No. A19A2056

IN THE COURT OF APPEALS
STATE OF GEORGIA

WILLIAM T. RAY BURKHALTER,
as Executor of the Estate of Louise Ray Burkhalter,

Appellant,

v.

GEORGE LARIS BURKHALTER and NANCY GAYLE WARD,

Appellees.

On appeal from the Probate Court of Macon-Bibb County

BRIEF OF APPELLEES

Stuart E. Walker
Georgia Bar No. 141620
sewalker@martinsnow.com

Jenny M. Walker
Georgia Bar No. 001286
jmwalker@martinsnow.com

Martin Snow, LLP
240 Third Street
P.O. Box 1606
Macon, Georgia 31202-1606

Amy M. Fletcher
Georgia Bar No. 530771
amfletcher@martinsnow.com

Counsel for Appellees

INTRODUCTION

Appellant William T. Ray Burkhalter ("Burkhalter") is the sole executor of the Estate of Louise Ray Burkhalter ("Decedent"), appointed under the Decedent's Last Will and Testament ("Will"), which was admitted to probate in June 2015.[1] Appellees George Laris Burkhalter and Nancy Gayle Ward (collectively, "Ward") are beneficiaries under the Will. This is the second time this case has been before the Court. *See In re Estate of Burkhalter*, 343 Ga. App. 417 (2017) (vacating and remanding for further proceedings).

This appeal is from the probate court's disposition of a post-remand amended petition for declaratory judgment (R. 84-94) that Ward filed against Burkhalter under O.C.G.A. § 9-4-4(a), in which Ward sought a series of declarations interpreting the scope and applicability of the in terrorem provision in Item IX of the Will. (11/2/18 T. 4.) First, Ward sought a declaration that the mere act of seeking a judicial construction of the in terrorem provision—as applied to clearly articulated prospective claims for relief—does not trigger a disinheritance. (R. 88 ¶(d), 98, 99-101.) Second, Ward sought a declaration that no disinheritance would occur if Ward sought *future* relief: (1) compelling Burkhalter to perform a loss calculation required by Item IV of the Will (R. 88 ¶(c), 102), and (2) compelling Burkhalter to perform

[1] Burkhalter was one of two co-executors appointed under the Will; the other co-executor has since died, leaving only Burkhalter. (R. 102, 141.)

an accounting of the Estate from its inception to date (which would include the Item IV loss calculation and the basis for it). (R. 88 ¶(c), 103.) Finally, Ward sought a declaration that no disinheritance would occur if Ward sought to remove Burkhalter as executor, in the event that Burkhalter persisted in refusing to discharge the duties imposed on him by Item IV of the Will. (R. 88 ¶(c), 104, 106.) To aid the probate court in resolving Ward's amended declaratory-judgment petition, Ward attached as Exhibit A to the amended petition a copy of a pleading that Ward proposed to file if the probate court determined that doing so would not cause a disinheritance under the in terrorem provision. (R. 89-94.)

On January 29, 2019, the probate court entered the order now under review—resolving Ward's amended petition and declaring, as a matter of law:

- that Ward was not disinherited by the in terrorem provision when Ward filed a petition seeking judicial construction of the scope and applicability of the in terrorem provision (R. 142-43);

- that the in terrorem provision validly bars "an actual will contest or attempt to break the will" because the provision "is in contemplation of an attack upon the will itself or some provision thereof" (R. 143-44);

- that the in terrorem provision is void as applied to, and cannot bar, any "attack . . . on the administration of [the Decedent's] estate" or any "attack . . . on the management or expenditures of the Burkhalter family trust" (R. 144); and

- that Ward was not disinherited by the in terrorem provision for seeking an accounting of the Estate. (R. 145-46.)

The probate court ordered Burkhalter to perform an accounting of the loss required to be calculated under Item IV within 60 days of January 29, 2019. (R. 146.) Burkhalter instead filed a notice of appeal from the January 29 order. (R. 4.)

The judgment of the probate court should be affirmed.

PART ONE
STATEMENT OF THE CASE

The following statement is included to give the Court a more succinct picture of what resolving this appeal entails (and what it does not).

A. The parties

Decedent died testate on March 18, 2015, and Decedent's Will was probated on June 10, 2015. (R. 34.) Burkhalter was one of two co-executors appointed under the Will to administer the Estate (R. 34; 11/2/18 T., Ex. 1, p. 2), and after the death of his co-executor, Burkhalter became (and remains) the sole executor of the Estate. (R. 141.) George Laris Burkhalter and Nancy Gayle Ward are beneficiaries under the Will. (11/2/18 T., Ex. 1, p. 1.)

B. The relevant sections of the Will

Two sections of the Will are at issue in this appeal: Item IV and Item IX.

Item IV of the Will provides in relevant part:

> I desire that my [executor] *make a calculation on loss sustained due to the actions of my daughter and grandson*. I desire that this calculation be at the complete discretion of my executors/executor, and may be up to my entire remaining estate. . . . I direct that this calculation, whatever

> it shall be, be considered, for the limited purpose of distribution, an asset of my estate already held by my daughter, Nancy Gayle Burkhalter. Each of my other children are entitled to the same benefit. Therefore, I direct that *prior to further distribution, an amount equal to this calculation be distributed to each of my other children* . . . to be held by them in fee simple forever. (11/2/18 T., Ex. 1, p. 1) (emphasis and bracketed material added).

Item IX of the Will provides in relevant part:

> *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* [1] *any provision of my Last Will and Testament*, or [2] *the administration of my estate*, or [3] *the management or expenditure 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. (11/2/18 T., Ex. 1, p. 2) (emphasis and brackets added).

C. Earlier proceedings

On June 15, 2015, Ward filed in the probate court a petition for a declaratory judgment seeking, in part, a declaration that Ward would be permitted to file a later declaratory judgment action "regarding Item IV" of the Will and "regarding Item IX" of the Will without running afoul of, and being disinherited by, the in terrorem provision in Item IX. (R. 11); *See In re Estate of Burkhalter*, 343 Ga. App. at 419. But Ward neglected to explain to the probate court the nature of the proposed future actions, other than that they would be "regarding" those two Items. (R. 34-35)[2]; *In*

[2] Contrary to Burkhalter's repeated assertions, Ward has never asked the probate court to invalidate Item IV or have it stricken from the Will.

re Estate of Burkhalter, 343 Ga. App. at 419 ("The petitioners did not, however, file copies of any proposed actions that they intended to file in these subsequent actions.") The probate court granted in part and denied in part Ward's request for declaratory relief. (R. 35.) Burkhalter appealed that order.

D. The previous appeal

On appeal, this Court determined that Ward's first declaratory judgment petition and the probate court's disposition of it were procedurally "flawed as a matter of law." *In re Estate of Burkhalter*, 343 Ga. App. at 420. This Court identified two errors. First, Ward's laconic description of the future relief sought was too vague to allow the probate court to determine whether Ward's later actions, if brought, would result in a disinheritance under the in terrorem provision. *Id.* at 419-20; *id.* at 423 (noting that a probate court must be able to "construe the relevant in terrorem clause and compare it to the action proposed by the petitioner in the declaratory judgment action," yet pointing out that Ward's "petition fails to specify the proposed claims . . . sufficient for the trial court to have determined that those claims would not violate the in terrorem clause.") Second, Ward sought to use one declaratory judgment action to determine the propriety of filing a future declaratory judgment action, which was a procedural misstep. *Id.* at 421 ("[W]e find no authority supporting a procedure by which an interested party may file one declaratory judgment action to determine whether it may file a second declaratory judgment

action to determine the validity of an in terrorem clause.") On the basis of these twin errors, the Court vacated the probate court's order in full and remanded for further proceedings. *Id.* at 424.

E. Post-remand proceedings in the probate court

On August 22, 2018, following the depositions of the parties, Ward filed an amended petition for a declaratory judgment (R. 84), which remedied the initial deficiency by attaching as Exhibit A to the amended petition a separate pleading (R. 89) that Ward proposed to file against Burkhalter—asking that Burkhalter be compelled to make the Item IV loss calculation and to provide an accounting of the Estate (or face removal as executor if he refused to do so)—if the probate court determined that it could be filed without triggering a disinheritance. On November 2, 2018, the probate court held a hearing on the amended petition for a declaratory judgment, at which William T. Ray Burkhalter, George Laris Burkhalter, and Nancy Gayle Ward testified. (11/2/18 T. 1-94 & Ex. 1.)

Item IV requires that certain distributions be made to beneficiaries, which cannot be made without the executor first calculating the loss under Item IV, because the amount of the Item IV-required distributions must be "equal to" the calculated loss. (11/2/18 T., Ex. 1, p. 1) ("I direct that prior to further distribution, an amount equal to this calculation be distributed to each of my other children . . . to be held by them in fee simple forever.") At the November 2 hearing, Burkhalter testified under

oath that he has never made the Item IV-required loss calculation. (11/2/18 T. 18.) Burkhalter also testified that he distributed "[p]retty much a hundred percent" (11/2/18 T. 21) of the Estate in late 2015 or early 2016 (11/2/18 T. 22)—while questions about the propriety of his administration of the Estate were being actively litigated before the probate court.

F. The order under review

As pointed out above, on January 29, 2019, the probate court entered an order declaring, as a matter of law:

- that Ward was not disinherited by the in terrorem provision when Ward filed a petition seeking judicial construction of the scope and applicability of the in terrorem provision (R. 142-43);

- that the in terrorem provision validly bars "an actual will contest or attempt to break the will" because the provision "is in contemplation of an attack upon the will itself or some provision thereof" (R. 143-44);[3]

- that the in terrorem provision is void as applied to, and cannot bar, any "attack . . . on the administration of [the Decedent's] estate" and as applied to any "attack . . . on the management or expenditures of the Burkhalter family trust" (R. 144); and

[3] Ward has always acknowledged the validity of the in terrorem provision to this extent. Ward's consistent position in the probate court has been that none of the relief Ward seeks would constitute an attempt to "contest" or "break" the Will itself or to have any provision stricken from the Will. (R. 102-03); (11/2/18 T. 6) ("[Ward] [is] not asking that the Court break the Will.") Importantly, the probate court did *not* conclude that any of the future relief proposed by Ward would, if pursued, constitute a "will contest" or an "attempt to break the will." The upshot, then, is that the probate court's declaration on this point, while true as a descriptive matter, was unnecessary because it has no bearing on any relief actually proposed by Ward.

- that Ward was not disinherited by the in terrorem provision for seeking an accounting of the Estate. (R. 145-46).

The probate court expressed its "concern[] that the executor has admitted that he has disbursed the estate and made his own determination that both Gayle Ward and George Laris Burkhalter's actions have invoked the in terrorem provision of the will, all while these questions were before the Court." (R. 145.) And the probate court observed that "the testimony at the hearing . . . stating that the estate has been disbursed additionally give[s] rise to a legitimate question of settlement of accounts by the executor to the beneficiaries." (R. 145-46.)

PART TWO
ARGUMENT AND CITATION OF AUTHORITIES

Jurisdiction

This Court, not the Supreme Court, has jurisdiction over this appeal. O.C.G.A. § 15-3-3.1(a)(3); Ga. Const. Art. VI, § V, Para. III; Ga. Const. Art. VI, § VI, Para. III.

Standard of Review

The interpretation of a will is a question of law, which this Court reviews de novo. *Odom v. Odom*, 148 Ga. App. 456, 458 (1978) ("[T]he construction of the will is a question of law for the court.")

Responses to the Enumerations of Error

A. The probate court did address—and rejected—Burkhalter's allegation that Ward has been disinherited by the in terrorem provision, and Burkhalter's argument to the contrary is meritless.

In his first enumeration of error (Appellant's Br. 9-11), Burkhalter argues that "[t]he Probate Court's Order is defective in that it *failed to address* whether [Ward] violated the terms of the in terrorem clause" by Ward's "actions thus far." (Appellant's Br. 9) (emphasis added). *See also* (Appellant's Br. 24) ("The Court erred in *failing to decide* whether [Ward] violated the in terrorem clause.") (emphasis added). But that is not so.

Far from "fail[ing] to address" or "failing to decide" the disinheritance issue, the probate court, in ruling on Ward's amended petition, expressly determined that Ward was not disinherited when Ward petitioned for a judicial construction of the scope and applicability of the in terrorem provision. (R. 142-43) (concluding that Ward was *not* disinherited because "[i]n a declaratory judgment action, a beneficiary can; therefore, question the validity of an in terrorem clause in a will.") In so concluding, the probate court applied the following longstanding rule, reiterated by this Court in the earlier appeal of this case: "[A]n interested party may seek a declaration concerning the validity of an in terrorem clause[,] [a]nd the filing of such an action is not itself a violation of the in terrorem clause at issue [because] [t]he search for the true meaning of a will is not an attack upon it." *In re Estate of*

Burkhalter, 343 Ga. App. at 421 (citations omitted and some punctuation marks added and altered). What is more, the probate court implicitly determined that Ward has not been disinherited by any other action taken. The fact that the probate court authorized Ward in the January 29 order to file a future petition for an accounting or for the removal of Burkhalter as executor is proof positive of this determination for a simple reason: The authorization of Ward to seek possible *future* relief against Burkhalter means, by definition, that the probate court has concluded that Ward retains ongoing rights (and therefore standing) under the Will and has not been disinherited. Why? Because a disinherited beneficiary would lack rights under the Will and lack any basis for seeking prospective relief against the executor. The substance and effect of the probate court's January 29 order, taken together, render meritless Burkhalter's argument that the probate court failed to address or decide the question of Ward's disinheritance.

Despite the probate court's determination to the contrary, Burkhalter argues that Ward should be considered disinherited because Ward "sought to attack Item IV of the Will" and "sought to challenge Item IX of the Will." (Appellant's Br. 9-10.) But this argument rests on a profound misunderstanding of the relief proposed by Ward. Ward has *never* asked the probate court to rule that Item IV or Item IX should be stricken from the Will. Indeed, Ward was at pains to stress to the probate court that striking these Items from the Will was *not* the relief sought. (R. 102)

("Movants' claims . . . seek *to enforce Item IV according to its terms*. . . . Movants allege that Executor has failed to make the calculation required by Item IV of the Will. Consequently, *Movants seek an order from the Court compelling Executor to do so*. . . .") (emphasis added); (11/2/18 T. 54-56, testimony of Nancy Gayle Ward); (R. 102-103).[4]

Burkhalter argues that "[j]udicial expediency requires that *this issue* be resolved quickly as most all other issue[s] arise out of this dispute." (Appellant's Br. 11) (emphasis added). But "this issue"—whether Ward has been disinherited by the in terrorem provision—has already been determined by the probate court. Burkhalter has not shown that determination to be error.

[4] As to Item IX, the following exchange between the probate court and Ward's counsel at the November 2, 2018 hearing makes it abundantly clear that Ward does not seek to strike the in terrorem provision from the Will: "THE COURT: -- let me ask a question just for clarity. Are you challenging the validity of the in terrorem clause, not the in terrorem clause as it relates to anything else but the actual validity of the in terrorem clause in the Will? MS. STANSFIELD: We are asking for the Court's interpretation of the in terrorem clause with regard to the petition . . . . [W]e are saying if we are to ask the Court for the relief in this Petition, as a prospective action, would this be a violation of the in terrorem clause? THE COURT: Okay. So, you're not, you are not saying that the in terrorem clause is invalid? MS. STANSFIELD: Not on its own, no." (11/2/18 T. 5-6.) In other words, Ward has not mounted a *facial* challenge to the in terrorem provision but instead seeks a judicial construction of the provision *as applied* to prospective claims for relief.

B. The probate court properly concluded that an in terrorem provision cannot bar a challenge to the "administration of [an] estate" where, as here, a beneficiary contends that the executor's actions are contrary to the will.

In his second enumeration of error (Appellant's Br. 11-12), Burkhalter faults the probate court's conclusion that it violates the public policy of the State of Georgia to disinherit a beneficiary who challenges an executor's "administration of [a] will." (Appellant's Br. 11) ("[T]he Court found that limiting an attack by a beneficiary against the administration of the will is against public policy. Nothing could be further from the truth.") (citation omitted). Burkhalter is wrong.

One part of the in terrorem provision in Item IX purports to disinherit any beneficiary "who attacks in any court of law . . . the administration of my estate." (11/2/18 T., Ex. 1, p. 2.) The probate court concluded that Ward's proposed petition for enforcement or removal would not, if filed, trigger disinheritance under this part of the in terrorem provision. The probate court reasoned that disinheriting a beneficiary who turns to a court for aid in enforcing the proper administration of an estate would violate the public policy of the State of Georgia. (R. 144) ("The Court finds these provisions[5] are invalid and contrary to public policy. . . . [T]he executor

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5 The probate court's reference to "these provisions" included the part of the in terrorem provision addressing "the administration of my estate" and the separate part addressing "the management or expenditure of the Burkhalter family trust." The probate court determined that both parts were void as against public policy. (R. 144.) Ward argued in the probate court, though, that the part addressing "the management or expenditure of the Burkhalter family trust" was inapplicable (not that it was void)

is never without accountability for his actions or violations in carrying out the terms of a will. The laws of Georgia governing an executor and fiduciary must have the ability to be enforced.") Burkhalter has failed to show that the probate court's conclusion is error.

An executor's duty is to administer the estate in accordance with the wishes of the decedent, as those wishes are expressed by the words of the will. If an executor fails to perform this duty—thereby failing to respect the decedent's wishes—a beneficiary may ask the probate court to compel the executor's compliance with the will. If an in terrorem provision purports to disinherit a beneficiary for holding the

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to each of the three claims for relief proposed to be pursued, because none of the relief proposed by Ward dealt with the Burkhalter family trust. *See* (R. 103) ("Nor is Movants' request for an order compelling Executor to perform his duties under Item IV an 'attack' on 'the management or expenditures of the Burkhalter family trust.'"); (R. 103) ("Movants' request for an order compelling an accounting of the Estate is not an 'attack' on 'the management or expenditures of the Burkhalter family trust.'"); and (R. 104) ("Movants' alternative request for an order removing Executor (should removal from office become necessary) is not an 'attack' on 'the management or expenditures of the Burkhalter family trust.'"); (11/2/18 T. 7) (MS. STANSFIELD: "The next section, and the last section of the in terrorem clause, deals with attacking in any court the management and expenditures of the Burkhalter Family Trust. We don't believe that section of the in terrorem applies in this case. Under no circumstances [is] [Ward] attacking anything about the family trust. There's no question as to the family trust.") Regardless of whether the family trust part of the in terrorem provision is treated as void or merely inapplicable, the result is the same: Ward is free to pursue the three claims for relief against Burkhalter without being disinherited by the family trust part of the in terrorem provision.

executor accountable in this manner, then the in terrorem provision is void and unenforceable.

Recall that Item IV of the Will requires Burkhalter to do three things: First, it requires him to "*make a calculation on loss* sustained due to the actions of my daughter and grandson." (11/2/18 T., Ex. 1, p. 1) (emphasis added). Second, it requires him to "consider[]" "this calculation, whatever it shall be . . . an asset of my estate already held by my daughter, Nancy Gayle Burkhalter." (11/2/18 T., Ex. 1, p. 1.) And third, it requires that "prior to further distribution, *an amount equal to this calculation be distributed* to each of my other children . . . to be held by them in fee simple forever." (11/2/18 T., Ex. 1, p. 1) (emphasis added).

The loss calculation is the cornerstone of Burkhalter's obligations under Item IV, because without that calculation Burkhalter cannot know the amount to be regarded as "an asset of [the Decedent's] estate already held by . . . Nancy Gayle Burkhalter" and cannot know the amount "equal to this calculation" that must "be distributed to each of [Decedent's] other children." And without knowing *that* amount, the Estate cannot be fully administered because the Item IV-required distributions cannot be made. Yet Burkhalter testified under oath that he distributed

"[p]retty much a hundred percent" of the Estate in 2015 or 2016 (11/2/18 T. 21, 22) without ever having made the loss calculation required by Item IV. (11/2/18 T. 18.)[6]

Burkhalter acknowledges that if he fails to administer the Estate in accordance with the terms of the Will, then Ward may seek relief from the probate court without being disinherited by the in terrorem provision. (Appellant's Br. 12) ("If in fact . . . [Burkhalter] had acted inconsistent with the provisions of the will, then the Courts have carved out an exception to th[e] otherwise burdensome result [of disinheritance].") Burkhalter admits that he has never made the loss calculation required by Item IV and that he nevertheless distributed all the property of the Estate anyway. Under the circumstances, the probate court rightly concluded that Ward is entitled to compel Burkhalter to comply with his obligation under Item IV without being disinherited, notwithstanding the part of the in terrorem provision purporting to bar a beneficiary from challenging the "administration of" the Estate.

[6] (11/2/18 T. 18) (Q. "[Y]our mother asked that the Executors make a calculation as to . . . the loss sustained due to the actions of [her] daughter and grandson. . . ." A. "Correct." Q. "Okay. And have you ever made that calculation?" A. "Actually, I have not as of yet.")

C. None of Ward's proposed relief implicates the part of the in terrorem provision that bars challenges to "the management or expenditures of the Burkhalter family trust," so even if the probate court erred in concluding that this part of the provision is void as against public policy, that error is harmless as a matter of law.

In his third enumeration of error (Appellant's Br. 12-13), Burkhalter argues that "[n]othing on the face of this provision"—i.e., the part of the provision barring challenges to "the management or expenditures of the Burkhalter family trust"—"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." (Appellant's Br. 13.) Here, there is common ground. Ward agrees with Burkhalter—and argued to the probate court (see footnote 5 above)—that the proposed relief against Burkhalter does not challenge in any manner the management or expenditures of the Burkhalter trust. (R. 103-04); (11/2/18 T. 7.)

This Court need not review the probate court's conclusion that this part of the in terrorem provision is void as against public policy. The Court can (and should) instead hold that this part of the in terrorem provision is inapplicable to the relief Ward proposes to pursue. Even if the probate court erred in determining that this part of the in terrorem provision is void, the probate court's ultimate conclusion—that Ward is not disinherited by this part of the in terrorem provision for asking the probate court to compel Burkhalter to carry out his duties under the Will—should nevertheless be affirmed.

D. The probate court properly determined that no part of the in terrorem provision bars Ward from obtaining an accounting of the way in which the Estate has been administered.

In his fourth enumeration of error (Appellant's Br. 14-16), Burkhalter argues that the probate court erred in ordering an accounting of the loss calculation required by Item IV, because "there cannot be a required calculation of [loss under] Item IV unless and until an ultimate determination is made as to Item IX." (Appellant's Br. 15.) Burkhalter appears to acknowledge (Appellant's Br. 16) what he acknowledged to the probate court—that he stands ready and willing to make the required loss calculation and to provide an accounting of how it was reached—but he says that his willingness to do so "presupposes a determination that [Ward] did not violate the in terrorem clause." (Appellant's Br. 16.)

As Ward explained above in Section A., the probate court has already determined that Ward has not been disinherited by any part of the in terrorem provision. What Burkhalter calls the "ultimate determination" (Appellant's Br. 15) has thus already been made.

Apart from his argument that Ward lacks any interest in the loss calculation required by Item IV *if* Ward has already been disinherited, Burkhalter makes no attempt to show that the probate court committed legal error in determining that the in terrorem provision cannot, as a matter of law, disinherit a beneficiary who seeks an accounting of the manner in which an estate has been administered. The probate

court applied settled Supreme Court precedent when it concluded that an in terrorem provision cannot disinherit a beneficiary who seeks an accounting of the administration of an estate. *See Sinclair v. Sinclair*, 284 Ga. 500 (2008);[7] *see also* (R. 104-06.)

E. The probate court did not err in authorizing Ward to file, if necessary, a petition to remove Burkhalter as executor if he continues to refuse to perform the duties imposed on him by Item IV.

In his fifth enumeration of error (Appellant's Br. 16-23), Burkhalter argues that the probate court erred by authorizing Ward to file, if necessary, a future petition to remove Burkhalter as executor of the Estate without being disinherited by the in terrorem provision. Again, Burkhalter is wrong.

Burkhalter's argument on this point proceeds in three parts. First, Burkhalter argues that Ward has already been disinherited by the in terrorem provision; second, Burkhalter argues that because of Ward's disinheritance Ward has forfeited all rights under the Will and thus lacks standing to demand that a loss calculation be made under Item IV; and, third, Burkhalter argues that Ward, lacking rights under the Will,

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[7] The Supreme Court in *Sinclair* held that "it would violate public policy to construe [a] condition in terrorem so as to require the forfeiture of a beneficiary's interest for bringing an action for *accounting* and removal of the executor." 284 Ga. at 502 (emphasis added). The Court further explained that "the in terrorem clause in Testatrix's will does not and cannot require forfeiture of the appellant's interest if he files the proposed action for accounting and removal of Executor." *Id.* at 504.

cannot insist that Burkhalter be removed as executor for declining to make a loss calculation in which Ward has no interest. The argument falters at step one: Ward has *not* been disinherited. As a result, Ward retains full rights as a beneficiary under the Will. Those rights, as the probate court properly concluded, include the right to demand the loss calculation required by Item IV, the right to demand an accounting, and the right to petition for Burkhalter's removal as executor if he fails to comply with his duties under the Will.

Burkhalter argues that Ward initiated proceedings to remove Burkhalter as executor *before* Burkhalter had taken any steps to administer the Will. (Appellant's Br. 21) ("[I]n the present case, the action to remove the executors was clearly begun prior to the executors having taken any action whatsoever.") That argument is flatly wrong. True, Ward did initiate a proceeding shortly after Burkhalter was appointed executor, but that proceeding was a *declaratory judgment action* asking the probate court to determine whether a *future* proceeding to remove Burkhalter would cause Ward to be disinherited by the in terrorem provision.[8] In fact, to this day Ward still

[8] This initial declaratory judgment petition (filed in 2015) was the subject of this Court's decision in *In re Estate of Burkhalter*, 343 Ga. App. 417 (2017). It is clear that *that* petition did not ask the probate court to remove Burkhalter and his (then living) co-executor from serving as co-executors. Ward filed that petition right off the bat based on Ward's reasonable suspicion (since confirmed) that Burkhalter would not carry out the duties imposed on him by the Will. In that sense, the initial petition was an "anticipatory act," as the probate court characterized it (R. 144)—but all declaratory judgment actions, by their very nature, are anticipatory.

has not filed any pleading with the probate court seeking to remove Burkhalter as executor, as the probate court expressly noted. (R. 145) ("It is important to note that the Petition for Accounting, or in the alternative, Removal of the Executor *has only been filed as an exhibit to this Petition* and 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.") (emphasis added).

The gist of Burkhalter's argument is that he has done nothing wrong in administering the Estate, and so there is no reason why he should be removed as executor. He recognizes, however, that Georgia law authorizes Ward to seek his removal as executor upon a showing that he (Burkhalter) has failed to comply with the terms of the Will. (Appellant's Br. 22) (accepting that "Sinclair[9] referred to seeking the removal of an executor when there is an accusation of mal/misfeasance, or some breach of fiduciary duty. . . . 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.") Here, Ward has contended at every turn that Burkhalter has failed to comply with his duties under Item IV of the Will. Burkhalter himself testified under oath that he has never done what Item IV requires him to do. (11/2/18 T. 18.) *Sinclair* confirms that under these circumstances—where the executor has breached his

[9] *Sinclair v. Sinclair*, 284 Ga. 500 (2008)

fiduciary duty to the Estate—Ward can seek Burkhalter's removal from the office of executor. The probate court did not err in so concluding.

CONCLUSION

For these reasons, the probate court's January 29 order should be affirmed.

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

June 24, 2019

Respectfully submitted,

Martin Snow, LLP
240 Third Street
Macon, Georgia 31201
478-749-1700
sewalker@martinsnow.com
jmwalker@martinsnow.com
amfletcher@martinsnow.com

/s/ Stuart E. Walker
STUART E. WALKER
Georgia Bar No. 141620

/s/ Jenny M. Walker
JENNY M. WALKER
Georgia Bar No. 001286

/s/ Amy M. Fletcher
AMY M. FLETCHER
Georgia Bar No. 530771

Counsel for Appellees

No. A19A2056

IN THE COURT OF APPEALS
STATE OF GEORGIA

WILLIAM T. RAY BURKHALTER,
AS EXECUTOR OF THE ESTATE OF LOUISE RAY BURKHALTER

Appellant,

v.

GEORGE LARIS BURKHALTER and NANCY GAYLE WARD

Appellees.

CERTIFICATE OF SERVICE

I certify that on this day I served the foregoing **BRIEF OF APPELLEES** by U.S. Mail to the following counsel:

James W. Davis
James W. Davis & Associates
143 Lamar Street
Macon, GA 31204
jdavis@defendmacon.com

Counsel for Appellant

June 24, 2019

/s/ Stuart E. Walker
STUART E. WALKER
Georgia Bar No. 141620