What We Know

ARTICLES & INSIGHTS

ABOUT THE AUTHORS

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Thurston Debnam, who received his undergraduate and law degrees from Wake Forest University, is one of the founding partners of Smith Debnam and the Section Head of the Business Law practice group. He is certified as a civil Superior Court mediator. Thurston concentrates his practice in the areas of business and corporate planning and real estate law, including land use

What is a Will Caveat and How Can it be Avoided?

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When individuals finally decide what they would like done with their assets at their death, they will usually consult with a lawyer who is familiar with will probate, estate planning, and other elder law issues. Once the final determinations have been made, usually after one or two conferences with the attorney and other professionals, the attorney typically prepares the will, using forms and formats that have been proven in the past to be appropriate and proper. The client then reviews the document and if he or she is satisfied, a very formal signing procedure is followed. First, the client reads the will and states that he or she is satisfied with its contents and that it carries out his or her intentions. That statement is then made in front of two impartial witnesses and a notary. The client then signs the will in the presence of the two witnesses and the notary. The two witnesses then sign the will in the presence of the client and the notary. Finally, the notary acknowledges those signatures in the appropriate format.

Once a Last Will and Testament is prepared with those formalities, most people would assume that the will is a solemn document and will be followed and honored after their death. Most of the time, this assumption is correct. The will cannot be changed or attacked unless the client chooses to change it prior to his or her death.

However, death and the probate of wills have a way of occasionally creating more controversy than the decedent expected. If one of the heirs of a decedent feels that he or she was slighted by getting less than they thought they should have received from the decedent or by being omitted from the decedent's will entirely, they may wish to raise serious questions. "I was always told that I was going to receive the farm from my daddy, but I didn't. What can I do about this?" The answer most of the time is that you can do nothing about it. It was the decedent's property, he or she devised it in their will in the way they intended, and it is their right to do so.

In some situations, however, the person complaining about how the will was written may have a remedy. If that person has specific factual information that would prove that the decedent was not competent or lacked the capacity to make a will at the time the will was executed, that fact, if true, could void the will. In addition, if the unhappy heir can prove with specific facts and circumstances that someone else was exerting

planning and zoning. For more than thirty years, Thurston has maintained a broad-based business practice, assisting clients with business and corporate planning and handling land development and real property issues and transactions.

undue and improper influence over the decedent at the time he executed the will, that fact, if proven, can void the will.

A real world example of this process could go something like this:

Daddy, who is a widower, dies in July and leaves everything to his daughter and nothing to his son. Daddy signed the will in May, two months before he died. Son is, of course, unhappy with this resolution, believing that he should receive at least half of daddy's assets. Son goes to a lawyer and reveals the fact that daddy was suffering from Alzheimer's disease, which had been diagnosed as early as May of the previous year, before he signed the will. In addition, son tells the lawyer that daddy lived with his sister, who was with him virtually all the time and even took daddy to the lawyer's office back in May to sign the will. Of course, son believes his sister unduly influenced his daddy to leave everything to her, which influence was easily accomplished given that daddy was suffering from Alzheimer's disease and being cared for by his daughter. Son might have a witness who would know that daughter told daddy she would put him in a rest home if he did not change his will. Son might have a statement from daddy's doctor saying daddy was not competent in May when he signed the will because the doctor examined daddy two days before the May will was signed.

Under those facts, son might well have specific evidence of lack of capacity and undue influence, which would allow him to file a will caveat action objecting to the probate of daddy's May will. Once the caveat was filed, all probate actions on daddy's May will would stop until the question of whether or not the May will was valid and enforceable is resolved. The caveat proceeding can take as much as one to two years to resolve. If the parties cannot resolve it themselves, it will ultimately be decided by a jury, who must answer the question as to whether or not daddy lacked capacity to make a will when he signed it in May and whether daddy was under the undue influence of his daughter when he signed the will.

What steps can someone take to avoid a will caveat?

Most importantly, they need to consult an attorney who is familiar with the execution of wills, estate planning, and other elder law issues. An attorney who has been involved in these matters in the past will know the red flags that might be present and will take whatever steps are available to mitigate the possibility of a caveat. It is imperative if there is any evidence of lack of mental capacity to make a will, the testator (the person making the will) should be examined by a physician at or about the time that he or she is executing the will. Hopefully, the physician would state the opinion, based on specific facts the doctor observed, that the testator at that time had the mental capacity to understand what a will was, to understand what his or her property was, to know who his or her family was, and to know the effect that making a will would have on his property and his family. To avoid the undue influence issues, an experienced lawyer will never allow someone else to be in the conference with the lawyer and the person making the will. The lawyer will ask questions of the testator to satisfy himself that this will is the result of the testator's own desires and not the inappropriate, improper and undue influence of someone else.

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