Ungumming the Works: Summary Judgment in Will Caveats based on Lack of Capacity or Undue Influence

By Morgan H. Rogers

Nothing gums up the works of probate quite like a will caveat. A caveat proceeding is "an attack upon the validity of the instrument purporting to be a will," which is filed by the "caveator." **In re Will of Mason**, 168 N.C.App. 160, 162, 606 S.E.2d 921, 923 (2005). Anyone claiming that the will is valid may participate in the proceeding as a "propounder." Caveators can make a number of challenges to the validity of the will. Among some of the most common reported challenges are that the testator lacked the requisite capacity to make a will, or that the will was procured by undue influence. *See* **In re Estate of Whitaker**, 144 N.C.App. 295, 298, 547 S.E.2d 853, 856 (2001) (sets forth the elements for testamentary capacity); **In re Will of Campbell**, 155 N.C.App. 441, 454, 573 S.E.2d 550, 560 (2002) (sets forth the elements for undue influence).

A caveat proceeding must be resolved before the estate can be closed. *See* N.C.G.S. §31-36. Propounders that are anxious to probate the will and close the estate may feel hijacked by a lengthy caveat proceeding. Propounders may also want to avoid testimony before a jury that the deceased did not have testamentary capacity, or was duped into making the will.

North Carolina courts have historically required all caveat issues to be tried by a jury, without exception. However, recent cases allow summary judgment in favor of the propounder when there is insufficient evidence of lack of capacity and undue influence.

Older Authorities State that Caveats "Must be Tried by a Jury." *See* **In re Hine's Will**, 228 N.C. 405, 410, 45 S.E.2d 526, 529 (1947). N.C.G.S. Section 31-33(a) states, "Upon the filing of a caveat, the clerk shall transfer the cause to the superior court for trial by jury." *(emphasis added)*. The legislature recently amended N.C.G.S. Section 31-33, without making any changes to the quoted provision in subparagraph (a) of that statute. S.L. 2014-115 (Aug. 11, 2014).

Older North Carolina opinions are uniform in holding that, "on the issue raised by caveat, as provided by the statute, the issue must be tried by a jury and not by the judge." **Hine's Will**, at 410, 45 S.E.2d at 529; *see also* **In re Hinton's Will**, 180 N.C. 206, 104 S.E. 341 (1920); **In re Westfeldt's Will**, 188 N.C. 702, 125 S.E. 531 (1924); **In re Roediger's Will**, 209 N.C. 470, 184 S.E. 74 (1936); **In re Redding's Will**, 216 N.C. 497, 5 S.E.2d 544 (1939); **In re Ellis' will**, 235 N.C. 27, 69 S.E.2d 25 (1952); **In re Will of Hodgin**, 10 N.C.App. 492, 179 S.E.2d 126 (1971).

These opinions state that the judge may not enter nonsuit, hear any evidence, or find any facts, even on an agreed statement of facts from the propounder and caveator. *Id.* While these cases do not address the propriety of summary judgment, they suggest that such a remedy would not be appropriate since it is entered by a judge. *See* N.C.R.C.P. 56, adopted by S.L. 1967-954 (Jun. 27, 1967).

The Emergence of Partial Summary Judgment in Caveats. Beginning in the 1980's, the Court of Appeals has held that the trial judge may enter a directed verdict on the issues of testamentary capacity and undue influence. **In re Will of Womack**, 53 N.C.App. 221, 280 S.E.2d 494 (1981) (holding that it was error for the trial court to deny directed verdict for propounder on issues of undue influence and lack of capacity); **In re Will of Coley**, 53 N.C.App. 318, 280 S.E.2d 770 (1981) (affirming directed verdict for propounder on testamentary capacity and undue influence); **In re Will of Jones**, 114 N.C.App. 782, 443 S.E.2d 363 (1994) (affirming directed verdict for propounder on undue influence); **In re Will of Sechrest**, 140 N.C.App. 464, 537 S.E.2d 511 (2000) (affirming directed verdict for propounder on testamentary capacity and undue influence).

As set forth below, the acceptance of summary judgment in appellate opinions did not gain steam until the twenty-first century. Obtaining summary judgment is generally preferable to the propounder because the court grants summary judgment well in advance of trial, whereas the court cannot grant a directed verdict until the party opposing directed verdict has submitted all of its evidence at trial. N.C.R.C.P. 50(a); 56(a), (b).

In a 2002 case, **In re Will of Campbell**, the Court of Appeals stated that summary judgment is appropriate as to issues such as undue influence, but not on the validity of the will, which is known by the Latin phrase, "*devisavit vel non*":

> While it is true that the issue of *devisavit vel non* (a determination of whether the will is valid) must be tried by a jury, it does not follow that partial summary judgment as to other issues (such as undue influence) is prohibited.

155 N.C.App. at 450, 573 S.E.2d at 558 (citations omitted). The Court of Appeals affirmed partial summary judgment as to undue influence, and affirmed a jury verdict on the validity of the will. *Id.*, at 461, 573 S.E.2d at 564. *See also* **Whitaker**, *supra*, 144 N.C.App. 295, 547 S.E.2d 853 (affirming the trial court granting summary judgment in favor of the propounder on the issues of testamentary capacity and undue influence, and affirming the jury verdict on *devasavit vel non*); *cf.* **In re Will of McCauley**, 356 N.C. 91, 565 S.E.2d 88 (2002) (holding that the trial court erred in granting summary judgment for the caveators and properly denied summary judgment for the propounders); **In re Will of Priddy**, 171 N.C.App. 395, 614 S.E.2d 454 (2005) (reversing summary judgment for propounder on issues of undue influence, testamentary capacity and compliance with formalities required for valid will).

In 2005, Judge Levinson issued a thoughtful Court of Appeals opinion in **In re Will of Mason**, which states that, "summary judg-

ment may be entered in a caveat proceeding in factually appropriate cases." 168 N.C.App. at 165, 606 S.E.2d at 924. The Court of Appeals recently cited this holding in **In re Will of Fuller**, 2015 WL 5825544, *3 (N.C. App. Oct. 6, 2015) (unpublished).

In **Mason**, the caveators claimed that a 1992 will and a 1994 codicil were revoked by a 1996 will, and the propounders claimed that the 1996 will was invalid on the grounds of lack of capacity, undue influence and duress. **Mason**, at 161, 606 S.E.2d at 922. The jury returned verdicts that the decedent had the requisite capacity to make the 1996 will, but that the 1996 will was procured by undue influence and duress. *Id.* at 161-62, 606 S.E.2d at 922. The trial judge entered judgment that the 1996 will was invalid, and upheld the 1992 will and the 1994 codicil. *Id.* at 162, 606 S.E.2d at 922. *See also* **In re Estate of Propst**, 164 N.C.App. 410, 595 S.E.2d 815, No. COA03-909 (May 18, 2004) (unpublished), which affirms summary judgment on undue influence and testamentary capacity, and the opinion is unclear whether it grants summary judgment on *devisavit vel non*.

On appeal, the caveator argued that the trial court erred by not submitting to the jury the issue of the validity of the 1992 will and the 1994 codicil. **Mason**, at 163, 606 S.E.2d at 923. The Court of Appeals held that the trial court's decision on the 1992 will and 1994 codicil was effectively a directed verdict, which is proper in a caveat proceeding. *Id.* at 166, 606 S.E.2d at 925.

Accordingly, as of the time of the Court of Appeals opinion in **Mason** in 2005, North Carolina cases suggested that the propounder must proceed to a jury trial on the validity of the will, and may obtain directed verdict at trial. Since then, the Court of Appeals has given propounders hope that they can avoid a trial date altogether.

The Whole Kit and Kaboodle: Summary Judgment on *Devisavit Vel Non*. In 2010, the Court of Appeals issued its opinion in **In re Will of Durham**, affirming summary judgment in favor of the propounders that the will was valid and was not procured by undue influence. 206 N.C.App. 67, 698 S.E.2d 112 (2010). In doing so, the Court of Appeals appears to have accepted that a judge can dispose of the issue of *devisavit vel non* on summary judgment, without the case having to proceed to trial:

> Were we to hold that a genuine issue of material fact as to the validity of the February 20, 2006 will arose from the failure of the notary's affidavit to address the identification issue, no self-proved will would be sufficient to support and sustain a summary judgment motion in a caveat proceeding. Such a result is inconsistent with the very concept of a self-proved will. As a result, the trial court properly granted summary judgment in Executors' favor on the execution issue.

Id. at 88, 698 S.E.2d at 128. The precedent set in **Durham** is significant because it states that a propounder can obtain summary judgment on all issues in a caveat, including *devisavit vel non*, even if such issues are contested.

In **In re Will of McNeil**, the Superior Court of Wake County granted the propounders motion for summary judgment, and on that basis, dismissed the entire caveat proceeding before trial. 2012 WL 10271821 (N.C.Super. Dec. 13, 2012). The Court of Appeals affirmed, holding that summary judgment was appropriate as to testamentary capacity, undue influence, and *devisavit vel non*. **In re Will of McNeil**, 749 S.E.2d 499 (2013). Unlike the caveator in **Durham**, the caveator in **McNeil** did not challenge the validity of the will at issue. *Id.* at n.1. Nevertheless, **McNeil** is important because it confirms the holding in **Durham** that summary judgment is not prohibited on the issue of *devisavit vel non*.

Tactical Decisions in Summary Judgment Motions. Based on the language of **Durham** and **McNeil**, a propounder has strong precedent to support a motion for summary judgment for complete dismissal of a caveat. That said, the North Carolina Supreme Court has not clearly stated that it would affirm summary judgment on *devisavit vel non*, despite having the chance to weigh in on the issue. In **In re Will of McCauley**, the Court of Appeals affirmed summary judgment in favor of caveators that argued the will at issue should be set aside because it was revoked by a subsequent will. 147 N.C.App. 116, 554 S.E.2d 13 (2001). Justice Campbell concurred, calling attention to the Court's note that the subsequent will could not be probated until the issue of *devisavit vel non* was tried by the jury. The Supreme Court reversed, holding that there were issues of fact as to the revocation, without commenting on the requirement of a jury trial on *devisavit vel non*. 356 N.C. 91, 565 S.E.2d 88 (2002). Accordingly, it is unclear whether the Supreme Court would affirm summary judgment on the issue of *devisavit vel non* if it was challenged on appeal.

Propounders are left with the tactical decision of whether to move for summary judgment on all issues, or whether to move for summary judgment on all issues except *devisavit vel non*. The obvious benefit to moving for summary judgment on all issues is that the caveat may be dismissed in one fell swoop. However, given the Supreme Court precedent on the issue, a caveator has at least a good faith basis to make that argument, and tie up the estate administration during a lengthy appeal.

The benefit to reserving *devisavit vel non* for trial is that it avoids the potential thorny issue on appeal as to whether *devisavit vel non* can be resolved on summary judgment. Assuming that a propounder can win summary judgment as to all issues except *devisavit vel non*, and assuming that the will complies with the statutory requirements (*see* N.C.G.S. §§31-3.1 through 31-3.6), a trial on *devisavit vel non* should be straightforward.

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