Probate Disputes

& Litigation

Tom Sparks
Walker Lambe, PLLC

NCPA's 38th ANNUAL MEETING & SEMINAR
March 22, 2018 – March 24, 2018

Tom Sparks
Walker Lambe, PLLC

In over 13 years of practice, Tom Sparks' primary area of practice has been litigation. In the area of business law litigation, he assists clients with, among other matters, contract disputes, employment and post-employment disputes, business dissolution issues, merger and acquisition disputes, disputed warranty claims, fiduciary duty disputes, real property liens, commercial lease litigation, unfair trade practice litigation, and claims against businesses by governmental entities, such as OSHA or the EEOC. In the area of Estate Planning Litigation, he assists clients with, among other matters, will caveat proceedings, estate administration disputes, trust modification, breaches of contract to make wills, and fiduciary duty disputes. Tom also has a strong interest in assisting business clients with litigation-prevention strategies. He brings a unique perspective to this area of practice in that he owned and ran a custom home design and build company for seven years.

Tom served as a Judge Advocate (JAG) in the Air Force for six years after receiving his law degree from Duke University. As a JAG, and specifically in the area of litigation, he served at different times as a prosecutor and a defense counsel for crimes committed by active duty personnel, defended the Air Force in law suits brought against it in Federal Court. He also, as a JAG practiced contract, environmental, labor, and operations law. After separation from the Air Force, he practiced for six years representing individuals in medical malpractice and serious personal injury lawsuits, in employment discrimination and employee benefits matters, in workers compensation claims, and in appeals for veteran's benefits claims. In those varied contexts, he practiced in Superior Courts throughout Eastern and Central North Carolina, in Federal Courts in all three Districts in North Carolina, at the North Carolina Industrial Commission, and with the Board and Court of Veteran Appeals.

He and his wife, Kelly, have two children – Kyle, born in 1991 (and a proud Appalachian State Mountaineer), and Randi, born in 1996. Tom enjoys long walks with Kelly and their golden retrievers, coaching Randi in travel soccer, fishing with Kyle in western North Carolina, enjoying the fellowship of friends at LifePointe Church in Raleigh, reading history, and playing tennis and soccer.

Tom Sparks
Walker Lambe, PLLC
(919) 493-8411; tsparks@walkerlambe.com

Probate Disputes & Litigation

Claims on Behalf of Estate

- Wrongful death actions – Chapter 28A, Article 18
- 28A-13-3 – PR has *power* **and** *duty* to maintain *appropriate* actions to recover possession of property of decedent and for injury done to that property
- 28A-15-12(a1) – PR has standing to sue in Sup. Ct.
- 28A-15-12-(b1) – PR has authority to bring action to seek examination of and recovery from person reasonably believed to be in possession of decedent's property
- Provisional remedies – More tools in your toolbox
  - Prejudgment Attachment
  - Garnishment
  - TRO/Preliminary Injunction

Beneficiary Liability

- Context
  - Post-death:
    - Will Caveat
    - Estate claim against former fiduciary
  - Pre-death: Almost always against fiduciary
    - Normally follows change of fiduciary (which can be made necessary by discover of abuse), OR
    - Follows Guardianship proceeding where prior fiduciary ousted

Getting Standing

- <u>Most instances</u> – Standing doesn't immediately exist

- *This is so because the offending party is usually the only one who can investigate or pursue claim*

- <u>Getting standing</u>
  - Incompetency/Guardianship proceeding (pre-death)
  - Revocation of letters – Post-death
  - Removal of Attorney-in-fact or suit by financially abused principal – requires involvement of principal (often difficult)
  - Removal of Trustee (either)

Incompetence

- "Competence" **NOT** a high bar
- <u>Exists if Testator</u>:
  - Knows his family tree
  - Understands kind, nature and extent of his property
  - Understands how he wants his stuff distributed
  - Understands effect of his act (e.g., disinheriting)
- <u>Statute of Limitations</u> – Tolled during incompetency, so look to caveat SOL (3 yrs))
- <u>Strategic Consideration</u> – Evidence of this blends with evidence of undue influence (especially if some, but not all, relatives disinherited)

Undue Influence

- Essence of case: Substitution of B's will over T's

- Factors to consider (T = Testator; B = Beneficiary):
  - Old age & physical/mental weakness
  - T subject to B's constant supervision
  - Isolation of T by B – Keeping others from T
  - New Will revokes old one
  - New Will favors unrelated B
  - New Will disinherits relatives
  - B procured execution of new Will

- Statute of Limitations – 3 years (NCGS §§1-52(9) & 31-32(a))

Breach of Fiduciary Duty

- <u>Elements</u>:
  - Existence of fiduciary relationship (*de jure/de facto*)
  - Breach of duty owed by agent
  - Breach caused damages to principal
- <u>Statute of Limitations</u> – 3 years (NCGS §1-52(1)) (but recall incompetency tolling)
- <u>Where to find "duties"</u>
  - General Statutes, Chapter 32 (Fiduciaries), Article 3
  - General Statutes, Chapter 32A (POAs), Articles 1 & 2A
  - General Statutes, Chapter 28A (Estate Administration), Articles 13-23
  - Elements not as stringent as actual fraud claim

Conversion

- Elements:
  - Unauthorized assumption & exercise of ownership
  - Over the property of another
  - To the exclusion of owner's rights
  - If lawfully obtained, then request for return must be made and refused
- Statute of Limitations – 3 years from date of discovery (NCGS §1-52(4))
- *"Theft by Power of Attorney"*

Fraud

- Elements:
  - False representation or concealment of mat'l fact
  - Reasonably calculated to deceive
  - Made with intent to deceive
  - Plaintiff deceived/relies
  - Reliance reasonable
  - Resulted in damages
- Statute of Limitations – 3 years from date of discovery (NCGS §1-52(9))
- Strategic Considerations
  - Must be pled with specificity – N.C.R.Civ.P. 9(b)
  - Punitive damages become available if proven
  - Everyone wants to claim this, but *VERY* hard to establish

Constructive Fraud

- <u>Elements</u>:
  - Relationship of trust and confidence existed
  - Fiduciary took advantage of relationship
  - Principal (or his estate) was injured
- <u>Statute of Limitations</u> – 10 years (NCGS §1-56)
- <u>Strategic considerations</u>
  - Tailor made where fiduciary relationship exists
  - Clear and convincing evidence standard – But ***STILL*** easier to prove than fraud
  - Burden shifting once prima facie case is established
  - Elements not as stringent as actual fraud claim

Constructive/Resulting Trust

- Elements:
  - Defendant got possession in circumstances where it would be unjust to retain property
  - Deprived Plaintiff of beneficial interest
  - Principal (or his estate) was injured
- Statute of Limitations – 3 years (NCGS §1-52(1))
- Strategic considerations
  - Tailor made where fiduciary relationship exists
  - Clear and convincing evidence standard
  - Dovetails with, and *should be claimed in conjunction with*, constructive fraud claim (in other words, this is the remedy for Constructive Fraud)

Deed Contests

- Situations of competency of grantor previously discussed
- Void*able* *Transactions* Act (NCGS 39A, Article 3A)
- Who can bring
  - Creditors of Estate
  - Frustrated beneficiary
- Statute of Limitations – In general, 4 years (NCGS §39A-23.9) … but transfers to Insiders to satisfy debts to insider = 1 year
- Factors
  - Transfer to Insider
  - Transfer left debtor/estate insolvent
- Transfer can have occurred before OR after debt incurred

Unjust Enrichment

- A.k.a., "quasi-contract" or "contract implied by law"
- <u>Elements</u>:
    - A measureable benefit was conferred
    - The benefits were consciously accepted
    - The benefit was not gratuitous (i.e., a gift)
- <u>Statute of Limitations</u> – 3 years (NCGS §1-52(1))

Other Will Issues

- <u>Improper Will execution</u> – There is no Will

- <u>Improper/failed revocation of prior Will</u>
  - Read together when possible
  - Newer Will prevails in conflicts

- <u>Ambiguities</u>
  - Patent – Contradictory language in Will – No extrinsic
  - Latent – Typically identity issues (e.g., "Uncle John" and there are two Uncle John's) – Extrinsic permitted