Will and Trust Caveats:
What every estate planner should know about the litigation of caveats

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Estate planners often do not focus on how decisions made as part of the estate planning process can affect litigation seeking to set aside a will or revocable trust. In addition, estate planners should be prepared to answer clients' questions about how a caveat would likely proceed if a challenge was made to the clients' estate planning documents. This presentation will identify several commonly litigated issues in caveats and then present both sides of the argument made to the court by propounders and caveators with respect to the issue. The audience will serve as the "judge" in deciding in whose favor the issue should be resolved.

I. Fact Pattern for Outline

Edith Smith died eight months ago at the age of 89. She was a widow—her husband having passed away 16 years ago. Edith has three children—Sam age 64, Carolyn age 61 and Robert age 53. Edith's husband was a successful businessman and Edith herself inherited several assets from her parents when they died. As a result, Edith's estate consists of several real estate holdings, all in North Carolina, with a value of $5 million and various stocks, bonds, cash and other assets totaling another $4 million. Edith is also the lifetime beneficiary of a $3 million Family Trust. Edith and her husband worked over the years with their long time estate planning attorney, John Jones, to put in place an estate plan that accomplished their goals and objectives. Mr. Jones had been their attorney for approximately 10 years prior to her husband's death and Edith continued to work with Mr. Jones after her husband's death. Mr. Jones prepared for Edith a will and a revocable living trust. He helped her transfer her non real estate assets to her Revocable Trust so that they would avoid probate upon her death. He also worked with her on tax planning to reduce the potential estate tax liability that could be owed upon her death.

Edith's children have never been particularly close. Robert, the baby of the family, has never held a steady job. He was married once briefly, but is now divorced and has essentially lived with Edith for the last sixteen years. He has no children. Sam, the oldest child, is a very successful businessman like his father. He has held executive level positions at several companies and has lived in multiple states. He currently lives in California and has an extremely demanding job that leaves him with little free time. He is married and has two adult children in their early 30s. Carolyn is a retired school teacher who lives in Florida with her husband who is a high school principal. Carolyn and her husband live modestly and have one adult son who has two children of his own.

During his lifetime, Edith's husband trusted Sam implicitly. His estate plan reflected that trust—Sam was named as his agent under his power of attorney and as the Executor of his estate. Sam worked closely with Mr. Jones following his father's death to settle his estate and oversee the transfer of his father's assets to Edith. Edith's husband created a Family Trust for Edith's lifetime benefit and left everything else to her outright. Edith has a limited power of appointment over the assets of the Family Trust exercisable in favor of her issue.

Following her husband's death, Edith worked with Mr. Jones to update her estate plan. As revised, Edith named Sam as her agent under her power of attorney and as Executor of her estate—just as her husband had. Her Will poured over to her Revocable Trust and provided for a $1 million trust to be created for each of her grandchildren and for a $500,000 trust to be created for each of her great-grandchildren. All of her remaining assets were directed to be divided as follows: 40% to Sam, 35% to Carolyn and 25% to Robert.

About 5 years ago, Edith began to show signs that her mental acuity was slipping. Carolyn, who was named as Edith's health care agent at the time, attended several doctor's appointments with her mother and learned that her mother had been diagnosed with mild dementia. Robert also attended at least one of those appointments. Over time, Edith's dementia gradually worsened. By the time of her death, Edith could not recognize her children or grandchildren and could not care for herself. 24/7 caregivers were hired to take care of her in the months leading up to her death. Robert also participated heavily in Edith's care and in the last years of her life was with her constantly, driving her to doctor's appointments, doing her shopping, managing her medicines, and opening her mail.

About 3 years prior to her death, Edith executed new estate planning documents with a new attorney, Ms. Johnson. Edith had no prior relationship with Ms. Johnson, having never used her for any legal work. Robert took Edith to her appointment with Ms. Johnson and answered calls from Ms. Johnson if she needed information to complete Edith's new documents. Under the new estate plan, Robert was named as Edith's agent under her power of attorney and as Executor of her estate. Edith's Will and Revocable Trust were amended to delete the trusts for the grandchildren and the great-grandchildren. The power of appointment over the Family Trust was exercised in Edith's Will to leave 80% of the value of the Trust to Robert and 10% to each of Sam and Carolyn. Edith's house and an adjacent parcel of real estate was specifically devised to Robert under Edith's Will. All remaining assets, including Edith's remaining real estate, were held in Edith's Revocable Trust at the time of her death and were directed to be distributed in three equal shares to Sam, Carolyn and Robert. An *in terrorem* clause was added stating that if any beneficiary attempted to contest the Will or the Revocable Trust, all provisions in favor of that beneficiary would be revoked.

About 18 months before Edith's death, Sam and Carolyn learned that the powers of attorney in their favor had been revoked and that Robert was now named as agent under both documents. When Sam and Carolyn approached Robert about the change, he informed them that Edith had changed her documents because Robert was closer to her and had the time to manage her affairs and take her doctor's appointments. He assured them the change was one that Edith had wanted and that the documents had been professionally prepared.

It was not until Edith's death that Sam and Carolyn learned that Mr. Jones had been replaced as counsel by Ms. Johnson, that Ms. Johnson had prepared new estate planning documents and that those documents changed significantly their mother's prior estate plan. Sam and Carolyn immediately met with an attorney and filed a will caveat and a trust contest. Sam, Carolyn, and their adult children were aligned as caveators. Robert was aligned as a propounder. The Clerk, as required by statute, entered an order freezing the administration of the probate estate.

II. First Issue: Should Caveators be Required to Post Bond?

Propounder's attorney argues that there is no basis for the caveats as Edith's estate planning documents were prepared by an attorney who oversaw their execution and believed Edith to be competent. He believes the litigation will slow down the administration of the estate, perhaps for years. Thus, he has filed a motion asking the court to require Sam and Carolyn to post a bond for the full amount of the assets subject to the caveats in order to be entitled to proceed with the litigation.

Relevant Statute: N.C. Gen. Stat. § 31-33

N.C. Gen. Stat. § 31-33(d) states that

> "Upon motion of an aligned party, the court may require a caveator to provide security in such sum as the court deems proper for the payment of such costs and damages as may be incurred or suffered by the estate if the estate is found to have been wrongfully enjoined or restrained. The court may consider relevant facts related to whether a bond should be required and the amount of any such bond, including, but not limited to, (i) whether the estate may suffer irreparable injury, loss or damage as a result of the caveat and (ii) whether the caveat has substantial merit."

A. Argument of Propounder's attorney:

Robert has a right to administer his mother's estate and receive his inheritance. His siblings and their children—who were not local, who were not caretakers for Edith, and who were not there on a daily basis for Edith—are contesting Edith's estate plan simply because they are dissatisfied with the amount each of them receives under her estate plan. Attacking an estate plan because of dissatisfaction with the plan is not a basis for a caveat. Caveators' claims lack substantial merit. And the litigation to resolve their claims will slow the administration of the estate and trust, perhaps for years, and thus delay distribution of Edith's assets. Such a delay will irreparably harm the Estate and Robert and, thus, should not be permitted unless Caveators are required to post a bond for the value of all assets subject to their claims.

It was long the jurisprudence of our state to require caveators to post bond when initiating a caveat, and it remains any propounder's right to request that parties challenging an estate plan post bond in order to advance their claims. Under former North Carolina law, failure to post bond was fatal to any challenge to a will. *See In re Will of Winborne*, 231 N.C. 463, 57 S.E.2d

795 (1950); *In re Will of Parker*, 76 N.C. App. 594, 334 S.E.2d 97 (1985). While the former requirement for bond has been relaxed, propounders are still entitled to a presumption that a decedent's last executed will is valid and expresses the decedent's wishes. This same presumption should also apply to a decedent's last executed revocable trust agreement. *See Matter of Estate of Phillips*, — N.C. App. —, —, 795 S.E.2d 273, 281-82 (2016); N.C. Gen. Stat. § 36C-1-112 & cmt. (noting that the rules governing the construction of wills apply to the construction of trust documents and stating that "[t]he revocable trust is used primarily as a will substitute with its key provision being the determination of the persons to receive the trust property upon the settlor's death" and that a revocable trust is the functional equivalent of a will).

Protecting the presumption that a decedent's last executed estate planning documents are valid is vital to continuing the State's long-standing public policy of deterring meritless claims which serve to delay estate administrations. To that end, Governor Beverly Purdue signed Senate Bill 432 into law on June 27, 2011, which, inter alia, protected a propounder's right to request bond when facing a challenge to the validity of an estate plan. Effective as of January 1, 2012, and codified at N.C. Gen. Stat § 31-33(d), North Carolina's current law allows an aligned party to request that a caveator to a Will should be required to post a bond in order to proceed with the caveat.

Robert respectfully requests that this Court require Caveators to provide security for the full value of the estate and trust assets subject to their challenges because Caveators' claims are without substantial merit and irreparable injury and harm will result to Robert and the Estate as a result of the caveat.

Caveators' claims do not have substantial merit and Plaintiffs should not be permitted to freeze the entire administration of Edith's estate without providing bond for the damages that will likely be incurred as a result of the delay if the estate is found to have been wrongfully enjoined. Caveators' are challenging Edith's estate plan because they are dissatisfied with their inheritances. However, "[a] child possesses no interest whatever in the property of a living parent." *Hauser v. Hauser*, 252 N.C. App. 10, 796 S.E.2d. 391, 394 (2017). Rather,

> In so far as his children are concerned, a parent has an absolute right to dispose of his property by gift or otherwise as he pleases. He may make an unequal distribution of his property among his children with or without reason.

Id. Simply put, Caveators have no right to any part of their mother's estate just because they were named as beneficiaries in a prior version of their parents' estate planning documents. Rather, they are harassing their brother through this litigation in an effort to coerce a result that puts a few more dollars in their pockets. Caveators believe that they should be entitled to a certain percentage of assets or a certain distribution scheme simply because the late Mr. Smith, the patriarch of the family, previously placed his trust in fiduciaries other than Robert, and because Edith's former (but validly revoked) estate plan differed from her final plan in terms of how her various descendants were treated.

However, Caveators do not acknowledge Robert's years of dedication and direct service to their mother as a caregiver, driver, and personal assistant. While Caveators lived in California and Florida, respectively, Robert Smith stayed with their mother. He did the heavy lifting of daily care in those final, difficult years. Edith wanted to reward this dedication; and indeed she did so through certain direct devises to Robert Smith before ultimately dividing her residuary estate into equal thirds. In addition to rewarding his love and devotion, Edith knew that her youngest child was financially less secure than her other children. Edith was well aware of her other children's financial successes and comfortable lives and retirements, while her son Robert struggled. Her estate plan indicates that she intended for Robert to have a larger share of the estate so that she could provide him with the resources to be financially secure for the rest of his life. The evidence before the Court shows nothing more than this—a mother providing certain additional benefits to a child with greater financial needs, a child who was by her side in her final several years of life.

Further supporting the argument that Caveators' claims are without merit, Edith's estate planning documents were all prepared by an attorney. That attorney oversaw Edith's execution of her planning documents. That attorney believed Edith to be competent and capable—she understood her assets, she knew her family members, and she was clear in what she intended to do with her assets upon her death. Edith was perfectly capable of implementing a new estate plan. Had Edith been incompetent, Ms. Johnson would not have allowed her to execute her final estate planning documents.

In addition, Robert and the Estate will suffer irreparable injury and harm during the pendency of the caveat litigation. Caveators should be required to post bond to secure this loss. As the record reflects, Robert lived with Edith and provided her daily care. In exchange, Edith provided Robert with room and board. Edith ultimately elected to memorialize the mutual caretaking arrangement as permanent in her estate plan when she left Robert her home and directed that additional liquid assets shall be transferred to him for personal maintenance and care of the home. Edith's home is older and requires regular upkeep. The same is true for the surrounding grounds, which require the continued and regular attention of Robert Smith. These assets will decrease in value if left to rot and fall into disrepair pending Caveators' claims. More often than not, such harm to the physical condition of improved real property is irreparable and irreversible, and the Estate and Robert should be secured against this irreparable loss.

Irreparable financial harm is also likely to result to the Estate and Robert in the form of missed business and investment opportunities. Over the past several years, Robert has been the devoted caretaker for this mother. He has been committed to her personal care, and as such has not been able to pursue his own interests as have Caveators, who were more physically and emotionally removed from their mother. Robert is not currently employed—having spent the last several years providing full-time care to his mother. Robert stands to miss out on investment and business opportunities he has already identified and begun to pursue if he is prevented by Caveators' claims from putting Estate assets and his inheritance to work. Additionally, he will not have funds available to him to pay his basic living expenses and needs. Finally, the real estate that Robert inherits under Edith's estate plan is likely to depreciate in value in the next several years. Robert needs to be able to sell that real estate now in order to lock in its value.

Caveators should be required to provide security to the Estate for the resulting losses and missed opportunities Robert will incur during the pendency of the caveat litigation.

As a final matter, the provisions of Section 31-33(d) should be interpreted as applying to Edith's Revocable Trust as well as to her Will. Because a revocable trust is the functional equivalent of a will, the public policy considerations justifying the statutory requirements that a caveator of a will may be required to provide security for such litigation should equally apply to a revocable trust. There is no distinction between the two documents—both operate to devise the assets that a decedent owned at the time of death to her beneficiaries.

While irreparable harm will likely result to the Estate and Robert without a bond in place to compensate the Estate for lost value and opportunity, Caveators are financially stable and are capable of providing security without substantial harm to them, individually, or their households. Caveator Sam Smith is a successful businessperson who does not require his inheritance to meet his daily living needs. As a career executive, he can afford to outlast Robert by freezing the administration of the estate and trust and squeezing his less fortunate brother, financially. Requiring Sam to post bond only protects Robert—it will not dissuade or prevent Sam from pursuing his claims. Caveator Carolyn Smith is retired with a working husband and likewise does not require her inheritance for basic living needs.

In the alternative, if this Court declines to require caveators to post bond for the entire value of assets subject to the litigation, the Court should, at a minimum, require some bond to secure the interests of the Estate and Robert. The Estate at issue, the combination of probate and trust assets, exceeds $12 million in value. Counsel estimates, at a minimum, that this litigation will take eighteen months in order to conduct all requisite discovery, including fact and expert witness depositions. Robert also estimates that he stands to lose 15% on planned investments of $2 million which he intended to pursue with estate assets. The costs and loss associated with such an effort may well exceed $300,000. Therefore, if the Court is not inclined to require security for the entire value of the assets now subject to claims, it should at a minimum require Caveators to provide security in the amount of $300,000 for the payment of costs incurred by the Estate until the Estate is found to have been wrongfully enjoined.

B. <u>Argument of Caveators' attorney:</u>

The bond issue must be treated differently in the caveat proceeding and the trust contest. In the caveat, the clerk *must* enter an order freezing administration of the estate until the caveat is resolved N.C. Gen. Stat. § 31-36(a). The Superior Court *may* subsequently require a bond, but the burden is on the movant, typically the propounder, to show that a bond is necessary. N.C. Gen. Stat. § 31-33(d). By contrast, there is no statutory requirement to freeze administration in a trust contest.[1] A freezing injunction may be entered in a trust contest if the challenger either (1) satisfies the general elements for a preliminary injunction applicable to all civil cases (*i.e.*, likelihood of success on the merits and irreparable harm), N.C. R. Civ. P. 65(b) or (2) shows that

[1] Instead of an automatic injunction, the Trust Code provides that a trustee is strictly liable for distributions made pursuant to trust terms that are later invalidated. *See* N.C. Gen. Stat. § 36C-6-604.

"a breach of trust has occurred or may occur[.]" N.C. Gen. Stat. § 36C-10-1001(b). However, in this case, the Caveators have not sought a freeze of the trust administration because they are comfortable with their right to seek damages from the purported trustee under N.C. Gen. Stat. § 36C-6-604 if he makes distributions to himself. Since the administration of the trust is not enjoined in any way, it would be inappropriate to require an injunction bond concerning those assets. Only the assets subject to the automatic injunction in the probate proceedings are relevant to this motion.

Once a will caveat has been filed, the clerk must transfer the case to the Superior Court for a jury trial. N.C. Gen. Stat. § 31-33(a). Historically, before this transfer could take place, the caveator had to post a $200 bond as security for a potential award of costs to the propounder if the propounder ultimately prevailed in the action. *See* N.C. Gen. Stat. § 31-33 (Eff. until Dec 31, 2011). This *mandatory* $200 prosecution bond was analogous to the *discretionary* $200 prosecution bond that still exists in all other civil cases. *See* N.C. Gen. Stat. § 1-109. Upon a motion by the propounder, the prior version allowed the Superior Court judge, at his or her discretion, to require an additional bond from other parties "who make themselves parties with the caveators." *Id.* In 2011, the General Assembly amended the statute to read:

> Upon motion of an aligned party, the court may require a caveator to provide security in such sum as the court deems proper for the payment of such costs and damages as may be incurred or suffered by the estate if the estate is found to have been wrongfully enjoined or restrained. The court may consider relevant facts related to whether a bond should be required and the amount of any such bond, including, but not limited to, (i) whether the estate may suffer irreparable injury, loss, or damage as a result of the caveat and (ii) whether the caveat has substantial merit. Provisions for bringing suit in forma pauperis apply to the provisions of this subsection.

N.C. Gen. Stat. § 31-33(d).

This statute marked a departure from past practice in several ways. First, the motion for bond can be made only by "an aligned party," which means that the bond can only be issued *after* the alignment hearing in the Superior Court, not before transfer as was the prior practice. Second, the entire bond is now discretionary. *Compare*, N.C. Gen. Stat. § 31-33(d) ("[A] court *may* require caveator to provide security"), *with* N.C. Gen. Stat. § 31-33 (Eff. until Dec 31, 2011) ("[W]hen a caveator *shall* have given bond…"). Third, the Superior Court now has express authority to include within the bond amount "such costs and damages as may be incurred or suffered by the estate if the estate is found to have been wrongfully enjoined or restrained." N.C. Gen. Stat. § 31-33(d) (emphasis added). This language tracks the bond requirement for preliminary injunctions in the civil context, *see* N.C. R. Civ. P. 65(c), and presumably refers to the automatic injunction that is entered at the start of every caveat proceeding.

There are no cases applying the new bond statute, and in our experience it is not often used by propounder's counsel. It seems that the Propounder is attempting to employ whatever artificial technicalities he can to shield his wrongdoing from judicial scrutiny. Ultimately, his argument is meritless for two reasons.

First, and perhaps most importantly, the caveat has substantial merit. Caveators' beloved mother was a feeble, 89-year-old woman who was suffering from dementia in the last five years of her life. She was constantly under the thumb of her often-unemployed son, the Propounder, who decided to move back into his parent's house when he was in his 40s and never left. In her twilight years, as Edith was mentally fading away, Propounder cultivated in her a nearly complete reliance on himself. He drove her to an appointment to change her testamentary plan. But not to Mr. Jones, who had been Edith's trusted advisor for decades, who was well acquainted with her assets and prior estate planning, and who, perhaps, might have noticed that she wasn't as sharp as she used to be. Instead, he drove her to the office of a stranger, Ms. Johnson. When Ms. Johnson needed follow up information, it was Propounder who answered the calls. Unsurprisingly, it was the Propounder who benefited the most from the new estate plan. Millions of dollars that had previously been earmarked for his nieces and nephews was diverted to him. The powers of attorney that she had previously entrusted to his siblings—siblings who had demonstrated maturity and good judgment by establishing independent, successful lives—were suddenly changed to name him, the middle-aged boomerang child. These changes came out of the blue. There is no indication that Edith was angry with her grandchildren or that Sam or Carolyn did anything to upset her. To the contrary, Sam and Carolyn regularly traveled from out of state to visit their mother and take her to doctor appointments. But neither Edith nor the Propounder told Sam or Carolyn about these drastic changes to her estate plan. Taken together, these incredibly suspicious circumstances reveal that Caveator's claims have substantial merit. A bond would do nothing but discourage their meritorious claims.

Second, Propounder can point to no irreparable injury that the estate might suffer while these proceedings move forward without a bond. At the end of this case, even if Propounder wins, the value of the estate is likely to be about the same as it is now. The executor is obligated by law to repair and maintain the assets of the estate, and the freeze order does nothing to limit his ability to do so. It may be true that the Propounder, personally, may miss out on some of the business opportunities that he would otherwise pursue if the distribution from the estate was made earlier. But that is not the question before this court. The question is whether the entity enjoined—the *estate*—will suffer damages as a result of the automatic injunction. It would be strange and improper for the executor to pursue business opportunities on behalf of the estate. And even if the lost opportunity costs were somehow an injury to the estate, the amount of those damages would be so speculative that they could not serve as a basis for a bond calculation. In short, the executor's primary responsibility is to *preserve* the assets of the estate and ultimately distribute them to the proper parties at the end of the case. In the meantime, the executor is free to repair and maintain the properties. Thus, far from causing damaging the estate, the automatic freeze order actually *protects* the assets of the estate. Thus, no bond is required.

III. Second Issue: Are the Drafting Attorneys' Files Subject to Attorney-Client Privilege?

Caveators' attorney believes that Mr. Jones has information in his file indicating that both Edith and her husband had specific reasons why Robert was receiving the smallest portion of their estates and that over the years Edith executed numerous estate planning documents consistent with that intent. Caveators' attorney also believes that Robert participated heavily in the estate

planning work performed by Ms. Johnson. As a result, Caveators' attorney wants full copies of both attorneys' files and issues a subpoena to both lawyers and their law firms seeking production of the files. Both lawyers retain counsel and oppose production of the files claiming they are attorney-client privileged.

Relevant Statute: Rule 45(c)(3)(b) of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 45(c)(3)(b).

> N.C. R. Civ. P. 45(c)(3)(b) provides that a person commanded to produce documents pursuant to a subpoena may object to the same if the subpoena requires "disclosure of privileged or other protected matter and no exception or waiver applies to the privilege or protection."

A. Argument of Drafting Attorneys' counsel.

The drafting attorneys oppose the subpoenas *duces tecum* issued to them and move to quash the same under Rule 45. The information sought by Caveators is protected by the attorney-client privilege, which neither Edith nor Robert, in his capacity as Executor of her Estate, has waived. In addition, the information Caveators seek is protected confidential information under the North Carolina State Bar's Rules of Professional Conduct and as licensed practitioners, Mr. Jones and Ms. Johnson may not disclose the information.

The privilege which attaches to communications between client and attorney is foundational to our legal system. Describing the attorney-client privilege, the United States Supreme Court observes that its "purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice" and that the "privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyers being fully informed by the client." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The privilege "rests on the theory that encouraging clients to make the fullest disclosure to their attorneys enables the latter to act more effectively, justly and expeditiously—benefits out-weighing the risks of truth-finding posed by barring full disclosure in court." *State v. Ballard*, 333 N.C. 515, 522, 428 S.E.2d 178, 182 (1993). Generally speaking, courts respect the sanctity of communications between a client and her attorney because, as the North Carolina Supreme Court recently observed, the privilege "is no trivial consideration, as this protection for confidential communications is one of the oldest and most revered in law." *In re Miller*, 357 N.C. 316 (2003). The clear public policy argument behind the privilege is to protect and ensure open and honest communications between client and attorney, which honestly should ultimately serve to advance the greater ideals of justice and equity.

A five-part test under North Carolina common law determines whether attorney-client privilege applies to any particular relationship or communication:

> (1) The relation of the attorney and client existed at the time the communication was made;
>
> (2) The communication was made in confidence;

(3) The communication relates to a matter about which the attorney is being professionally consulted;

(4) The communication was made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated, and;

(5) The client has not waived the privilege.

State v. McIntosh, 336 N.C. 517, 523-24, 444 S.E.2d 438, 442 (1994).

All five prongs of this test must be met in order for the privilege to apply. "If any one of these five elements is not present in any portion of an attorney-client communication, that portion of the communication is not privileged." *In re Investigation of the Death of Miller*, 357 N.C. 316, 335, 584 S.E.2d 772, 786 (2003). While the privilege is personal to the client, if the client is not present to assert the privilege the law assumes that the client would object to the production of any privileged information. Kenneth S. Broun, Brandis & Broun on North Carolina Evidence § 129 & n. 128 (7th ed).

Drafting attorneys Jones and Johnson move to quash the subpoenas issued to them because the subpoenas require disclosure of attorney-client privileged information and no exception applies to this important protection and privilege. Mr. Jones and Ms. Johnson each served as counsel to Edith at various junctures over the course of many years, first Mr. Jones as a legacy relationship when Mr. Smith was still living, and later Ms. Johnson who assisted with Edith's final estate plan. Each attorney provided legal advice to Edith regarding the most private matters of personal finance and testamentary desires. Each attorney accumulated files of notes, drafts, and documents resulting from direct communications with Edith, as a client who entrusted her most private thoughts and considerations to her attorneys. The records comprising these attorneys' files are most certainly subject to the attorney-client privilege.

Respondent drafting attorneys acknowledge that the United States Supreme Court and the North Carolina Supreme Court recognize a "testamentary exception" to the general rule that the attorney-client privilege protects disclosure of privileged information. See *Glover v. Patten*, 165 U.S. 394, 406 (1897) ("[i]n a suit between devisees under a will, statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged"); *Swidler & Berlin v. United States*, 524 U.S. 399, 404 (1998) ("testamentary disclosure was permissible because the privilege, which normally protects the client's interests, could be impliedly waived in order to fulfill the client's testamentary intent"); *In re Will of Kemp*, 236 N.C. 680, 684, 73 S.E.2d 906, 910 (1953) ("It is generally considered that the rule of privilege does not apply in litigation, after the client's death, between parties, all of whom claim under the client; and so, where the controversy is to determine who shall take by succession the property of a deceased person and both parties claim under him, neither can set up a claim of privilege against the other as regards the communications of deceased with his attorney"). This testamentary exception is an equitable response to a personal representative's possible inclination to waive privilege in only those instances where it benefits the personal representative's interests, but then assert the privilege against some other heir or interest. *See, generally*, *Russell v. Jackson*, 9 HARE 387, 68 Eng. Rep. 558 (V.C. 1851) (holding that neither

the decedent's next-of-kin nor the decedent's devisees could assert the privilege against the other).

The testamentary exception to attorney-client privilege should not apply under the facts in this case, and if the Court finds that it does apply then the exception should only apply to certain of Ms. Johnson's planning notes and files and not to any of Mr. Jones' files. Mr. Jones was <u>not</u> the drafting attorney of the documents which Caveators now challenge. The testamentary exception to the attorney-client privilege is a limited exception to attorney-client privilege that applies (i) in the context of will caveats (ii) where the drafting attorney of the documents at issue (iii) is called to testify. Under our facts, while Ms. Johnson did draft the documents at issue, Mr. Jones did not. In addition this matter involves both a will caveat and a trust contest and the issue of whether the exception applies to a trust contest has not yet been addressed by our courts.

The question appears to be unsettled under North Carolina law as to whether a prior attorney, *i.e.* an attorney who is not the draftsman of the plan at issue, may be subpoenaed to produce records which are otherwise privileged. The North Carolina Court of Appeals has examined this issue. In a dissenting opinion addressing the merits of an appeal and not procedure, Judge Tyson argued that the testamentary exception to attorney-client privilege should apply to an attorney whose representation of the deceased was terminated prior to execution of a challenged estate planning document. *In re Will of Johnston*, 157 N.C. App. 258, 578 S.E.2d 635 (2003) (aff'd, 357 N.C. 569, 597 S.E.2d 670). However, no North Carolina court has resolved this question of law and the applicability of the exception to counsel who drafted prior documents is not settled. Respondent drafting attorneys ask this Court not to extend the exception under the facts of Edith's case.

In support of not extending the testamentary exception to Mr. Jones' or Ms. Johnson's files related to Edith's revised Trust Agreement, Respondents note that North Carolina courts treat matters concerning wills and matters concerning trusts differently. "A caveat is an in rem proceeding . . . [i]t is an attack upon the validity of the instrument purporting to be a will. The will and not the property devised is the res involved in the litigation." *In re Will of Cox*, 254 N.C. 90, 91, 118 S.E.2d 17, 18 (1961). Conversely, a trust is a contract between the grantor and trustee governed by the principles of contract law. John H. Langbein, The Contractarian Basis of the Law of Trust, 105 YALE L. J. 624, 627 (1995) (stating "Either way, the deal between settlor and trustee is functionally indistinguishable from the modern third-party-beneficiary contract. Trusts are contracts.") A claim to rescind a trust agreement is based in principles of contract law. *See, generally*, *State v. Philip Morris USA, Inc.*, 363 N.C. 623, 685 S.E.2d 85 (2009) (discussing application of contract principles to interpretation of a trust). Accordingly, it is not settled law that the testamentary exception recognized in the context of will caveats applies at all to disputes concerning trust agreements. The underlying legal actions are completely different, and Respondent drafting attorneys request that this Court not make the unsubstantiated leap to apply the testamentary exception in the case of Caveators' trust contest claims.

Mr. Jones and Ms. Johnson are also prohibited from producing their estate planning files for Edith and therefore object to the subpoenas issued to them on the basis that the information sought is confidential. Both Mr. Jones and Ms. Johnson are North Carolina licensed lawyers subject to the North Carolina Rules of Professional Conduct. Under Rule 1.6(a) each owes a duty of confidentiality to Edith and may not comply with Caveators' subpoenas because "[a]

lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." N.C. Rules of Prof'l Conduct R. 1.6(a). The duty of confidentiality is even more broad than the attorney-client privilege, as Rule 1.6(a) applies to all information derived from or learned during the attorney-client relationship, regardless of its source. Comment 3 to Rule 1.6 states:

> The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information acquired during the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

N.C. Rules of Prof'l Conduct R. 1.6, cmt. 3.

Each attorney's duty of confidentiality survives the death of his or her former client. N.C. Rules of Prof'l Conduct R. 1.6, Cmt. 21. Further, Opinion RPC 206, Disclosure of Confidential Information of a Deceased Client, adopted by the State Bar April 14, 1995, provides that

> [a] lawyer may only reveal confidential information of a deceased client if disclosure is permitted by the exceptions to the duty of confidentiality set forth in Rule 4(c). Specifically, a lawyer may reveal confidential information of a deceased client if the disclosure was impliedly authorized by the client during the client's lifetime as necessary to carry out the goals of the representation.

Id.

The North Carolina State Bar has addressed RPC 206 and the question of whether an attorney may testify regarding the distribution of a decedent's estate. N.C. State Bar Adopted Opinion 2002 FEO 7, Disclosure of Deceased Client's Confidences in Will Contest Proceeding (January 24, 2003). Opinion 2002 FEO 7 provides two conclusions regarding attorney testimony: (1) that the lawyer may testify in a dispute "because the personal representative consents to the disclosure," and (2) that "[i]f someone other than the personal representative calls the lawyer as a witness, the lawyer may testify to relevant confidential information of the deceased client if the lawyer determines that the attorney/client privilege does not apply as a matter of law or the court orders the lawyer to testify on this basis." *Id.* Because Robert, in his capacity as personal representative of Edith's estate, has not waived Edith's attorney-client privilege, both Mr. Jones and Ms. Johnson believe the attorney-client privilege prevents them from disclosing confidential information of their deceased client, and this Court should respect the confidential nature of each attorneys' files and refuse to order production. Respondents also want to note for the Court that

Opinion 2002 FEO 7 is not consistent with the North Carolina Supreme Court's opinion in *In re Miller*, supra, where the Court held that a personal representative cannot consent to the disclosure of privileged information without specific authority from the decedent. *In re Investigation of the Death of Miller*, 357 N.C. 316, 324-25, 584 S.E.2d 772, 779-80 (2003).

Because the subpoenas issued to each attorney seek the disclosure of information which is both protected by the attorney-client privilege and required to be maintained as confidential under the Rules for Professional Conduct, Respondent drafting attorneys respectfully request that this Court grant their motions to quash the subpoenas *duces tecum*.

In the alternative, if this Court is inclined to require one or both attorneys to produce some portion of his or her file, Mr. Jones and Ms. Johnson request an in camera review of all documents subject to the subpoenas; a privilege log; or the appointment of an independent referee to make a determination as to which documents in Mr. Jones's files and Ms. Johnson's files are responsive, are not protected by privilege, and are subject to production upon order of this Court. To do any less would be to betray the confidence Edith reposed in her counsel.

B. Argument of Caveators' Attorney

The Motion to Quash should be denied because neither the attorney-client privilege nor the Rules of Professional Conduct prohibit production of the Respondent's files. A subpoena may be quashed if it "requires disclosure of privileged or other protected matter *and no exception or waiver applies to the privilege or protection.*" N.C. R. Civ. P. 45(c)(3)(b) (emphasis added). It is well established that the attorney-client privilege does not apply to disputes like these, where the point of the litigation is to determine "who shall take by succession the property of a deceased person and both parties claim under [her]." *In re Will of Kemp*, 236 N.C. 680, 684, 73 S.E.2d 906, 910 (1954). Likewise, "in a will contest or other litigation about the distribution of the decedent's estate," the North Carolina Rules of Professional Conduct permit a lawyer to disclose all information that might otherwise protected by Rule 1.6 if the information is relevant to the testamentary dispute and "the attorney/client privilege does not apply as a matter of law." N.C. State Bar Adopted Opinion 2002 FEO 7, Disclosure of Deceased Client's Confidences in Will Contest Proceeding (January 24, 2003). Because the testamentary exception to the attorney-client privilege applies, the motion to quash must be denied.

Respondents concede, as they must, that the testamentary exception exists. *See, e.g., Kemp*, 236 N.C. 680, 684, 73 S.E.2d 906, 910 (1954); *see also, e.g., Glover v. Pattern*, 165 U.S. 394, 406 (1897) (holding that "in a suit between devisees under a will, statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged"); *Swidler & Berlin v. United States*, 524 U.S. 399, 405 (1988) (holding that attorney-client privilege does not apply to communications that are "sought to be disclosed in litigation between the testator's heirs"). Instead, the Respondents argue that the testamentary exception must be narrowed so that it applies only in the will context (and not to trusts) and only to the most recent drafting attorney. Both of these proposed constraints on the exception would frustrate the common-sense rationale underlying the testamentary exception: the assumption "that a client impliedly authorized the release of confidential information in order that the estate might be properly and thoroughly administered." *In re Johnston*, 157 N.C. App. 258, 266, 578 S.E.2d 635, 641 (2003) (quoting RPC 206 14 April 1995) (internal alterations omitted).

The first limitation that Respondents seek to graft into the testamentary exception would have no practical consequence. As is common in modern estate planning, the Respondents contemporaneously prepared both a will and trust document to carry out Edith's alleged testamentary intent. In other words, Edith's unprivileged communications regarding the preparation of the will—which clearly must be produced under Rule 45—are also likely to be relevant to the preparation of the trusts. After all, there is only one estate plan, even if ultimately codified in multiple documents. What's more, while it is true that there is binding case in North Carolina that directly addresses whether the testamentary exception applies to trust documents, our courts have recognized "that the testamentary exception may extend beyond the will in probate to 'other similar document[s].'" *Johnston*, 157 N.C. App. at 266 (quoting *Glover*, 165 U.S. at 406); *see also Kemp*, 236 N.C. at 684 (holding, broadly, that the exception applies to all "litigation, after the client's death, between parties, all of whom claim under the client.") Notably, in the seminal *Glover* case, the United States Supreme Court applied the testamentary exception the communications regarding the drafting of a disputed *trust* instrument. *Glover*, 165 U.S. at 399. And federal courts applying North Carolina law have concluded that the testamentary exception has equal force in the trust context. *Falls v. Goldman Sachs Tr. Co., N.A.*, No. 5:16-CV-740-FL, 2017 WL 1628885, 2017 U.S. Dist. LEXIS 65902, at *6 (E.D.N.C. May 1, 2017).

Respondents' second proposed limitation—that the testamentary exception should only apply to the most recent drafting attorney—is novel and completely unsupported law. It also misses the point: *all* of the wills and trusts, no matter who drafted them, are in in dispute in this case. *See Falls*, 2017 WL 1628885, 2017 U.S. Dist. LEXIS 65902, at *10 (recognizing that prior drafter's papers were discoverable because a dispute existed about whether the prior instruments were effective). In this case, Propounder argues that the most recent documents reflect Edith's testamentary intent; Caveators argue that the true intent is shown in the prior documents. Discovery into Edith's communications with *both* of the drafters is necessary to resolve the dispute. Limiting the scope of discovery to only those communications related to the most recent testamentary instruments would frustrate the ability of the fact-finder to determine the truth. Edith would have wanted the truth to be known. Accordingly, the court should reject the Respondents' invitation to create new law that would warp the testamentary exception in Propounder's favor.

In the end, resolution of the Motion to Quash is simple. The motion should be denied because the testamentary exception applies.

IV. Third Issue: Do the *in terrorem* Clauses in Edith's Will and Revocable Trust Revoke the Bequests for Sam and Carolyn?

Robert's attorney files a motion seeking to invalidate the bequests made to Sam and Carolyn on the basis that the filing of the caveats triggered the *in terrorem* clauses in both documents and caused the bequests to Sam and Carolyn to be revoked.

Type of clause at issue in Will:

"ARTICLE I
IN TERROREM

> If any person who is given an interest in my estate or in a trust under this Will institutes or joins in (except as a party defendant) any proceeding to contest the validity of this Will or any of its provisions, all benefits provided for that person shall be revoked, and those benefits shall pass as though the person did not survive me. This provision shall apply regardless of whether such proceedings are instituted in good faith or with probable cause."

Type of clause at issue in Revocable Trust Agreement:

"ARTICLE I
IN TERROREM

> If any income beneficiary or remainder beneficiary, named or described herein, whether as a member of a class or otherwise, directly or indirectly, under any pretense or for any cause or reason whatsoever, shall institute, abet, take, or share in any action or proceeding to impeach, impair, set aside, or invalidate this trust or any of its provisions, or make any agreement, direct or indirect, in connection with any of the foregoing, with any person instituting, abetting, taking or sharing in such action directly or indirectly, I do hereby revoke any and all dispositions, gifts, trusts, or other provisions to or for the benefit of any such person, and I direct that any such dispositions, gifts, trusts, or other provisions, to or for the benefit of such person, shall be disposed of as if such person had predeceased the date hereof without leaving issue surviving such person. This provision shall apply regardless of whether such proceedings are instituted in good faith or with probable cause."

A. Argument of Propounder's attorney

Caveators have knowingly and willing violated the no-contest clauses which Edith elected to include in her Will and Revocable Trust Agreement by filing the will caveat and the trust contest. A no-contest clause in a revocable trust agreement is fully enforceable against the challenger without further inquiry. Additionally, Caveators lacked probable cause to file the will caveat and the trust contest. Thus, the bequests to each of them contained in the Will and the Revocable Trust Agreement should be revoked.

A clause in a will providing for forfeiture of all beneficial interest of a devisee or legatee in the event of the beneficiary's contest has been held to be valid and not violative of public policy. *See Whitehurst v. Gotwalt*, 189 N.C. 577, 127 S.E. 582 (1925). In *Whitehurst*, the NC Supreme Court held in dictum that an *in terrorem* clause was enforceable where the trial court sustained the will and found as a matter of fact that no probable cause existed for the filing of the caveat.

As a result, the caveators in *Whitehurst* forfeited all interests in the decedent's real estate which passed under his will. The no contest clause at issue in *Whitehurst* stated:

> I do hereby and herein instruct and demand of my executrix, that if any attempt is made on the part of any of the beneficiaries herein named to defeat, nullify, or contest in law or otherwise, the disposition or division of my property as herein made by me, that those so endeavoring to defeat, nullify or contest my wishes as herein expressed, shall not be entitled to the part I have intended for them, and shall only receive the sum of $ 10 each, and that part or portion of my estate herein set apart for them, shall revert to the other legatees or beneficiaries as may stand firmly by my wishes as herein expressed, and defend the distribution and disposal herein made by me of my property.

Id. at 577, 578, 127 S.E. 582, 583. The Court held that that "a condition of forfeiture, if the devisee shall dispute the will, is valid in law." *Id.*.

Twenty-seven years after the *Whitehurst* decision, the North Carolina Supreme Court squarely addressed the issue of the enforceability of an *in terrorem* clause in a will and held that such a clause was enforceable unless the caveator could show that the will caveat was made in good faith and with probable cause. *See Ryan v. Wachovia Bank & Tr. Co*., 235 N.C. 585, 588, 70 S.E.2d 853, 855 (1952).

The holding in *Ryan* does not stand for the proposition that *in terrorem* clauses are *per se* unenforceable. Rather the court carved out an exception to the general rule that such clauses are enforceable. Thus, unless Caveators can show that their will caveat was brought in good faith and with probable cause, the bequests made in their favor under the Will must be revoked. The probable cause requirement must be strictly interpreted. Probable cause is more than just a suspicion that a bad act occurred. Probable cause is defined as "sufficient reason based upon known facts to believe a crime has been committed." *See* Legal Dictionary at law.com. Applied to the will caveat, Caveators must have sufficient reason based upon known facts to believe that Edith's Will was the product of undue influence and that she lacked the minimal capacity necessary to execute her Will.

Caveators cannot meet this standard. As finder of fact, this Court should decide based upon the evidence of record that Caveators have not instituted this litigation in good faith and with probable cause. The allegations of the Caveators essentially consist of accusing Robert of being too good of a son. Robert is accused of living with Edith, helping her with finances, taking her to doctor's appointments—actions that he took to insure that she could live comfortably and remain in her house until her death. Caveators know that Robert has fallen on difficult times in the past and that their mother always supported him financially in those times. Caveators ignore the evidence offered by Robert that their mother specifically intended to change her estate plan to leave a larger percentage of her assets to Robert in order to provide him with a place to live and a source of support following her death. Caveators also completely ignore the fact that Robert coordinated and participated heavily in Edith's care, driving her to doctor's appointments, doing her shopping, managing her medicines, and opening her mail. In fact, they even knew about their mother's revisions to her legal documents 18 months prior to her death, but did not

initiate any contest or formalize any complaint at that time. Caveators' litigation is not based on probable cause. Instead, Caveators filed their caveats in an attempt to force a settlement.

Caveators' proof that a bad act was performed is that Edith revised her estate planning documents in a manner that reduced what they would have received under prior estate planning documents. Such evidence is proof of nothing more than the fact Edith changed her mind. The right of the individual to deal freely with his or her own property without fear of interference by others is a fundamental right. Thus, an individual has the power to enforce this right by including an *in terrorem* clause in a Will and expecting it to be enforced.

Even in issuing its decision in *Ryan*, the Court distinguished between litigation brought to harass and litigation brought in good faith, noting

> There is a very great difference between vexatious litigation instituted by a disappointed heir, next of kin, legatee or devisee, without probable cause, and litigation instituted in good faith and with probable cause, which leads the contestant to believe that a purported will is not in fact the will of the purported testator.

Ryan v. Wachovia Bank & Tr. Co., 235 N.C. 585, 590, 70 S.E.2d 853, 857 (1952). This is the former. Edith's Will states that "[i]f any person who is given an interest in my estate … institutes … any proceeding to contest the validity of this Will or any of its provisions, all benefits provided for that person shall be revoked." Because Caveators have offered no facts sufficient to establish that they had probable cause to bring their will caveat, the provisions in Edith's Will in their favor should be revoked.

Additionally, the *Ryan* exception to the general rule that *in terrorem* clauses are enforceable does not apply to revocable trust agreements and should not be extended to apply to revocable trust agreements. In *Ryan*, the issue was whether a no-contest clause <u>in a will</u> should be enforced. The decision contained no holding with respect to the applicability of no-contest clauses to revocable trust agreements. Indeed, the question of whether the "good faith and probable cause" exception to the general rule supporting enforceability of a no-contest clause applies to a trust contest appears to be one of first impression in North Carolina.

Other jurisdictions have considered the issue and have found that an *in terrorem* clause is enforceable without further inquiry. In *Rossi v. Davis*, 345 Mo. 362, 133 S.W.2d 363 (1939), the Missouri Supreme Court held, in a case involving a forfeiture clause in an inter vivos trust, that the provision was valid and should be enforced upon violation without regard to any exception based upon the good faith and probable cause of the contestant. Likewise, the Michigan Supreme Court held that an *in terrorem* provision in a trust is enforceable even if there is probable cause for challenging the trust. *See Nacovsky v. Hall* (*In re Griffin*), 765 N.W.2d 613, 613 (Mich. 2009). In so, holding the Michigan Supreme Court reversed the Court of Appeals which had applied the exception to *in terrorem* provision in a trust and adopted the reasons stated in the Court of Appeals dissenting opinion which stated that "Michigan public policy does not dictate that an *in terrorem* provision in a trust agreement is unenforceable if there is probable cause for

challenging the trust." *Nacovsky v. Hall* (*In re Griffin*), 281 Mich. App. 532, 543, 760 N.W.2d 318, 324 (2008) (dissenting opinion).

B. Argument of Caveators' Attorney

As an initial matter, the determination as to whether an *in terrorem* clause should be enforced cannot be made until after all the evidence has been presented at trial. Only then should the court decide whether the caveat was brought in good faith and with probable cause. For Caveators, the determination of probable cause does not have to exist at the moment the caveat was filed. Evidence gathered during the litigation can be used to support a finding of probable cause. Robert appears to assert that the moment that the caveat was filed, the *in terrorem* clause in Edith's Will and Revocable Trust Agreement was triggered and, thus, the court should rule <u>at this time</u> that Caveators' interests under the Will and Revocable Trust are revoked. Such a ruling would be premature.

However, even if the court were to rule that the determination of probable cause must be made at the time the caveat is filed, Caveators meet that standard. In the criminal context, North Carolina courts have defined "probable cause" as that which allows "a reasonable man to commence a prosecution" when the "facts and circumstances, known to him at the time" would "induce" him to believe that the person charged is guilty of the offense. *Lenins v. K-Mart Corp*., 98 N.C. App. 590, 596 (1990) (citing *Pitts v. Village Inn Pizza, Inc*., 296 N.C. 81, 87, 249 S.E.2d 375, 379 (1978)). Applying this definition to the instant case, Caveators would meet the probable cause definition if a reasonable person would have filed the caveat on the basis that the facts and circumstances known to them at the time of filing would induce them to believe Robert had exerted undue influence on their mother.

"The four general elements of undue influence are (1) decedent is subject to influence, (2) beneficiary has an opportunity to exert influence, (3) beneficiary has a disposition to exert influence, and (4) the resulting will indicates undue influence." *In re Will of Smith*, 158 N.C. App. 722, 726, 582 S.E.2d 356, 359 (2003). The North Carolina Supreme Court has identified several facts that may support a reasonable conclusion that undue influence has taken place: (1) the decedent's old age and physical or mental weakness, (2) the decedent lived with the beneficiary and is "subject to his constant association and supervision," (3) other potential beneficiaries have little or no opportunity to see the decedent, (4) the new testamentary instruments are different from and revoke the prior testamentary plan, (5) the new testamentary plan favors someone who is not related to the decedent by blood, (6) the new testamentary plan disinherits the "natural objects of [the decedent's] bounty", and (7) the beneficiary procured the execution of the new testamentary instruments." *See In re Andrews*, 299 N.C. 52, 54, 261 S.E.2d 198, 200 (1980). The *Andrews* factors are not exhaustive and they do not all need to be met. *In re Will of Jones*, 362 N.C. 569, 576, 669 S.E.2d 572, 578 (2008) (noting that the collective evidence need only "satisfy a rational mind" of the existence of undue influence). Even before this lawsuit was filed, it was clear that virtually all of the *Andrews* factors were present here. Edith was 89 years old and depended on Robert and her other caretakers for her daily activities. Edith had been diagnosed with dementia. Propounder moved into Edith's home and lived with her for years before her death, going almost everywhere with her. The Caveators were not able to spend nearly as much time with Edith because they lived out of state. The new will and trust drastically

changed Edith's estate plan by increasing Propounder's share by millions of dollars and effectively disinheriting Edith's grandchildren and great-grandchildren. Propounder quite literally procured the new testamentary instruments by driving Edith to the new lawyer's office and answering all of her follow up questions. Plainly, the Caveators' conclusion that Propounder unduly influenced Edith is a rational one.

The same rationale that warrants a "good faith and probable cause" exception in the will context should equally apply to a revocable trust agreement. A beneficiary's inheritance should not be precluded merely because of the existence of an *in terrorem* clause in the settlor's revocable trust agreement. Instead, the beneficiary should have the ability to challenge the validity of the revocable trust agreement if the beneficiary knows of facts and circumstances that would rise to the level of probable cause to file a caveat.

While the issue before the North Carolina Supreme Court in *Ryan* dealt with an *in terrorem* provision in a will, the Court's holding was not as narrow as Robert attempts to paint it. In fact, the Supreme Court specifically noted that the weight of authority around the country supports the view that a contest or opposition made in good faith, and with probable cause, must not result in the forfeiture of a caveator's interest in the contested estate. *Ryan v. Wachovia Bank & Tr. Co.*, 235 N.C. at 588, 70 S.E.2d at 855. Subsequent decisions of our Supreme Court support this common law rule that no contests clauses in testamentary documents are enforceable unless the court finds that a party instituted his or her caveat in good faith and with probable cause. See, e.g., *Haley v. Pickeisimer*, 261 N.C. 293, 298-99 (1964); 30 STRONG'S N.C., INDEX 4th Wills § 74.[2] The Supreme Court expressed the public policy reasons behind its decision, noting:

> In our opinion, a bona fide inquiry whether a will was procured through fraud or undue influence, should not be stifled by any prohibition contained in the instrument itself. In fact, our courts should be as accessible for those who in good faith and upon probable cause seek to have the genuineness of a purported will determined, as they are to those who seek to find out the intent of a testator in a will whose genuineness is not questioned.

Ryan v. Wachovia Bank & Tr. Co., 235 N.C. 585, 590, 70 S.E.2d 853, 856 (1952)

The public policy regarding the validity of no-contest clauses in wills as set forth by the North Carolina Supreme Court should apply to and control the enforceability of no-contest clauses in trust agreements. Legal authorities agree that the same test should apply to no-contest clauses in wills and trust agreements. As observed in Bogert, Trusts & Trustees (rev 2d ed, 2008 Cum Supp), § 181, p 103 "Although [in terrorem] clauses appear most frequently in wills, there appears to be no reason to apply a different test in determining the validity of such a clause in a living trust instrument . . . ." Similarly, 2 Restatement Property, 3rd, Wills and Other Donative Transfers, § 8.5, comment i p 200, provides: "With the increase in the use of revocable inter vivos trusts as will substitutes, no-contest clauses and clauses restraining challenges of particular provisions in those trusts serve the same purpose as do such clauses in wills, and the same test applies to determine the validity of those clauses in the two comparable situations."

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[2] The Restatement (Third) of Property (Wills & Don. Trans.) at § 8.5 also support this position, providing that no contest clauses are "enforceable unless probable caused existed for instituting the proceeding."

North Carolina's own trust code supports this conclusion. N.C. Gen. Stat. § 36C-1-112 states that the "rules of construction that apply in this State to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property."

For these reasons, the court should extend this state's public policy that no-contest clauses in wills are unenforceable if there is probable cause for challenging the will to revocable trust agreement.

V. Fourth Issue: Which Party has the Burden of Proof on the Issue of Undue Influence?

Sam and Carolyn's attorney files a motion seeking to establish that the burden of proof with respect to the issue of undue influence lies with Robert to prove that he did not exert undue influence over Edith because he was in a confidential relationship with Edith by virtue of the power of attorney appointing him as agent under the financial power of attorney and as health care agent under the health care power of attorney.

There is no relevant statute on this issue. North Carolina case law governs the determination of when the burden of proof shifts.

A. Argument of Propounder's Attorney

Robert opposes Caveators' motion to shift the burden of proof with respect to the issue of undue influence. Caveators have failed to show that a fiduciary relationship existed between Robert and Edith that would be sufficient to shift the burden of proof to Robert to prove the testamentary documents at issue were not the subject of his undue influence. Robert did not actually serve in a confidential relationship with his mother. While he was her named financial agent; in actuality he did not act as her agent but merely assisted her with normal acts of daily living as her caretaker and son. The fact that Robert was designated as an agent is not, in itself, sufficient to establish a fiduciary relationship and shift the burden of proof to him in the present action.

The burden of proof is normally on the caveator to show by the greater weight of the evidence that the execution of a will was procured by undue influence. *In re Will of Andrews*, 299 N.C. 52, 261 S.E. 2d 198 (1980). However, under North Carolina law, a presumption of fraud or undue influence arises when a fiduciary is alleged to have benefited from an interaction with his principal. *See McNeill v. McNeill*, 223 N.C. 178, 181, 25 S.E.2d 615, 616 (1943); *Lee v. Pearce*, 68 N.C. 76 (1873). Our Courts have held that the relationship between principal and agent is a common fiduciary relationship "where the agent has entire management so as to be, in effect, as much the guardian of his principal as the regularly appointed guardian of an infant." *Cross v. Beckwith*, 16 N.C. App. 361, 363, 192 S.E.2d 64, 66 (1972) (quoting *McNeill*, 223 N.C. at 181, 25 S.E.2d at 617). Thus, the Court of Appeals concluded in *Cross* that a general agent who manages the affairs of his principal must show by the greater weight of the evidence that any

transaction concerning the principal where the agent benefited from the principal is not the product of a fraud. *Cross*, 16 N.C. App. at 363-64, 192 S.E.2d at 66. In other words, it is the common law in North Carolina that a presumption of fraud automatically arises with respect to any transaction as between a principal and an agent whereby the agent is benefited. In such an instance, the agent must rebut the presumption. *Id*.

Despite the presumption of fraud and the resulting shifting of the burden of proof in transactions where an agent benefits from the principal, North Carolina courts have carved out an exception to this rule. The Court of Appeals has held that the burden of proof in an undue influence claim does not shift to a propounder-beneficiary who previously served as agent for the decedent and benefited under decedent's estate plan. *In re Will of Sechrest*, 140 N.C. App. 464, 537 S.E.2d 511 (2000). In *Sechrest*, the testatrix appointed a health care agent under a validly executed health care power or attorney which gave the health care agent "full power and authority to make health care decisions on [her] behalf." *Id*., 140 N.C. App. at 471-722, 537 S.E.2d at 516-17. Caveators argued that the existence of the power of attorney and agency created thereunder automatically created a confidential relationship between testatrix and the agent, such that the burden of proving a benefit resulting to the agent upon testatrix's death was fair and reasonable. The Court of Appeals considered the healthcare power of attorney and held that an agent is a fiduciary only as to matters within the scope of his agency. *Id*. (citing *Hutchins v. Dowell*, 138 N.C. App. 673, 531 S.E.2d 900 (2000)). Because the testatrix's health care power of attorney authorized only medical decisions, it did not create a general fiduciary relationship between agent-propounder and the testatrix sufficient to reassign the burden of proof from the caveators. *Sechrest*, 140 N.C. App. at 472, 537 S.E.2d at 516-17.

The testatrix in *Sechrest* also executed a general financial power of attorney designating the same agent and vesting him with, "full power and authority to do and to perform all and every act or thing whatsoever requisite or necessary to be done for [testatrix's] upkeep, care and maintenance and for the management of any property owned by [testatrix], as fully to all intents and purposes as [she] might or could do if personally present." *In re Will of Sechrest*, 140 N.C. App. 464, 472, 537 S.E.2d 511, 517 (2000). The record evidence confirmed the testatrix executed this general power of attorney contemporaneously with her will which left one-half of estate to the agent-propounder. *Id*. However, the record did not contain any evidence tending to show when the agent-propounder was directly made aware or became aware of his appointment and authority as general agent for the testatrix. *Sechrest*, 140 N.C. App. at 472, 537 S.E.2d at 517. Therefore, the Court of Appeals upheld the trial court's decision not to submit to the jury whether a confidential fiduciary relationship existed between testatrix and the propounder, even though propounder was clearly designated as agent under a validly executed power of attorney. *Sechrest*, 140 N.C. App. at 472, 537 S.E.2d at 517; citing *In re Estate of Ferguson*, 135 N.C. App. 102, 105, 518 S.E.2d 796, 798 (1999) (court properly declined to submit issue of whether power of attorney created fiduciary relationship where no evidence existed in the record "that Propounder served as Testator's attorney-in-fact at the time Testator executed her will"). The Court held that it would not presume propounder-agent exerted undue influence simply because of the existence of the power of attorney, and absent evidence of an actual action as a fiduciary and an actual confidential relationship, the caveators were not entitled to shift the burden of proof on undue influence to the propounder. *Sechrest*, 140 N.C. App. at 472, 537 S.E.2d at 517.

Consistent with *Sechrest*, in a recent unpublished opinion, the Court of Appeals upheld a trial court finding that the burden of proof on the issue of undue influence did not shift from caveators to propounders where a propounder was designated as agent for the decedent. *See In re Estate of Sanders*, 249 N.C. App. 233, 791 S.E.2d 650, No. COA15-1244, 2016 N.C. App. LEXIS 838, at *__ (N.C. App. Aug 16, 2016) (unpublished). The caveators did not present evidence showing that the propounder-agent ever knew about the power of attorney executed on his behalf, or showing that the propounder-agent ever acted as a fiduciary for his late father. *Id*, at *14-15. The Court of Appeals held that the mere existence of the power of attorney was not sufficient evidence to create a fiduciary relationship sufficient to shift the burden of proof. *Id.* at *15.

The case of the late Hester Womack also supports Robert's position that the burden of proof should not shift to Robert Smith on the issue of undue influence. *See In re Will of Womack*, 53 N.C. App. 221, 280 S.E.2d 494 (1981). Relying on *McNeil*, the caveators contended that one Frank Boswell acted as agent for Ms. Womack before her death and had a confidential relationship with her such that the burden of proof as to undue influence shifted to him. The Court held that the burden remained on the caveators to show that the will was procured by undue influence. *Womack*, 53 N.C. App. at 225-26, 280 S.E.2d at 497. Beneficiary-propounder Mr. Boswell lived with Ms. Womack and assisted her with her bank accounts and business affairs in conjunction with another caretaker as a condition of his ultimate inheritance. *Id*. at 221, 225-26, 280 S.E.2d 494, 497. He also served as personal representative in the place of Miss Womack following her renunciation from that role in another estate. *Id*. But the record evidence did not reflect that Mr. Boswell acted in a fiduciary capacity on behalf of the testatrix at any time. *Id*. at 221, 225, 280 S.E.2d 494, 497. Mr. Boswell's frequent contact with the testatrix and general assistance with her finances did not cause the burden of proof to flip to him. *Id*. at 221, 225-26, 280 S.E.2d 494, 497.

Just as the burden of proof did not shift to the propounder-agents in *Sechrest* and *Sanders* simply because of the existence of a power of attorney, the burden of proof should not shift to Robert in this matter simply because his mother named him as agent in her durable power of attorney. Although Robert was named as agent for his late mother, the record evidence does not support a finding that he acted in an official capacity as her legal agent under the power of attorney. See *Cross v. Beckwith*, 16 N.C. App. 361, 363, 192 S.E.2d 64, 66 (1972). Instead, Robert was simply a caretaker and a good son. He assisted his mother with acts of daily living; he opened her mail for her; he assisted with check writing, he managed her appointments and took her to the doctor—he ensured her comfort. The record does not reflect that Robert wrote checks on his mother's accounts as agent under a POA, that he represented his mother in financial transactions, or that he acted as her guardian. Instead, like Mr. Boswell in the *Womack* case, while Robert may have lived with and cared for his mother, but he did not assume an actual fiduciary role sufficient to remove the burden of proof from caveators on the issue of undue influence.

In the present case, the mere existence of a power of attorney is not sufficient to shift the burden of proof to Robert on the issue of undue influence, and Caveators have not shown an actual, active fiduciary relationship between Robert and his mother. Caveators' motion should be denied and the burden of proof should remain on Caveators to prove that Edith's Will and Revocable Trust Agreement were the product of the undue influence which they allege.

B. <u>Argument of Caveators' Attorney</u>

Caveators are entitled to a ruling from this court that the burden of proof with respect to their undue influence claim should be shifted to Propounder (Robert) to prove that he did not exert undue influence over their mother. Caveators are entitled to this ruling because Propounder stood in a confidential relationship with Edith because (i) he was her named agent under her durable power of attorney and acted in that role on her behalf, and (ii) he occupied a position of trust and confidence with her and used that position of trust to his advantage to procure estate planning documents that benefited him.

The law in North Carolina is clear on this point. When a transferee of property stands in a confidential or fiduciary relation to the transferor, the transferee has the burden of showing that in getting the property he acted fairly and in good faith. *Stone v. McClam*, 42 N.C. App. 393, 257 S.E. 2d 78 (1979). North Carolina law is also clear that

> A confidential or fiduciary relation can exist under a variety of circumstances and is not limited to those persons who also stand in some recognized legal relationship to each other, such as attorney and client, principal and agent, guardian and ward, and the like; it also "extends to any possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other."

Stilwell v. Walden, 70 N.C. App. 543, 546-547, 320 S.E.2d 329, 331-332 (1984) (quoting *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931)).

The fact that Robert was named as his mother's agent under a durable power of attorney and acted in that capacity is sufficient to establish a confidential relationship between Robert and Edith and trigger a shift in the burden of proof. Such a result is appropriate because an attorney-in-fact serves as an agent to his principal and an agent is a fiduciary with respect to matters within the scope of his agency. In an agency relationship, at least in the case of an agent with the power to manage all the principal's property, it is sufficient to raise a presumption of fraud (and a corresponding shift in the burden of proof) when the principal transfers property to the agent. Self dealing by the agent is prohibited. *See Honeycutt v. Farmers & Merchants Bank*, 126 N.C. App. 816, 818, 487 S.E.2d 166, 167 (1997).

But even if Robert was not named as his mother's agent or, if as he asserts, he never acted officially in his capacity as her agent, he was still in a confidential relationship with Edith because Edith placed her confidence in Robert, trusted him and relied on him for all of her needs. Robert, in turn, used his domination and influence over her to his advantage, compelling her to execute new estate planning documents that benefited Robert to detriment of Edith's other children and grandchildren.

The facts of the *Stilwell* case illustrate the fact that no formal legal relationship is required to establish a confidential relationship. In *Stilwell*, the Court of Appeals stated that a "clearer example of a confidential relationship within the purview of the foregoing case would be hard to find." *Id*. The evidence presented to the court in *Stilwell* showed that the decedent, who was

wheelchair bound and in declining health, had relied upon the defendant to handle his funds and see that his needs were attended to. The defendant made purchases for the decedent, paid his bills, managed his investments, and saw to it that his household was properly operated and his needs supplied. *Id*. These facts are substantially identical to the facts at issue in this case.

In analyzing these facts, the Court of Appeals in *Stilwell* stated "such evidence bespeaks dependence and confidence on the one hand and influence on the other; which relationship was accentuated by the fact that the [decedent], because of his health, was unable to do for himself and therefore needed the help of others." *Id*. It is because "confidence in others inherently and inevitably begets influence that the law of constructive fraud is needed, lest that influence be exerted for the benefit of the one having it, rather than that of the one whose confidence created it." *Id*.

The *Stilwell* decision is supported by the North Carolina Supreme Court's decision in *Curl v. Key*, 311 N.C. 259, 316 S.E. 2d 272 (1984). In that case, the Supreme Court held that a fiduciary relationship was created on facts less strong than those at issue in *Stilwell*. In so holding the Supreme Court cited Justice Lake for the proposition

> Where a transferee of property stands in a confidential or fiduciary relationship to the transferor, it is the duty of the transferee to exercise the utmost good faith in the transaction and to disclose to the transferor all material facts relating thereto and his failure to do constitutes fraud. . . . Such a relationship "exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." . . . Intent to deceive is not an essential element of such constructive fraud. . . . Any transaction between persons so situated is "watched with extreme jealousy and solicitude; and if there is found the slightest trace of undue influence or unfair advantage, redress will be given to the injured party."

Curl v. Key, 311 N.C. 259, 264 316 S.E.2d 272, 275 (1984) (quoting *Link v. Link*, 278 N.C. 181, 192, 179 S.E. 2d 697, 704 (1971) (citations omitted)).

In *Curl*, the North Carolina Supreme Court found that a confidential relationship existed despite the fact that no formal legal relationship of any kind existed among the plaintiffs and the defendants. *Id.* The Supreme Court held that it was sufficient that the bad actor was a close family friend who was trusted by the family and who the family relied on after their husband/father died. Plaintiffs testified that Defendant Key was a "special friend of the family"; that he lived with them for a period of time after their husband/father died; and that they had trusted him and relied on him for as long as they could remember. *Id*. at 262-263, 316 S.E.2d at 274-275.

Similarly, in this case, Robert moved in with Edith about the time her husband died about 16 years ago. He became her primary caretaker. He was with her constantly, taking her to doctor's appointments, opening her mail, and managing her day-to-day life. As her weakness overtook her, she depended on him to look after her best interests. For these reasons, although it surprised Caveators that Edith had revoked their powers of attorney, it certainly did not surprise them that

she had appointed Robert to be her power of attorney. As the local son, he had effectively been serving in that capacity for years.

When a superior party obtains a possible benefit through the alleged abuse of the confidential or fiduciary relationship, the aggrieved party is entitled to a presumption that constructive fraud occurred. *Watts v. Cumberland County Hospital System, Inc.*, 317 N.C. at 116, 343 S.E.2d at 884; McNeill v. McNeill, 223 N.C. 178, 181, 25 S.E.2d 615, 617 (1943). "This presumption arises 'not so much because [the fiduciary] has committed a fraud, but [because] he may have done so.'" *Forbis v. Neal*, 361 N.C. 519, 529-530, 649 S.E.2d 382, 388-389 (2007) (quoting *Watts*, 317 N.C. at 116, 343 S.E.2d at 884 (alterations in original)). Because Robert was in a confidential relationship with his mother, Caveators are entitled to a presumption that he exerted undue influence on her and it should be up to him to prove he did not.

There can be no real dispute that Robert had assumed a confidential and fiduciary relationship with Edith in the 16 years they lived together, or that the relationship was formalized when she executed the power of attorney shortly before her death. There is also no dispute that Robert benefitted enormously from Edith's change to her estate plan. In these circumstances, the law presumes that the new will and trust were procured by undue influence, and the burden is on Robert to prove otherwise.

VI. Fifth Issue: Is Video Taping a Will Execution a Good Idea?

As part of the discovery in this litigation, a video tape of the will and trust signing was produced. The video was made by Ms. Johnson and documents part of the meeting that Ms. Johnson had with Edith to execute her new estate planning documents. The video is played during the trial of the caveats. Both attorneys use the video in their closing arguments to support their positions.

A. Argument of Propounder's Attorney

This Court can clearly see that Edith was capable of signing her planning documents and the same should be enforced.

First of all, let's be clear here. Attorney Johnson would never draft estate planning documents for a client who lacked capacity to understand her testamentary decisions. Ms. Johnson is a dedicated estate planning attorney in good standing with the State Bar. Unlike a general practitioner who may dabble in various practice areas and not be as familiar with specific capacity laws, Ms. Johnson knows the law; understands the requisite legal capacity to make a will; and would not draft documents for a client who lacked capacity.

In the same vein, Ms. Johnson would never draft documents which did not reflect a testator's intent, but instead reflected the unjust and overpowering influence of another.

If Ms. Johnson had any concerns about Edith's testamentary capacity – if Ms. Johnson had any concerns about the overpowering and undue influence of another on a susceptible client – would Ms. Johnson videotape that signing conference?! I think not.

This video recording is the best evidence this Court could review in assessing Edith's abilities and faculties, because the Court can view Edith at the exact moment she executed here estate plan. It is clear to me and clear to the Court that Edith was not just lucid, but was more than engaged and capable to sign legal documents.

The video evidence supports Attorney Johnson's conclusion and what should be this jury's conclusion – that Edith was competent to sign her planning documents and was no subject to the undue influence of any person, especially not her caretaker child, my client Robert Smith.

B. **Argument of Caveators' Attorney**

This video is really difficult to watch. It plainly shows that Decedent was not acting of her own free will. She is passive and resigned. She seems confused, simply parroting what other people are telling her. It's clear that she's not doing well. The sad person in this video is just a shell of her former self. Frankly, it's a heartbreaking that Propounder and his preferred drafting attorney forced Decedent to sit through this, like some medical curiosity or specimen.

Let's be real: the only reason a lawyer would ever videotape the execution of a will is if they thought someone might later challenge their client's capacity. It's an incredibly defensive move. The hope is that, if they can catch their client in a moment of lucidity, dress her up all nice, and get the camera angle and lighting just right, they can perhaps gloss over the competency concerns. But that effort clearly failed here. Sure, she's not drooling on herself. But as anyone who has ever had to care for mentally fading relative will tell you, this is what dementia looks like. This is exactly what incompetence looks like in the real world. It's shocking that Propounder would force the Decedent to endure this video, but I'm glad he did. Now the Court can see for itself that Decendent was incompetent.

There is, of course, much that this minutes-long video cannot show. It cannot show Propounder's years-long campaign to cultivate complete reliance. It cannot show the conversations they had after he moved in with her. It cannot show Propounder's incessant insistence, day in and day out, that she should change her testamentary instruments to give him more. That she owed him. That he was the only one who loved her. It cannot show Propounder calling to set up the appointment with Mrs. Johnson. It cannot show him bundling her into the car and driving her to the office. It cannot show him talking with Mrs. Johnson after the appointment to provide more detail, documents, and information. It cannot show him waiting in the background as the instruments are signed. Simply put, it cannot show undue influence.

The Propounder acts like we are somehow attacking Mrs. Johnson's judgment or professionalism. We are not. She simply didn't know. Unlike Mr. Jones, Mrs. Johnson didn't know Decedent. Maybe she didn't even know about the dementia diagnoses. She certainly didn't have a baseline from which to compare the woman we saw in that video. Mrs. Johnson had no information at all about Propounder's undue influence. So her failure to recognize the warning flags is perhaps excusable—after all, she barely knew the woman. And she knew far less about that facts than this Court does now. But it's important to ask *why* she didn't know. It's because

Propounder chose to shop for a new attorney, one who might be receptive to such a drastic change in the testamentary plan.

At the end of the day, the video can only tell a very small part of a much larger story. But even the video shows the exact opposite of what Propounder contends. I see a frail old woman who does not know what she's doing. I urge the jury to apply common sense and conclude that Decedent was incompetent and suffering from undue influence when she executed the disputed testamentary instruments.