



An Inherent Dilemma: Prospective Beneficiaries Confronted With In Terrorem Clauses

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An in terrorem, or "no-contest," provision is designed to prevent against challenges to a will or trust under the threat of disinheritance. This clause often provides for the revocation of a gift to a prospective beneficiary if she contests the will or trust, or otherwise challenges its validity.

The validity of the in terrorem clause is well established in Ohio. Such a clause is intended to discourage a dissatisfied heir at law from contesting a will or a trust if the amount bequeathed to her is deemed sufficient by the testator or settlor. This clause reflects the desire of the testator or settlor to prevent a will contest or trust contest following the testator or settlor's passing. To avoid competing challenges to a will or a trust, the testators and settlors often request the insertion of such an in terrorem clause within their will or trust to the effect that, if any beneficiary contests, such beneficiary automatically forfeits any bequest that such person would otherwise receive under the will or trust. Within an in terrorem clause, a testator or settlor may also include language that provides for forfeiture of the beneficiary's entire interest in the testator or settlor's estate or trust assets, if the beneficiary challenges a particular portion of such instrument.

Court actions to obtain an interpretation, or a request for construction, of a will or trust, do not necessarily challenge the legitimacy of the will or trust and, therefore, do not invoke an in terrorem clause. Of critical importance, an in terrorem clause does not place the fiduciary's conduct beyond the oversight of the Probate Court, nor does every request for involvement of the Probate Court by a prospective beneficiary constitute a challenge to a will or trust sufficient to invoke the consequences set forth within an in terrorem clause.

In terrorem clauses are often designed to present the beneficiary with a difficult choice. Either accept the gift under a will or trust, or contest the will or the trust in the hope of increasing the beneficiary's distributive share. Contesting the will or the trust entails the concomitant risk of forfeiting the benefits if the contest fails. If the beneficiary is successful in contesting the will or invalidating the trust, the instrument is nullified. If the beneficiary is unsuccessful, then the in terrorem clause applies and the bequest is forfeited.

In a series of cases, Ohio courts have ruled that in terrorem clauses do not place the fiduciary's conduct beyond the oversight of the Probate Court, and every request by a beneficiary for involvement of the Probate Court does **not** constitute a challenge to a will or a trust that would trigger the clause. Instead, Ohio courts require a direct challenge to the will or trust to trigger the clause. A declaratory judgment action to construe a will or trust, exceptions to an estate inventory, and a challenge to the fiduciary's actions or fiduciary's duties, have been viewed as separate and distinct from a contest to the validity of the instrument. Accordingly, Ohio courts have viewed these actions as within the purview of the Probate Court to supervise the actions of the fiduciary. Broad in terrorem clauses are often viewed narrowly to preserve the Court's authority to supervise the fiduciary.

It is important for the client to understand the purpose of the in terrorem clause. If the testator or settlor expects a fight from a presumptive heir and wishes to leave her nothing under the will or trust, then that omitted person may have little to lose by challenging the instrument. The existence of an in terrorem provision does not necessarily divest a challenging beneficiary from standing to sue. Providing a disfavored beneficiary some gift under the instrument functions as a positive incentive and may better serve the client's wishes inasmuch as the beneficiary now has something to lose, should she choose to challenge the instrument. Because these types of disputes are often deeply personal and highly emotional, even a well-crafted in terrorem provision cannot guarantee that future litigation will be avoided. However, a testator or settlor who employs a no-contest clause can rest assured that it will likely be enforced in Ohio.

If someone is confronted with, or would like to bring, a will or a trust contest, in the face of an in terrorem or no-contest provision, sophisticated and experienced trust, estate, and probate litigation counsel should be consulted to help effectuate successful resolution.

This article provides an overview and summary of the matters described therein. It is not intended to be and should not be construed as legal advice on the particular subject.