IN THE SUPREME COURT OF THE STATE OF GEORGIA

FROM

THE PROBATE COURT OF BIBB COUNTY, GEORGIA

William T. Ray Burkhalter, Appellant

VS

George Laris Burkhalter and Nancy Gayle Ward, Appellees

APPEAL CASE NO. A19A2056

In Re: ESTATE OF LOUISE RAY BURKHALTER, DECEASED

Probate Estate No. 15PV4126

Before

The Honorable Sarah Harris, Judge

Probate Court of Bibb County, Georgia

INITIAL BRIEF OF APPELLANT

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1. The crux of the dispute between the parties is whether Appellees' actions thus far have violated the in terrorem clause. The resolution of this issue will ultimately resolve all claims made both by Appellees and Appellants in this action and therefore should have been determined prior to an Order to calculate ITEM IV and would make other issues addressed herein moot.

B. THE PROBATE COURT'S ORDER ERRS IN DECLARING *THE IN TERROREM CLAUSE IN ITEM IX OF THE LAST WILL AND TESTAMENT OF LOUISE RAY BURKHALTER IS INVALID AS TO AN ATTACK BY AN HEIR OR BENEFICIARY ON THE ADMINISTRATION OF THE ESTATE.*

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E. THE PROBATE COURT'S ORDER ERRS IN DECLARING *The Movants may proceed to file a Petition for Accounting or in the Alternative Removal of Executors without violating the in terrorem clause of Item IX of the will, should they deem such is necessary after receipt of the loss calculation from the executor,* and to the extent the Court intended to reference Item IV instead of Item IX.

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II. STATEMENT OF FACTS AND PROCEDURAL POSTURE

Testator Louise Ray Burkhalter died on March 18, 2015. Appellants, William T. Ray Burkhalter and John Allan Burkhalter, filed a Petition to Probate her Last Will and Testament (hereafter "the Will") in Solemn Form in the Bibb County Probate Court on May 27, 2015. The Will was admitted to probate and, on June 10, 2015, Letters Testamentary were issued to Appellant William T. Ray Burkhalter and John Allan Burkhalter, deceased October 12, 2016, whom the Will named as executors. The Will contains a clause, labeled Item IX, which states,

> *In order to assure there will be no dispute between my children concerning some of the expenditures made out of the Burkhalter Family Trust and other financial transactions with the assets in my estate, I want to declare that I have personally authorized these transactions. This trust was established by my late husband, Harry H. Burkhalter for my use during my lifetime. I am entitled to use the income and the corpus of this trust as I need and direct. I absolutely do not wish for my children to engage in legal disputes over this estate after my death. Therefore:*
>
> *Any person whether named as a beneficiary under my Last Will and Testament or becoming an heir of my estate by operation of law or any other means who attacks in any court of law any provision of my*

Last Will and Testament, or the administration of my estate, or the management or expenditures of the Burkhalter family trust shall be specifically disinherited from any portion of my estate that would go to them either from provisions in my will or through operation of law. If this provision becomes operative, I direct that any portion of my estate that is involved be added to the residue and be distributed to the remaining beneficiaries, according to this, my Last Will and Testament.

On June 15, 2015, Appellees George Laris Burkhalter and Nancy Gayle Ward filed a Petition for Declaratory Judgment seeking, inter alia:

(b) *That the Movants be permitted to file a Petition for Declaratory Judgment regarding Item IV of the LW&T without being in violation of the condition in terrorem clause in Item IX of the LW&T;*

(c) That the Movants be permitted to file a Petition for Declaratory Judgment regarding Item IX of the LW&T without being in violation of the condition in terrorem clause in Item IX of the LW&T; and,

(d) That the Movants be permitted to file a Petition for Removal of the Executors without being in violation of the condition in terrorem clause in Item IX of the LW&T. (***Petition for Declaratory Judgment, pg. 4***).

Nancy Gail Ward signed the Verification of the Petition on June 11, 2015 and George Laris Burkhalter signed on June 12, 2015. Appellees filed their Petition on June 15, 2015, five days after appointment and prior to any action having been taken by the Executors. Appellants filed their answer to Appellees' Petition on June 29, 2015, noting in Paragraph 4 that Appellees violated the in terrorem clause by seeking the removal of the executors prior to any action by the executors. (See Court Record CR pg 25).

On August 15, 2015, a hearing was held on Appellees' Petition. During that hearing, Appellees acknowledged that the in terrorem clause in Item IX of the Will is valid. Also, in that hearing, Appellants brought to the Court's attention as well as to the attention of the Appellees and counsel, the considerable risk and apparent conflict of interest between Appellees. Particularly that the general nature of the Petition appeared to be a challenge to ITEM IV of the will. ITEM IV provided for a disbursement, which would have included Appellee George Laris Burkhalter prior to the inclusion of Appellee Nancy Gayle Ward. Appellant noted that both were subject to disinheritance, based primarily on a dissatisfaction with Item IV of Testator's will. (*Recording of this hearing lost due to Court equipment failure*)

In an Order dated October 5, 2015, the Probate Court directed the parties to attend mediation. That Order required the parties to complete the mediation within sixty days. The parties attended mediation with retired Judge Lamar Sizemore on

December 2, 2015. The mediation did not produce any results; thereafter, on February 12, 2016, the Probate Court issued an Order, granting in part and denying in part, Appellees' Petition for Declaratory Judgment. In that Order, the Probate Court denied Appellees' Petition as to item (b) of that Petition, which related to ITEM IV stating that the provision "*on its face seems clear*." The Order granted appellees' Petition as to items (c) and (d), which would have allowed Appellees to submit an unseen Petition to Remove the Executors and/or challenge the in terrorem clause, without risk of violating the in terrorem clause. Appellants successfully appealed this decision as to (c) and (d) and the case was remanded by A16A1698, Decision of this Court October 27, 2017.

Subsequent to the Courts February 12, 2016 order but prior to the notice of appeal of that Order, on February 18, 2016, Appellees filed an Emergency Motion to freeze the assets of the estate. On February 24, 2016, Appellants filed their Response to Appellees' Emergency Motion, as well as their Notice of Appeal. On that same date, the Probate Court convened a hearing on the Emergency Motion. After hearing arguments, the Court ruled from the bench, denying the Emergency Motion. The Court issued an Order denying the Emergency Motion on February 26, 2016 and also on February 26, 2016, Appellees entered a withdrawal of their already denied motion. (*These actions appear to be inadvertently left out of this appellate record, Appellants are asking the Court to provide these documents*).

These actions took place during the time between the above-mentioned order and the filing of the Notice of Appeal which may have contributed to their absence from the appellate record.

After receipt on remand, the Court reopened Discovery. Depositions were taken of the parties. Among the Discovery items requested was an unfinished calculation of ITEM IV, which would show Appellants' calculations, wholly within their discretion, of the amount to be distributed prior to any distribution to Appellee Nancy Gayle Ward. Appellant maintained that this calculation was not yet finished and was at that point moot and not required, as Appellant maintained Appellees had violated ITEM IX, the in terrorem clause, and were therefore disinherited both by the filing of the Petition for Declaratory Judgment (CR pg 8) and the filing of the Emergency Motion to Enforce Order on Declaratory Judgment and Freeze all Assets of the Estate of Louise Ray Burkhalter.

On August 22, 2018, Appellees filed their Amended Petition for Declaratory Judgment, seeking that the Court (b) *decide as to the validity of the in-terrorem clause*; (c) permit Appellees *to file a Petition for Enforcement of Last Will and Testament of Decedent and for an Accounting or, in the alternative, for removal of Executor* and *declare the filing of a declaratory judgment action is not an attack upon the Will itself*. Appellant responded requesting that the Court determine among other items (a) *That the in terrorem clause contained in Item IX of the Will*

is valid; (b) *That Petitioners have violated said clause*; and (d) *That Petitioners Ward and Burkhalter are specifically disinherited.*

January 29, 2019, the Court entered an Order finding:

1: The in terrorem clause in Item IX of the last will and testament of Louise Ray Burkhalter is VALID as to an attack by an heir or beneficiary on any provision in the will, and

2. The in terrorem clause in Item IX of the last will and testament of Louise Ray Burkhalter is INVALID as to an attack by an heir or beneficiary on the administration of the estate, or the management or expenditures of the Burkhalter family trust, and

3. The executor shall provide, within 60 days of the date of this Order, a complete accounting of the calculation of loss sustained as referenced in Item IX of the will and provide the same to the Court and Movants;

4. The Movants may proceed to file a Petition for Accounting or in the Alternative Removal of Executors with out violating the in terrorem clause of Item IX of the will, should they deem such is necessary after receipt of the loss calculation from the executor.

5. The issue of attorney fees is reserved.

The errors enumerated were preserved by the timely filing of Notice of Appeal in the Probate Court.

III. ENUMERATION OF ERRORS

B. THE PROBATE COURT'S ORDER ERRS IN THAT IT FAILS TO ADDRES APPELLANT'S COUNTERCLAIMS THAT THE APPELLEES HAVE VIOLATED THE IN TERROREM CLAUSE AND ARE THEREFORE SPECIFICALLY DISINHERITED.

2. The crux of the dispute between the parties is whether Appellees' actions thus far have violated the in terrorem clause. The resolution of this issue will ultimately resolve all claims made both by Appellees and Appellants in this action and therefore should have been determined prior to an Order to calculate ITEM IV and would make other issues addressed herein moot.

B. THE PROBATE COURT'S ORDER ERRS IN DECLARING *THE IN TERROREM CLAUSE IN ITEM IX OF THE LAST WILL AND TESTAMENT OF LOUISE RAY BURKHALTER IS INVALID AS TO AN ATTACK BY AN HEIR OR BENEFICIARY ON THE ADMINISTRATION OF THE ESTATE.*

C. THE PROBATE COURT'S ORDER ERRS IN DECLARING *THE IN TERROREM CLAUSE IN ITEM IX OF THE LAST WILL AND TESTAMENT OF LOUISE RAY BURKHALTER IS INVALID AS TO AN ATTACK BY AN HEIR OR BENEFICIARY ON THE MANAGEMENT OR EXPENDITURES OF THE BURKHALTER FAMILY TRUST.*

D. THE PROBATE COURT'S ORDER ERRS IN DECLARING *THE EXECUTOR SHALL PROVIDE, WITHIN 60 DAYS OF THE DATE OF THIS ORDER, A COMPLETE ACCOUNTING OF THE CALCULATION OF LOSS SUSTAINED AS REFERENCED*

IN ITEM IX OF THE WILL AND PROVIDE THE SAME TO THE COURT AND MOVANTS, **AND TO THE EXTENT THE COURT INTENDED TO REFERENCE ITEM IV INSTEAD OF ITEM IX.**

E. THE PROBATE COURT'S ORDER ERRS IN DECLARING *The Movants may proceed to file a Petition for Accounting or in the Alternative Removal of Executors without violating the in terrorem clause of Item IX of the will, should they deem such is necessary after receipt of the loss calculation from the executor,* and to the extent the Court intended to reference Item IV instead of Item IX.

IV. STATEMENT OF JURISDICTION

The Georgia Court of Appeals has jurisdiction of this case on appeal rather than the Supreme Court of Georgia due to provisions of OCGA § 15-3-3.1(a) (3) (effective January 1, 2017, the Court of Appeals will have jurisdiction over cases involving wills).

V. STANDARD OF REVIEW

With respect to all enumerations of error in this case, since a question of law forms the basis for all of the enumerations, this Court owes no deference to the trial court's order and the applicable standard of review is "plain legal error". Suarez v. Halbert, 246 Ga. App. 822, 824, 543 S.E.2d 733 (2000) (When a question of law is at issue, as here, we owe no deference to the trial court's ruling

and apply the "plain legal error" standard of review. (citing Glover v. Ware, 236 Ga. App. 40, 45, 510 S.E.2d 895 (1999)).

VI. ARGUMENT AND CITATION OF AUTHORITY

A. THE PROBATE COURT'S ORDER ERRS IN THAT IT FAILS TO ADDRES APPELLANT'S COUNTERCLAIMS THAT THE APPELLEES HAVE VIOLATED THE IN TERROREM CLAUSE AND ARE THEREFORE SPECIFICALLY DISINHERITED.

1. The crux of the dispute between the parties is whether Appellees' actions thus far have violated the in terrorem clause. The resolution of this issue will ultimately resolve all claims made both by Appellees and Appellants in this action and therefore should have been determined prior to an Order to calculate ITEM IV and would make other issues addressed herein moot.

The Probate Court's Order is defective in that it failed to address whether Appellees violated the terms of the in terrorem clause. Appellant petitioned the Court to declare that Appellees violated the in terrorem clause and were therefore disinherited. (*See William T. Ray Burkhalter's Responses to Amended Petition For Declaratory Judgment and Counterclaims request (b) and (c) Clerk's Record CR pg 115*). Appellant showed that Appellees had sought to remove Executors prior to the Executors having taken any action whatsoever, (CR pg 115) Appellees further sought to attack Item IV of the Will and were denied without appeal (February 12, 2016 Order CR pg 35). Appellees also sought to challenge Item IX

of the Will, the in terrorem clause which they acknowledged initially was valid on its face but then challenged, that challenge now a portion of this Appeal.

Further, Appellant reminded the Court that *Due to Petitioners' alleged controversy, the Court ordered mediation on October 5, 2015*. Continuing, Appellees had filed the February 18, 2016 *Motion to Enforce Order on Declaratory Judgment and Freeze all assets of the estate of Louise Ray Burkhalter. A hearing was held on the motions on February 24, 2016*. Appellants reminded the Court that this motion was denied February 26, 2016. (See CR pg 111)

As the Court found in ***Lanier***, *The plaintiff, as a beneficiary under the will, seeks a determination as to whether or not he forfeited his interest under the will in bringing the declaratory judgment action. Code § 113-820 provides, "A condition in terrorem shall be void, unless there is a limitation over to some other person; in which event the later shall take. Conditions which are impossible, illegal or against Public Policy shall be void." Here, the condition in terrorem imposes a forfeiture but with a limitation over, and certainly, it is obvious that this action contest the "... validity of my will or any provision thereof, ..." It cannot be said that such a provision violates public policy, and since the provision is otherwise valid under Code § 113-820, the interests of the plaintiff are voided by this suit*. ***Lanier v. Lanier 218 Ga. 137 (1962)***.

Judicial expediency requires that this issue be resolved quickly as most all other issue arise out of this dispute. The Court erred when this issue was ignored, and peripheral issues were addressed without it's determination.

B. THE PROBATE COURT'S ORDER ERRS IN DECLARING *THE IN TERROREM CLAUSE IN ITEM IX OF THE LAST WILL AND TESTAMENT OF LOUISE RAY BURKHALTER IS INVALID AS TO AN ATTACK BY AN HEIR OR BENEFICIARY ON THE ADMINISTRATION OF THE ESTATE.*

The terms of **Lanier** above stated, were addressed in the instant case. T*here is a limitation over to some other person; in which event the later shall take*. However, here the Court found that limiting an attack by a beneficiary against the administration of the will is against public policy. (see CR 144). Nothing could be further from the truth. While the present case could be determined relying solely on the Petition for Declaratory Judgment, the actions by Appellees to freeze the assets of the estate violate this challenged provision and therefore this finding remians of paramount importance.

In preparing for a person's Last Will and Testament, a person necessarily has the right to restrict their potential beneficiaries from undue litigation which is the stated purpose of the testator in the instant case. Without this provision and the comfort of knowing that the estate will not be litigated through various appeals as has happened here; a person may refrain entirely from devising to an individual

prone to litigation. Without the comfort of knowing that their estate will not be reduced by undue litigation is of public interest as all persons preparing a Will need to know whether they can rely on their stated request in this matter. Georgia upholds this tradition and to find, as the Court did here, that limiting the "attack on the administration of my estate" violates Public Policy is to void in terrorem clauses in Georgia in full. No public policy was named regarding this issue and no public policy exists to so determine.

If in fact, as in **Sinclair**, the Executors had acted inconsistent with the provisions of the will, then the Courts have carved out an exception to this otherwise burdensome result. However, in the present case, Appellees have attacked this provision prior to any actions being taken by the executors at all. Additionally, they have violated its terms with an attack on the estate through a motion to freeze assets. That result was denied and therefore determined invalid without appeal. Furthermore, their inclusion in this motion the attempt to "enforce Order on Declaratory Judgment" shows their original intention to attack despite the sidestep of asking for permission to file, attempting to disguise their original actions through framing as a Petition for Declaratory Judgment.

C. THE PROBATE COURT'S ORDER ERRS IN DECLARING *THE IN TERROREM CLAUSE IN ITEM IX OF THE LAST WILL AND TESTAMENT OF LOUISE RAY*

BURKHALTER IS INVALID AS TO AN ATTACK BY AN HEIR OR BENEFICIARY ON THE MANAGEMENT OR EXPENDITURES OF THE BURKHALTER FAMILY TRUST.

The above arguments to B are applicable here. While an attack by a beneficiary against the administration is directly related to the will itself, nothing prohibits a testator from addressing an issue that may arise simultaneously with the probate of her will. As in this case, the testator's death triggered a second event, the final distribution of a Trust left by her late husband for her benefit. All of the requirements for an in terrorem clause also applied to this provision. Again, it was said to have violated public policy. No public policy was named only that it was found to violate public policy. No claim has been made specific to a violation of this portion of the clause and therefore there is no evidence of justification for requesting a deviation based on public policy. Nothing on the face of this provision violates any named public policy and no action was claimed to have triggered this portion of the provision, therefore, the Court erred in finding that this provision violates public policy.

D. THE PROBATE COURT'S ORDER ERRS IN DECLARING *THE EXECUTOR SHALL PROVIDE, WITHIN 60 DAYS OF THE DATE OF THIS ORDER, A COMPLETE ACCOUNTING OF THE CALCULATION OF LOSS SUSTAINED AS REFERENCED IN ITEM IX OF THE WILL AND PROVIDE THE SAME TO THE COURT AND MOVANTS,*

AND TO THE EXTENT THE COURT INTENDED TO REFERENCE ITEM IV INSTEAD OF ITEM IX.

While this Order requires Appellants to "complete accounting of the calculation" referenced in Item IX, it is Appellant's view that the Court may have intended to require a calculation of Item IV. Item IX is the in terrorem clause and Appellant has made clear that the calculation of this clause as it states on its face is complete disinheritance and no calculation is needed. As stated above, Appellees requested calculation of Item IV and Appellant maintains this is moot.

This Order of the Court therefore is clear error. It is either unnecessary or premature. The Court has determined as valid Item IX at least as far as "Any person whether named as a beneficiary under my Last Will and Testament or becoming an heir of my estate by operation of law or any other means who attacks in any court of law any provision of my Last Will and Testament" … "shall be specifically disinherited from any portion of my estate that would go to them either from provisions in my will or through operation of law." On its face this provision is clear and has been so stated by Appellant.

If in fact the Court intended this to have required a calculation of Item IV, then it necessarily requires a determination of whether Appellees have been "specifically disinherited from any portion of my estate that would go to them" … "from provisions in my will." Therefore, as Appellant has made it abundantly

clear that the estate has been distributed in accordance with the desires of the testator, through the direction in her Will, there cannot be a required calculation of Item IV unless and until an ultimate determination is made as to Item IX.

Appellees are seeking some relief from the harsh result of their actions. The Court correctly notes, "*On its face the petition appears an anticipatory act.*" (CR pg 144) A calculation of Item IV, no matter the result, can only be used as an attempt to give cover for Appellees who filed a petition to (1) challenge Item IV, which was denied without appeal, (2) challenge Item IX, which they initially perceived as valid but now are attacking through this action and (3) attempted to remove the Executors (Appellant and deceased executor). In addition to these acts, Appellees filed their motion to freeze the assets of the estate, which was denied. Appellant has acted by the stated terms of the will. It is not Appellant's right to enforce the in terrorem clause, it is his obligation.

While the Court acknowledges "*the respondents have never denied that the beneficiary/movant, Gayle Ward was ever going to receive a distribution under the will*," the Court also states that *"Gayle Ward already knew as soon as the will was probated that she was not going to receive a distribution under the estate and that the reason she would not receive a distribution was based upon a calculation of loss sustained and as set out in Item IV of the Will*." (CR pgs 144-145) This contention has been denied by Appellant and is not consistent with testimony of

Appellees. The Court also notes, "*it may not matter in the end because the will gives complete discretion to the executor to determine how this calculation is to be made.*" Therefore, this provision of the Order can only ensure more litigation, with the parties arguing over a moot calculation made in their "complete discretion." In fact, a removal of the executors would not have changed the calculation under Item IV, as it called for a calculation by William Thomas Ray Burkhalter and John Allan Burkhalter, specifically and not by a replacement executor.

As the Court further notes, "*the executor stated that he is willing to provide an accounting and calculation of the loss sustained due to the action of Gayle Ward and her son.*" This presupposes a determination that Appellees did not violate the in terrorem clause. As stated in Enumeration of Errors A, this is the issue upon which all other enumeration of errors may hinge.

E. THE PROBATE COURT'S ORDER ERRS IN DECLARING *The Movants may proceed to file a Petition for Accounting or in the Alternative Removal of Executors without violating the in terrorem clause of Item IX of the will, should they deem such is necessary after receipt of the loss calculation from the executor,* and to the extent the Court intended to reference Item IV instead of Item IX.

Similarly, to the previous appellate action in this case, here, the Court grants Appellees authority to file an action based on their own subject determination that

"they deem such is necessary after receipt of the loss calculation from the executor." First, on its face, this does not require the filed Petition to be specifically the Petition attached to their Amended Petition for Declaratory Judgment. More concerning is it gives this permission based upon a non-argued position. Almost certainly, Appellant would respond to this Order as written, declaring the calculation based upon Item IX to be disinheritance just as he has maintained in all litigated matters. Just as certain is the likelihood that Appellees will "deem such is necessary."

Appellees have not, nor could they have sought a judicial opinion as to the validity of any calculation which has not yet been performed. Kesler v. Watts, 218 Ga. App. 104, 460 S.E.2d 822 (1995), addressed the specific question of a Petition for Declaratory Judgment as to the validity of a condition in terrorem clause in the will. Id. at 105, 460 S.E.2d 822. Kesler goes on to cite Ga. Code Ann. § 9-4-4(a)(3), which states, "[E]very final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings; but the court shall not give the successful party relief, though he may be entitled to it, where the propriety of the relief was not litigated and the opposing party had no opportunity to assert defenses to such relief." Id. § 9-11-54(c)(1). As used in that code section, "[t]he term 'judgment'… includes a decree and any order from which an appeal lies." Id. § 9-11-54(a). As the

calculation order has not yet been made, there has been no litigation as to the validity of Appellant's calculation. The relief sought, the filing of a Petition For the Enforcement of the Last Will and Testament of Decedent and For an Accounting or, in the Alternative, For Removal of Executor, is ordered now based solely upon Appellees subjective determination that "*they deem such is necessary after receipt of the loss calculation*" not yet made by the executor.

Assuming the proposed filing of Exhibit A to Appellees Petition, the new Petition claim they "*seek to affirm the Will and enforce the disposition of the estate as contemplated by the Decedent*" and "*seek a court-ordered accounting of the estate from the date of death to the present*." No further relief is sought prior to the removal of the executor. As continually maintained throughout all of these proceedings by Appellant, the disposition of the estate was executed as *contemplated by the Decedent*. Additionally, there has been no claim by Appellees that they have not received an accounting of the estate from the date of death to present. To the contrary, they are not asking for an accounting of the estate, they are asking for a calculation of Item IV, because they are not satisfied with the accounting of the estate. Therefore, the only result of their proposed Petition is solely for the Removal of the Executor.

Appellant has repeatedly asserted and requested in good faith that the Court determine that Appellees have violated the in terrorem clause. Appellant maintains

that all of his and his prior co-executor's actions have been to execute the Will as written. The executors did not make this decision lightly and did not indicate a desire for this result. Their actions have included the bringing to the attention of the Court and parties the belief that Appellee George Laris Burkhalter was improperly a party to this action. Appellant references his bringing this out in the prior hearing, which was held August 5, 2015. (*See transcripts T pg 31 ln 5-T-32 ln 9*). He cited his concern that the two Appellees have competing interest. For any amount Appellee Ward may have lost through the calculation in Item IV, Appellee Burkhalter stood to gain one-third of that amount.

Furthermore, while opposing counsel characterized it as a threat, Executor John Allan Burkhalter was alleged by Appellee Ward to have warned her not to participate in an action like this as it would likely lead to her disinheritance. (*See T-31 ln 5-T-32 ln 9*) When asked "Did you make a statement that somebody told you something about if you don't stop this action, you'll be, you'll lose everything, has somebody made that statement to you?" Appellee Ward responded "John is the only one who ever called and made comments like that, but it was going on before our mother's death. (See T-61 n 7-13) When asked if any of this caused her to believe that John should not be executor she replied, "No." (T-63 ln 8-10)

Therefore, the Probate Court's Order, granting Appellees permission to file a Petition for Removal of Executors, grants Appellees (and, should it be allowed to

stand, any future litigants) carte blanche to file any frivolous Motion for Removal of Executors as should be their whim. It requires Appellees to show no cause, is impermissibly broad, and misinterprets both the spirit and the letter of this Court's ruling in Sinclair v. Sinclair, 284 Ga. 500, 670 S.E.2d 59 (2008).

This Court's order grants Appellees at their subjective whim, the ability to file what amounts only to a Removal of the Executor action and gives them cover by predetermining that action not to violate the in terrorem clause. This provision of the order is clear error both as written with regard to Item IX and as may have been intended regarding Item IV.

Appellees and the Court have stated no grounds, other than dissatisfaction with Executors' calculation, within their complete discretion, of a clause that is moot, due to the harsh result of the testator's inclusion of an in terrorem clause, upon which they would base such a Petition for Removal of Appellants as executors. In fact, the original Petition that seeks to remove Appellant as executor was prepared at or before the time that Appellants were issued their Letters Testamentary (see Verification of Nancy Gail Ward, Petition for Declaratory Judgment, pg. 5, signed the day after the Letters Testamentary were issued). The Probate Court's Oder would sanction this action of challenging executors, named by the testator and whose positions as executors are every bit as much a reflection of the will of the testator as any other provision or bequest of the Will, by

expanding the ability of any disgruntled heir to bring a challenge, no matter how unfounded, without suffering any consequence.

The Probate Court's Order improperly expands this Court's ruling in Sinclair. The Courts have not, as yet, given a definitive answer on the issue of whether a condition in terrorem which results in a forfeiture because a beneficiary seeks removal of an executor violates public policy. (See, e.g., Preuss v. Stokes-Preuss, 275 Ga. 437, 438, 569 S.E.2d 857, 858 (2002) ("[W]e need not decide a related issue raised by this case, which is whether an in terrorem clause violates public policy when it requires the forfeiture of a beneficiary's interest when he or she brings an action to remove an executor)." The reason that the Court has not given such a definitive answer seems clear – there is no single answer. Certainly, when an executor acts against the interest of the Testator, a challenge to his actions is warranted as this Court has found. However, in the present case, the action to remove the executors was clearly begun prior to the executors having taken any action whatsoever. The present case clearly reflects the beneficiaries challenge to the Testator's choice of who shall serve as her executor. No provision in a will can be said to be of higher importance. To allow the removal of named executors prior to any action being taken would void any use of in terrorem clause. Such unyielding rigidity is not and cannot be the state of the law in Georgia.

Sinclair referred to seeking the removal of an executor when there is an accusation of mal/misfeasance, or some breach of fiduciary duty. It also implied that the success of the Petition for removal is relevant to the question: "Testatrix's will would not be broken *if Appellant succeeds in obtaining an accounting and removal of Executor*. 'The effect of [his] success would [leave] the will in full force and effect . . .'" Sinclair, 284 Ga. at 502, 670 S.E.2d at 61 (citing Harber v. Harber, 158 Ga. 274, 123 S.E. 114 (1924)) (emphasis added).

In Sinclair and all of its progeny, there is an explicit implication that some misbehavior on the part of the executor is a key factor: "[A] condition in terrorem cannot make an executor unanswerable for any v*iolations of the will or of the laws governing personal representatives in Georgia*. Id. at 502, 670 S.E.2d 59. "[O]ur Supreme Court has held that, as a matter of public policy, in terrorem clauses *may not be construed so as to immunize a fiduciary from the law that imposes certain duties upon and otherwise governs the actions of such fiduciaries*." Callaway v. Willard, 321 Ga. App. 349, 353, 739 S.E.2d 533, 536-37 (2013) (emphasis added).

The most recent Supreme Court case to touch on the subject follows the same line of reasoning: "In [Sinclair], this Court held that a petition for accounting and for the removal of an executor does not constitute a will contest, because it first *affirms* the validity of the will." Norman v. Gober, 292 Ga. 351, 354, 737 S.E.2d 309, 311 (2013) (emphasis in original). However, as in **Lanier**, if this

request is made without just cause, framing it in the form of a Petition for Declaratory Judgement does not relieve the harsh result that may follow.

Each of the cases cited by Sinclair also follow this simple logic: If an executor is violating the laws of the State, the rights of the beneficiaries, or the terms of the Will, it is not a challenge to the Will to seek removal because, by seeking the removal of such an executor, a beneficiary is asking the court to enforce the Will. It is equally reasonable and logical to say that, when a beneficiary seeks to remove an executor for a frivolous reason, or for no reason at all, such a beneficiary seeks to break the Will because the naming of executors is as much a part of the will of the testator as any other provision of a Will (in the instant case, it is Item VIII of the Will).

There seems little question, that Appellants actions in the instant case have been taken in direct accordance with the wishes of the Testator through her written Will. Appellant has requested the Court to make a determination so as to determine if in fact the law does not allow the wishes of the Testator to be interpreted or executed in the manner he justly perceives. If in fact, the state of the law is contrary to his stated position, Appellant stands ready to execute in the manner prescribed by law.

VII. CONCLUSION

The Probate Court's Order concerning the Petition for Declaratory Judgment should be reversed. Appellant stated his position in his immediate answer to a "Petition for Declaratory Judgment" seeking permission to remove the executors filed five days after Letters Testamentary were issued and prior to any action being taken under that authority. The evidence shows the Executors did not seek this result but are following the desires of the Testator as written. Attempts were made to warn Appellee Burkhalter of his inappropriate involvement in the action as it put him at risk of disinheritance for a result that would only presumably reduce his financial interest. Appellees began an action intending not only to remove the executors but also to challenge Item IV and Item IX of the Will itself. These actions alone are believed by Appellant to trigger the in terrorem clause (Item IX). Appellees lost on the Petition regarding Item IV with no appeal. Thereafter, Appellees sought to Freeze the Assets of the Estate and again lost without appeal.

Appellees claimed a "controversy" which triggered a required mediation, with no result. Appellees moved to freeze the assets of the estate. A reasonable reading of the Will and review of applicable law led Appellant to the belief that the Testator's wishes under these circumstances was disinheritance. Appellant sought clarity on his position from the Court and was denied an answer. **The Court erred in failing to decide whether Appellees violated the in terrorem clause**.

Without applying any facts, such as the fact that Appellees had moved to freeze assets of the estate, the Court declared that an in terrorem clause penalizing an attack by a beneficiary on the administration of the estate is void on its face as violative of public policy. No analysis of the public policy which it is purported to violate is given. **The Court erred in determining that disinheritance of a beneficiary for an attack on the administration of the estate is void for public policy**.

Similarly, without applying any facts, the Court determined disinheritance based on administration of a Trust to be against public policy. While this provision is unique to this case, it is not uncommon for a testator to desire a strict provision to restrain their beneficiaries from some action. Certainly, this has the potential to be violative of public policy if that restriction is in some way contrary to law or the public good. Here that is not the case. The issues with the Trust are directly linked to the Will. If in fact, there were allegations of mishandling, then in that case the potential for a public policy decision would exist. That would require inquiry of the alleged events themselves. Here there is an absence of any such allegations. The Court made an apparent determination of the face of the provision. For the same analysis as above and in the absence of analysis to the contrary, **the Court erred when it declared the portion of in terrorem clause of the will relating to**

management or expenditures of the Burkhalter family trust to be violative of public policy.

The calculation of Item IX, disinheritance, exists on its face. This was argued by Appellant at all stages of these proceedings. If the Court disagreed with this analysis it could have so stated. If in fact, the Order intended the calculation to actually be for Item IV, then it is moot unless and until a determination is made that Appellees did or did not violate the in terrorem clause. **Therefore, the Court erred in requiring Appellant to provide an accounting of loss sustained as referenced in Item IX**.

Appellees seek two items in their purported unfiled petition, to affirm the Will and enforce the disposition of the estate and a court-ordered accounting of the estate from the date of death to present. Appellant has affirmed the Will and executed same, subject to a contrary finding of the Court with regard to the in terrorem clause of the Will itself. Appellees have not denied receipt of an accounting of the estate but rather are dissatisfied with the result, based on the application of the in terrorem clause. As the first two items of their proposed petition have already been addressed, there remains only a Petition to Remove Executor. There is no likelihood that Appellees will not deem necessary to file the Petition based on their subjective review; and no review of the calculation of Item IX has been made by the Court. **Therefore, the Court erred in determining *The***

Movants may proceed to file a <u>Petition for Accounting or in the Alternative Removal of Executor</u> without violating the in terrorem clause of Item IX of the will, should they deem such is necessary after receipt of the loss calculations from the executor.

WHEREFORE Appellants pray that the Court reverse the decision of the Probate Court and deny items (2), (3) and (4) of said order, and determine that Appellees violated the in terrorem clause or remand for this determination.

This submission does not exceed the word count limit imposed by Rule 24.

Respectfully submitted this 31st day of May, 2019.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served or caused to be served a true and correct copy of the above and foregoing INITIAL BRIEF OF APPELLANT by hand delivery and/or facsimile upon the Petitioners, through their counsel of record at:

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This 31st day of May, 2019

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