectrum of facts undue influence falls sufficient to set aside a Will. As also indicated above, the burden of proof element is very important on this issue of undue influence in a Will contest proceeding.

A. The Possible Roll of the Dice with a Jury Trial.

One of the greatest threats is a Will contest is a jury's agreement with the Caveator that the testator lacked testamentary capacity or was unduly influenced in signing her Will. The question of whether undue influence existed at the level to set aside a Will, in particular, is extremely subjective and, if put before the fact-finding jury, can result in the Will successfully being set aside. A retired judge recently made a comment that should be instructive to all litigation clients: "When I was on the bench, I never saw a case someone could not lose."

B. Formality in Signing a Will.

Here are the statutory requirements under Georgia law for the formal signing and execution of a Last Will and Testament. O.C.G.A. § 53-4-20, captioned "Required Writing; Signing; Witnesses; Codicil", requires:

- (a) A Will shall be in writing and shall be signed by the testator or by some other individual in the testator's presence and at the testator's express direction. A testator may sign by mark or by any name that is intended to authenticate the instrument as the testator's Will.
- (b) A Will shall be attested and subscribed in the presence of the testator by two or more competent witnesses. A witness to a will may attest by mark. Another individual may not subscribe the name of a witness, even in that witness's presence and at that witness's direction.
- (c) A codicil shall be executed by the testator and attested and subscribed by witnesses with the same formality as a Will.

As set forth in the statutory requirement above, Georgia law does not require the testator to sign the Will in the presence of the two witnesses, as long as the testator shows the witness her signature and acknowledges it is the signature on her Last Will

and Testament. Also, under Georgia law the two witnesses do not have to be together at the time each one signs and acknowledges the testator's signature. *See also, for example, [North Carolina] N.C. Gen. Stat. Ann. § 31-3.3 (West)*

However, some other states may require a common law "line of sight" witnessing of the witnesses actually being able to see the testator sign her Will in both witnesses' presence. Therefore, if possible the belt-and-suspenders approach in any state (even Georgia) is to get the testator to acknowledge and sign her Will within the line-of-sight of both witnesses and a notary public. All together at the same time.

The notary public is also required for the self-proving affidavit already referred to above.

C. Testamentary Capacity.

As a threshold point under Georgia law, a person who is under age 14 cannot make a Will. The primary requirement for testamentary capacity, assuming the person is 14 or older, is that the individual has a decided and rational desire as to the disposition of his or her property. *See O.C.G.A. § 54-3-11.* The Georgia courts have held that neither advancing age nor eccentricity of habit or thought is inconsistent with the testamentary capacity to make a Will. *See Norman v. Hubbard*, 203 Ga. 530, 47 S.E.2d 574 (1948); *Burchard v. Corrington*, No. S10A0941, 2010 WL 3619947 (Ga. Sup. Ct., Sept. 20, 2010).

Georgia law essentially requires that a person have testamentary capacity only at the time of signing his or her Will. However, Georgia courts have also held that evidence of incapacity during a reasonable time before and after a person signs his or her Will creates an issue of fact as to the capacity of the person at the time of signing the Will. *See, for example, Sullivan v. Sullivan*, 273 Ga. 130, 539 S.E.2d 120 (2000).

Old age and bad health are not factors alone to show lack of testamentary capacity. *See, for example, Strong v. Holden*, 287 Ga. 482, 697 S.E.2d 189 (2010)(testator did not lack the requisite capacity simply because she was elderly, hospitalized, physically weak, vomiting and taking prescribed medications).

Compare Sullivan, 273 Ga. 130 (evidence authorized finding testator lacked testamentary capacity where oncologist testified he was incapacitated, hallucinating, and irrational in weeks before Will was executed).

D. Undue Influence.

This is the most subjective aspect of a Will contest and is ripe for a potentially adverse outcome even with the barest of facts to support the undue influence. The law presents technically a high hurdle for a successful undue influence allegation. However, as discussed above, the roll-of-the-dice jury factor in arriving at a conclusion of the facts can sometimes push a subjective element of the case surprisingly in favor of a Caveator's assertion.

As a matter of law, undue influence is where the will of another is substituted for the wishes of the testator. *Crumbley v. McCart*, 271 Ga. 274, 517 S.E.2d 786 (1999). Evidence showing only that the deceased placed a general trust and confidence in the primary beneficiary is not sufficient to trigger the rebuttable presumption that undue influence was exercised. *King v. Young*, 222 Ga. 464, 467, 150 S.E.2d 631, 633-4 (1966).

As to undue influence in a Will contest, Georgia courts place a stringent standard that a Caveator must overcome in order to set aside a Will because to do otherwise is to deprive a person of the valuable right to dispose of her property as she wishes. *Pope v. McWilliams*, 280 Ga. 741, 743, 632 S.E.2d 640, 643 (2006). However, again, the theoretical burden on the person challenging the Will is difficult; whereas, the burden to try and force a shakedown settlement is much less difficult.

Evidence of both an opportunity to influence and a substantial benefit under the Will does not alone point to undue influence. *Quarterman v. Quarterman*, 268 Ga. 807, 493 S.E.2d 146 (1997). See *Crumbley v. McCart*, 271 Ga. at 275 (evidence showing only that the deceased placed a general trust and confidence in the primary beneficiary is not sufficient to trigger the rebuttable presumption that undue influence was exercised). See also *McGee v. Ingram*, 264 Ga. 649, 651, 448 S.E.2d 439, 441

(1994)(even if it could be said that evidence raises a suspicion that the propounder exercised undue influence over the testator at the time he executed the Will, the Caveator failed to show that the propounder exercised such force or duress that destroyed the testator's free agency as to his Will.).

E. **Fraud.**

This speaks for itself. A Will that is the product of fraud is invalid (and should be).

V. **THE STATUS OF TEMPORARY ADMINISTRATOR AND THE SHAKEDOWN.**

This is the **most important point** in this outline.

The letters testamentary *pendente lite* so drastically ties the executor's hands that the administration of the estate and the management of the assets become almost impossible during the pending Will contest litigation. Thus, the Caveator essentially kidnaps the estate while the case is in litigation, ripe for demands by the Caveator for ransom. The ransom becomes the basis of a shakedown settlement.

The reason for this virtual kidnapping is that the letters *pendente lite* places severe limitations on the named executors during the pending caveat. These limitations allow the executors to do nothing more than act as a "temporary administrator" of an estate as limited under O.C.G.A. § 53-7-4.

Section 53-7-4 reads:

Temporary administrators, pending the appointment of a personal representative, and executors, pending litigation of caveats to wills, are authorized to carry out existing contracts of the decedent, carry on the business of the decedent, and do such acts as are necessary for the protection and preservation of the estate provided proper orders are secured from the probate court after due notice to all parties in interest.

Read this paragraph carefully. The *pendente lite* temporary status of the executor means that virtually every task for administering the

estate (paying bills, paying taxes, paying legal fees for the litigation, selling property, borrowing funds for liquidity) will require filing papers with the probate court requesting an order of approval. Of course, these papers prior to the court order (if the order is granted) have to be served on the Caveator for her input and objection.

This drag on moving the estate forward can frustrate the parties so completely that the Caveator is often able to force some level of settlement more favorable than what she would have received absent the Will contest.

VI. RELATED CONCEPTS FOR WILL CONTESTS.

A. Summary Judgment.

Summary judgment is an important type of court motion (court papers) used frequently in litigation cases. A party's Motion for Summary Judgment is the filing of court papers setting forth an attempt to persuade the court that there are no remaining material issues of fact that need to be determined by the court or by a jury.

In other words, it is an argument that there already exists sufficient evidence to support the material facts in the proceeding. Thus, a party who files a motion for summary judgment is at the time asking the court to decide the case at that time and uphold the conclusion and finality of the case as argued within the motion for summary judgment. A court can grant (approve) a motion for summary judgment if the pleadings (court papers), depositions, answers to interrogatories, and admissions, together with affidavits (if any) show there is no genuine issue as to any material fact.

This summary judgment procedure can be a very effective way to short-circuit a litigation proceeding and eliminate the need ultimately for a trial of the case before the judge or a jury. But, the flip-side of this benefit is that the case has to be virtually tried during the discovery stage in order to arrive at a point of filing a motion for summary judgment. This typically means that the parties and key witnesses are fully subject to the discovery process, including production of documents and deposition testimony. This can be very expensive.

The summary judgment standard is no different in a probate case. *Gilley v. Hudson*, 283 Ga. App. 878, 879, 642 S.E.2d 898, 899 (2007) (citing O.C.G.A. § 9-11-56(c)).

After the propounder of a Last Will and Testament carries his or her *prima facie* burden, summary judgment must be granted unless a Caveator can produce admissible evidence showing the existence a genuine issue of material fact. *See, e.g., Sherrill v. Stockel*, 252 Ga. App. 276, 278, 557 S.E.2d 8, 11 (2001). Affidavits opposing summary judgment "must be made on personal knowledge and must set forth such facts as would be admissible in the evidence." *Id.* (citing O.C.G.A. § 9-11-56(e)). "[A]ll hearsay evidence, unsupported conclusions, and the like, must be stricken or eliminated from consideration in a motion for summary judgment." *Id.*; *see also, Liles v. Innerwork, Inc.*, 279 Ga. App. 352, 353, 631 S.E.2d 408, 410 (2006). "A self-serving, conclusory affidavit not supported by fact or circumstances is insufficient to raise a genuine issue of material fact." *Id.*

B. In Terrorem Clauses.

Some clients will include an *in terrorem* clause (a no-contest) clause in their Last Will and Testament as a defensive measure to try and eliminate disputes and litigation about the Will. This is typically a clause in the Will stating that a person who objects to the Will is cut out of the Will.

If effective, an *in terrorem* clause may only apply to an actual Will contest situation. It does not apply if a beneficiary under a Will wishes to seek a judicial determination about the construction of interpretation of certain rights under the Will or a declaratory judgment as to how certain rights are affected among different beneficiaries, and so forth.

One of the hurdles for many clients in using an *in terrorem* clause is that the clause is valid only if it specifies a specific person(s) who will get the estate property in place of the other person who seeks to contest or challenge the validity of the Will. An *in terrorem* clause merely stating that a beneficiary who seeks to contest the Will will be deemed to have predeceased the decedent is not effective and will render the *in*

terrorem clause void. See, for example, *Linkous v. National Bank of Georgia*, 247 Ga. 274, 274 S.E.2d 469 (1981).

Thus, for many clients an *in terrorem* clause greatly hinders the ability to control how and to whom property will pass in the event a beneficiary is cut out of the Will for seeking the challenge or contest.

C. Can You Challenge the In Terrorem Clause?

The answer is 'yes'. An interested party under a Will may not be able to challenge the validity of a Will due to the possible adverse consequences of an *in terrorem* clause. But, that interested party may be able to challenge the validity of the *in terrorem* clause itself. See *Kesler v. Watts*, 218 Ga. App. 104, 460 S.E.2d 822 (1995)(a legatee under the Will is entitled to a declaration by the court concerning the validity of the *in terrorem* clause); see also O.C.G.A. § 9-4-4(a)(3) that provides, in part: "any person interested as ... [a] legatee ... may have a declaration of rights or legal relations in respect thereto and a declaratory judgment ... [t]o determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings."; O.C.G.A. § 9-4-1 also provides that this statute is to be liberally construed and administered so as to "afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations"

D. Dead Man Statute.

The Dead Man Statute is a reference to a litigation evidence rule. This rule prohibits introducing evidence in a trial about discussions or communications with a person who is now dead, if the evidence is against the deceased person or against his estate.

An example is a person asserting in a caveat trial that she is the virtually adopted child of the decedent who told her while he was alive that he viewed her as his child and planned to include her in his Will. This testimony from the child - here seeking a share of the estate (thus, against the estate) - about what the decedent said to her is inadmissible under the Dead

Man Statute. *See, for example, Willis v. Kennedy*, 267 Ga. 165, 476 S.E.2d 246 (1996)(dealing with the virtual adoption situation described above).

However, Georgia now does not follow the Dead Man Statute. Prior Georgia Code Ann. § 38-1603 was amended in 1979 to eliminate application of the Dead Man Statute for all discussions and communications that occur after July 1, 1979.

There are other states that presently still apply the Dead Man Statute.

E. Who Opens and Closes the Argument Before the Jury?

This deals with which party in a caveat trial gets to stand first before the jury to begin the closing argument after the presentation of the evidence. Under Georgia law the propounder of the Will stands first and last before the jury for the closing argument, with the caveator's argument to the jury in between. Thus, the propounder gets two bites at the argument. *See McGee v. Loftin*, 228 Ga. 142, 143, 184 S.E.2d 578, 579 (1971).

VII. SETTLEMENT AGREEMENTS CONTRARY TO THE TERMS OF THE WILL.

A. Settlement Contrary to the Terms of a Will.

Georgia law allows the individuals who have an interest under a Will to arrive at an agreement for disposition of the estate property contrary to the terms of the Will. *See* O.C.G.A. § 53-5-25. Any such settlement must be in writing and must be agreed upon by all heirs of the testator and all beneficiaries affected by the settlement. Although not mandatory, O.C.G.A. § 53-5-25(a) provides that the court may approve the settlement agreement. *See, for example, Leone Hall Price Foundation v. Baker*, 276 Ga. 318, 577 S.E.2d 779 (2003)(no requirement that settlement agreements contrary to Will be approved by the court).

B. Declaration of Trust (Revocable Trust).

The above areas of attacking a Will are often within a short of time (*e.g.*, the day the Will was signed) focusing on the circumstance surrounding that date.

By contrast, the use of a revocable trust, often called a Declaration of Trust, as a person's primary estate planning document expands the time period during which a court (or jury) can conclude the decedent knew what they were doing and what the trust provisions are for the disposition of the person's property. This defense is bolstered even more if the decedent while alive actually had property (such as investment accounts) in the name of the trust. This helps indicate the trust document was a known, active part of the decedent's planning..

VIII. PREVENTIVE MEASURES FOR AVOIDING WILL CONTESTS.

A. Do It Right.

Don't overlook or skimp on the details for the proper, formal, and uncluttered preparation and signing of core estate planning documents, particularly if a Will is the primary document. Don't create facts that can even lend themselves to the appearance of undue influence, lack of formality, lack of testamentary capacity (and, of course, absolutely no element that even comes close to a perception of fraud). This requires careful review of the process and mechanics for the preparation of signing of the documents. It also requires competent and capable witnesses.

B. Don't Have Chinks in the Armor.

The estate planning documents need to be written with the level of precision that does not leave openings for questions, inferences, gaps, and so forth. These can provide chinks in the armor as inroads to litigation over the document.

C. Who Is the EP Client?

This is an area that creates an abundance of litigation problems, particularly if these facts make way to a jury. That is, make absolutely sure the lawyer who prepares the estate planning documents is the testator's lawyer and is giving her independent counsel. In other words, don't drive your elderly mother to your own real estate lawyer and ask him to prepare her Will. Don't sit in on every meeting with your mother while your other siblings are 600 miles away. Don't do the talking with the lawyer for your mother. These are but a few examples of factors the Caveator can capitalize on for the jury to create the impression (or reality) of undue influence.

D. Avoiding Undue Influence.

As stated above, this is the weakest and most subjective link in the chain of defending against a Will contest. Use common sense and don't engage in any actions (again, such as driving mother to your own real estate lawyer for her new Will; or, having private discussion, e-mails, *etc.*, with mother about reducing brother George's share of her estate, *etc.*).

Frankly, don't engage in any actions pertaining to a person's Will that you are not willing to have a judge or jury examine under full spotlight (whether or not you believe the judge or jury could ever be justified in drawing a negative or unreasonable conclusion about what you did).

Reality in these situations is not reality. Perception is the reality you will be having to address.

E. Precatory Explanations.

"Precatory" sentences in a legal document are not the technically binding provisions, but rather are informal statements by the testator of intent or explanations. Such as "I am fully aware the provisions in my Will include trust provisions only for my son John with my other children getting their shares outright." These types of precatory statements in the Will are important in getting this information in front of the court or jury, as generally documents and statements not

contained in the Will itself are not admissible as evidence (called parol evidence). They are particularly important where some beneficiaries under the Will are treated differently than others or are purposely omitted as beneficiaries.

F. Year's Support Claims.

Even with the best written Will that can withstand attack in a Will contest, no Will can withstand a year's support claim. The term "year's support" is a claim by a surviving spouse or minor children against the estate for a share of the estate, regardless of the provisions in the testator's Will. This is sometimes referred to as a claim against the Will. See O.C.G.A. § 53-3-5, *et seq.* The details of a year's support claim are beyond this Outline. In other words, this claim can apply contrary to the terms of the Will regardless of who else are beneficiaries named in the Will.

A year's support claim applies only against property passing under the terms of a Will. It does not apply to non-probate property. Thus, a preventive measure to help insulate against a year's support claim is to use a revocable trust as the core estate planning document with the property in the name of the trust at the time of death (don't wait for a pour-over Will funding of the revocable trust).

The preventive measure is often important in second marriage situations.

G. Declaration of Trust (Revocable Trust).

This is worth repeating, and as already discussed above, a core revocable trust as the person's primary estate planning document, called a Declaration of Trust, is an excellent defense against a Will contest and a year's support claim.

H. Marriage or Birth or Adoption of Child after the Making of a Will.

Disputes and disagreements can arise where a Will has the effect of excluding a specifically-named child. This question also frequently arises where, for example, a client has only two children at the time she signs a new Will and thereafter has

additional children. The client's concern is whether the additional children are covered under the Will. Georgia law, at O.C.G.A. § 53-4-48(b), provides that a provision in a Will for a class of children is presumed to include the contemplation of the birth of adoption of additional children as members of that class, absent a statement in the Will to the contrary. This statutory provision also states that the mere identification in the Will of children already born (the two children in this example) will not defeat the presumption that further children born or adopted are included in the Will.

I. Failure to Contemplate Marriage or Future Children.

Keep in mind, the preceding discussion is for the situation where children are included in the Will with a concern about future born or adopted children. By contrast, if the Will includes no reference to marriage or to children, the Will is deemed revoked if there is a marriage or birth or adoption of children to the extent provided in O.C.G.A. § 53-4-48(c). This provision gives the subsequent spouse or child a share of the estate as if the testator had dies intestate (meaning no Will). The other provisions of the Will remain effective, except to the extent of these intestate distributions.

A person can include language in a Will stating that the Will is to stand regardless of a future marriage or children. In this event, this statutory revocation will not apply.

J. Formality of Signing the Documents.

This speaks for itself. There simply is no excuse in fouling up this technical aspect for the signing and execution of a Will. And, always use a self-proving affidavit.

K. Remedial Georgia Statute for Deaths During 2010.

The Georgia legislature enacted O.C.G.A. § 53-4-75 to help reduce issues and disputes for individuals dying during 2010 without updated estate planning documents to take into account the no-estate tax environment. This statute provides that references within a Will or trust to federal estate and GST nomenclature, such as "applicable exemption amount",

“applicable exclusion amount”, or “GST exemption”, shall be deemed to refer to the federal estate and GST tax laws as though the decedent died December 31, 2009.

L. To My Heirs.

This reference “to my heirs” compared to “to my then living heirs” can cause considerable disagreement. Under Georgia law, the term “heirs at law” are determined at the date of death of the testator, rather than as of the date of death of the last life beneficiary. See *Epstein v. First National Bank*, 260 Ga. 217, 391 S.E.2d 925 (1990).

M. Finally, Spell the Names Correctly.

This almost sounds facetious, but I am always surprised at the extent to which clients will not point out that their lawyer has misspelled a name of a beneficiary (and in rare cases the client’s own names) within the estate planning document. Whether this is due to a client’s unreasonable deference to her lawyer or simply oversight on the part of both the client and lawyer, misspelled names can give a Caveator a great theme before a jury to frame an argument the testator did not know what is included in the Will as to the disposition of her estate. After all, what might a jury think if the testator did not even notice the misspelled names of her own children?