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Limitations on In Terrorem Clauses

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In terrorem or "no contest" clauses are a powerful tool in the estate planner's tool box. Such provisions, which can be included in a will or trust, provide that a beneficiary will forfeit any assets she was to receive under the instrument if she engages in specified conduct. Their purpose is usually to deter a litigious heir from objecting to the probate of the testator's will or challenging the validity of a trust. Some in terrorem clauses seek to go even further, purporting to prohibit beneficiaries from "interfering" with the fiduciary's performance of his or her duties once appointed.

However, there are limits to what an in terrorem clause can accomplish. This article examines some exceptions to the operation of these provisions.

Statutory Exceptions

EPTL § 3-3.5(b) sets out a number of actions that a beneficiary may take without triggering an in terrorem clause, most of which concern conduct in a probate proceeding. A beneficiary can do any of the following without fear of disinheritance: (1) mount a contest, predicated on probable cause, to establish that a will is a forgery or was revoked; (2) disclose, to any party or to the court, information concerning a document offered for probate or relevant to a probate proceeding; (3) object to the court's jurisdiction in a probate proceeding; (4) refuse or fail to join in a petition for probate or to execute a consent to or waiver of notice of probate; (5) commence or participate in a will construction proceeding; and (6) conduct preliminary examinations in a probate proceeding, under SCPA § 1404, of a proponent's witnesses, the person who prepared the will, the nominated executors, the will's proponents and any other person whose examination the court determines may provide information of substantial importance concerning the will's validity or the decision to file objections.

The statute also provides that "an infant or incompetent may affirmatively oppose the probate of a will without forfeiting any benefit thereunder." Since infants and persons found incompetent cannot act on their own behalves, the practical import of the statute is to permit guardians for such persons to object to probate. The rule finds its genesis in public policy, which dictates that a provision in a will is void if it infringes upon the court's paramount duty to protect the rights of those under a legal disability duty.

Further Precedential Exceptions

The Court of Appeals has made it clear that "the statutory safe harbor provisions of Surrogate's Court Procedure Act § 1404 and Estates, Powers and Trusts Law § 3–3.5 are not exhaustive." To that end, courts have found that public policy prevents the operation of in terrorem clauses in other circumstances. As it concerns persons under a disability, the absolute bar to an in terrorem clause's operation applies outside the probate context. For example, in Matter of Shuster, the Surrogate's Court and the Appellate Division agreed that a

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of the trust assets, and the transactions underlying the releases.

As such, the Court concluded that the trustee's evidence was sufficient to raise genuine questions of fact as to what was known or disclosed to the petitioner. The Court opined that while a fiduciary acts at his peril in seeking a general release without an accounting, there is nothing in the law that mandates it as a necessary precondition to its validity.

Moreover, the Court rejected the notion that only the trustee could make the requisite disclosure surrounding the procurement of a release. Rather, the Court held that the appropriateness of a disclosure must be determined in light of the circumstances, with the touchstone being fairness.

Following the decision in Bronner, courts have continued to weigh in on the principles underlying receipts and releases, and the protection, if any, they afford the fiduciary. Of note are the opinions by the Appellate Division, Second Department, and Fourth Department, in Matter of Lee, 2017 NY Slip Op 06276 (2d Dep't 2017), and Matter of Alford, 2018 N.Y. App. Div. 682 (4th Dep't 2018), respectively, and the opinions by the Surrogate's Court in In re Salz, NYLJ, July 27, 2017, at p. 22 (Sur. Ct., New York County), and In re Ingraham, NYLJ, June 16, 2017, at p. 28 (Sur. Ct., New York County).Recently, the Surrogate's Court, Bronx County, in In re Advani, NYLJ, Aug. 9, 2021, at 17 (Sur. Ct., Bronx County), addressed the issue when it dismissed a compulsory accounting proceeding instituted by the petitioners, the decedent's two nieces.

The proceeding had been instituted after the petitioners had executed receipts and releases, based on an informal accounting, and received a distribution from the estate. Objections were filed by the administrator, annexed to which was the original notarized receipt and release agreements from, inter alia, the nieces.

The Court noted that the informal account was provided to the nieces who had the opportunity to consult an attorney and accountant before they executed the receipt and release agreement and received their distributions.

Moreover, the Court found the nieces had failed to claim or demonstrate bad faith, fraud or duress on behalf of the administrator in procuring the releases, which would warrant the court to direct a judicial accounting.

Counsel should take heed that a release may not always serve to insure the complete and final discharge of a fiduciary. At the very least, a release should be comprehensive in its terms, and clear and unambiguous as to the scope of its application, most especially if it is designed to constitute a waiver of an accounting.

But of course, it should always be borne in mind, that regardless of the language of the instrument, the court may invoke the provisions of SCPA 2205, and direct an accounting on its own motion, if it deems it in the best interests of the estate to do so.

i Notably, the beneficiary was not represented by counsel at the time she signed the releases.

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disabled individual's commencement of a federal case challenging a will's in terrorem clause did not trigger the provision because it was unenforceable as to him. In Matter of Andrus, the decedent's will contained an in terrorem clause which provided that the infant beneficiaries would forfeit their inheritance unless they, or their guardians, acquiesced in, ratified and confirmed in writing all acts of the trustees of the decedent's inter vivos trusts. Similarly, in Matter of Carples, an in terrorem clause provided for forfeiture of an infant beneficiary's legacy if she or her guardian, among other things: "oppos[ed] the execution of any of the provisions or directions contained [in the will] on the part of the executors and trustees." Both provisions were held unenforceable.

No contest clauses have also been set aside to the extent they "can be interpreted so as to exonerate fiduciaries from their duties of reasonable care." For instance, courts have refused to enforce clauses that provide for forfeiture where beneficiaries object to a fiduciary's accounting and/or refuse to sign releases, and where beneficiaries "interfere with or question the administration or management of [decedent's] estate or of any trust created [under his will]." These holdings are based on EPTL § 11-1.7(a)(1), under which "the attempted grant to an executor or testamentary trustee...of [exoneration] from liability for failure to exercise reasonable care, diligence and prudence" is void.

Conclusion

Understanding the limits on the operation of in terrorem clauses is important for estate planners and litigators alike. The former should be sure to advise clients that these provisions may not be effective in certain situations, and litigators should always investigate whether there is an applicable exception that permits a beneficiary to take action without risking her inheritance.