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Extending EPTL 3-3.5 Safe Harbor Provisions to Inter Vivos Trusts

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In recent years, estate practitioners have seen an increase in the use of in terrorem clauses as an estate planning tool. In terrorem clauses, also referred to as "no contest" provisions, are conditions placed by a testator or grantor upon bequests—usually to discourage beneficiaries from challenging the provisions of a will or trust. These provisions are attractive to many clients because they discourage frivolous or so-called "strike suits" and they tend to settle estates quickly. Under certain circumstances, in terrorem clauses provide that beneficiaries forfeit their rights or interests under a will or in a trust to the extent that they trigger the condition in the provision. For this reason, they are disfavored and strictly construed under New York law; however they are generally enforceable.

Estate Powers and Trust Law §3-3.5 and its predecessors are an attempt by the New York State Legislature to balance the competing interests of testators to avoid challenges to their testamentary wishes, and of beneficiaries to make informed decisions as to the merits of any probate objections they might file. EPTL 3-3.5 sets forth a non-exhaustive list of "safe harbor" provisions which shield beneficiaries from triggering in terrorem clauses contained in testamentary instruments.

EPTL 3-3.5's safe harbor provisions unquestionably protect beneficiaries under testamentary instruments from triggering an in terrorem clause contained therein. However, there is no comparable statutory protection when beneficiaries are faced with an in terrorem clause within an inter vivos trust. Historically, some Surrogates have seemingly recognized an analogous right in the context of inter vivos trusts; however, with the increasing use of inter vivos trusts as an estate planning tool, these statutory safe harbor provisions should be formally extended within the statute.

History of EPTL 3-3.5

In the early 1960s, the Legislature created the Bennett Commission to study the law of estates and to make recommendations for its revision and modernization. As part of the commission's work, SCA 142-a was proposed which helped to simplify what is now SCPA 1404 pre-objection discovery.[1] This proposal by the commission included certain safeguards such as allowing any party entitled to citation in a proceeding to raise objection while giving the Surrogate the

discretion to require that the witnesses be produced personally and examined.[2]

Later, the Bennett Commission recommended expanding the range of exceptions.[3] The Legislature responded by enacting the predecessor to the current EPTL 3-3.5, which allowed a testator to disinherit a beneficiary who contested the will, but it also included a wider range of exceptions, including (i) objections (with probable cause) on the grounds of forgery or revocation by a later will; (ii) objection by the guardian of an infant beneficiary (EPTL 3-3.5(b)(2)); (iii) objection to the court's jurisdiction (EPTL 3-3.5(b)(3)(A)), refusal to join in the probate petition or waiver of service of a citation (EPTL 3-3.5 (b)(3)(C)); (iv) commencement of a construction proceeding once the will is probated (EPTL 3-3.5 (b)(3)(E)); (v) allowing a beneficiary to provide information or testimony relevant to the probate of the will (EPTL 3-3.5 (b)(3)(B)); and (vi) allowing preliminary examinations under SCPA 1404 to evaluate the merits of any potential objections.

Originally, the safe harbor provisions of EPTL 3-3.5(b)(3)(D) for SCPA 1404 examinations only permitted the beneficiary to examine the attesting witnesses. The Legislature amended the statute in 1992 to also allow the beneficiary to depose the preparer of the will, and again in 1993 to allow depositions of the nominated executor and proponent.[4] This discovery allows the beneficiary to weigh the merits of any potential objections against the risk of losing a bequest and facilitates settlement in many instances. The statute also allows the court to discharge its SCPA 1408 obligation more easily by allowing testimony without any fear of losing a bequest.[5]

Expansion After 'Singer'

In *Matter of Singer*, 13 NY3d 447 (2009), the Court of Appeals expanded the safe harbor related to SCPA 1404 examinations further than those individuals statutorily proscribed. The decedent in *Singer* left most of his estate to his daughter and included two in terrorem clauses. The first precluded any beneficiary who contested the will from taking under the will and the testator's revocable living trust. The second specifically forbade the decedent's son to "contest, object to or oppose" the will or trust and to take the daughter to any religious or other court. Notwithstanding, the son conducted a deposition of the decedent's prior attorney. Both the Surrogate and the Appellate Division ruled that the son had violated the discovery limits when he examined a party not listed in the "safe harbor" of EPTL 3-3.5(b)(1)(D).

The Court of Appeals reversed, holding that circumstances may exist where it is "permissible to depose persons outside the statutory parameters without suffering forfeiture." Id. at 452. The Court of Appeals opined that the drafter of the prior wills helped the son make an informed decision on whether the last will was the product of undue influence, and the son did not object to the will. The court believed in this circumstance the public policy behind EPTL 3-3.5 was accomplished as well as the testator's wish to prevent the son from contesting. The court directed the Surrogates to look at each case separately to determine whether the conduct undertaken was within the testator's intent.

Based upon this ruling, in 2011, the Legislature amended EPTL 3-3.35 (b)(3)(D) to allow the beneficiary, in "special circumstances," to depose "any person whose examination the court determines may provide information with respect to the validity of the will that is of substantial importance or relevance to a decision to file objections to the will."

Inter Vivos Trusts

For the most part, there is little substantive difference between an in terrorem clause within a will or one within an inter vivos trust. As found by Surrogate Renee Roth in *Matter of Davidson*, 177 Misc2d 928 (Surr Ct New York Co. 1998) (Roth, J.)

Revocable trusts—used increasingly as devices to avert will contests—function essentially as testamentary instruments (i.e., they are ambulatory during the settlor's lifetime, speak at death to determine the disposition of the settlor's property, may be amended or revoked without court intervention and are unilateral in nature) and therefore must be treated as the equivalent of wills in the eyes of the law.

In *Matter of Stralem*, 181 Misc2d 715 (Surr Ct Nassau Co. 1999)(Radigan, J,), in which coauthor C. Raymond Radigan was Surrogate, an income beneficiary under an inter vivos trust created by the decedent sought a determination that certain provisions of the decedent's will and amendments to the trust were void as against public policy, or otherwise did not trigger any forfeiture by the beneficiary. The beneficiary was a party to an accounting proceeding related to the trust and was concerned that certain steps she might take going forward could trigger the forfeiture language in the will and trust, including a proceeding to revoke letters of trusteeship, filing objections to the accounting or a construction proceeding relating to the trust language.

The court strictly reviewed the specific language of the in terrorem clauses in the will as it related to each act contemplated by the beneficiary. First, the court found that a challenge to the executors or trustee's appointments was not encompassed by the in terrorem clause. The court also reviewed the will's mandate that the beneficiaries execute a release to the

trustees as a precondition to receiving any benefits, albeit with a carve-out for claims against the fiduciary which were "finally determined judicially to have resulted from fraud, deceit, or dishonesty by such trustee." Id. at 718-719. On this point, the court looked to EPTL 11-1.7 and struck down that part of the provision as against public policy to the extent it required the execution of a release to the fiduciaries as a prerequisite to receiving any benefit. The court also found that the same ruling applied to any suggestion that the mere act of filing of objections to the fiduciaries' account could trigger forfeiture.

Lastly, in *Stralem* the court reviewed the beneficiaries' query whether merely seeking a construction of certain provisions of the trust could trigger a forfeiture. The movant's concern was that while will construction is statutorily protected from any forfeiture under an in terrorem clause, there is no such statutory provision in EPTL 3-3.5 for proceedings to construe the terms of an inter vivos trust. In reviewing, the court found that "As with wills, in terrorem clauses in inter vivos instruments should be equally disfavored" and strictly construed. Upon review, the court found that there was no language in the in terrorem clause that could be fairly interpreted as requiring the forfeiture of any interest by a person who seeks to construe any of its terms or provisions.

The court in *Stralem* did not specifically rely upon or extend EPTL 3-3.5 to inter vivos trusts in reaching its decision; however, it is clear that the court was mindful of the same public policy rationales. When faced with this situation, other courts have also looked to a strict reading of the in terrorem provisions with an eye toward public policy.

For example, in *Matter of Stiefel*, 20 Misc3d 1135(A) (Sup Ct Ulster Co. 2008), the court reviewed whether a beneficiary had triggered an in terrorem clause in a trust which stated "…if a beneficiary…should legally challenge this Trust, its provisions, or asset distribution, then all asset distributions to said challenging beneficiary shall be retained in Trust and distributed to the remaining beneficiaries…" Previously, a beneficiary had offered an alternative construction of an ambiguous trust provision in response to a petition. The court found that act did not constitute a waiver of the right to invoke the in terrorem clause in a subsequent proceeding because it would have been premature to determine the application of the in terrorem clause until the distribution provision was settled.

Conclusion

Because of the increasing use of inter vivos trusts in estate planning, the same policy reasons for the safe harbor provisions in EPTL 3-3.5 for wills should be extended to inter vivos trusts. Beneficiaries should have the ability to explore potential objections without concern that their bequests will be forfeited.

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Endnotes:

1. SECOND REPORT OF THE TEMPORARY STATE COMMISSION ON THE MODERNIZATION, REVISION AND SIMPLIFICATION OF THE LAW OF ESTATES at 93.

2. Id.

3. See Fifth Report of the Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates, Leg. Doc. (1966) No. 19, March 31, 1966, at 481-82.

4. Turano Practice Commentaries, EPTL 3-3.5.

5. Turano Practice Commentaries, EPTL 3-3.5 citing SECOND REPORT OF THE EPTL-SCPA LEGISLATIVE ADVISORY COMMITTEE, 1992 Appendix 14B, citing *Matter of Zurkow*, 74 Misc2d 736 (Surr Ct New York Co. 1973).