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No One Can Contest a New York Will If It Includes an In Terrorem Clause. Right? Right?!?!?!!?

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Unfortunately, including an *in terrorem* ("no contest") clause in your Will does not make it impenetrable under New York law.

Although New York law recognizes *in terrorem* clauses as valid,[i] they are narrowly construed by the courts. An *in terrorem* clause in a Will threatens that if a beneficiary challenges the Will, such beneficiary (and, typically, all of his or her descendants) will be treated as if he or she predeceased the testator, thereby disinheriting the beneficiary. The purpose of an *in terrorem* clause is to discourage litigation and ensure that the testator's intentions are carried out.

Regardless of how well drafted a Will's *in terrorem* clause is, the conditions that trigger forfeiture are limited by statute in New York. New York Estates, Powers and Trusts Law ("EPTL") 3-3.5(b) sets forth a non-exhaustive list of exceptions where an *in terrorem* clause will not be triggered by a beneficiary's actions regardless of the terms of the *in terrorem* clause. **These statutory "safe harbors" include:**

1. Objections (with probable cause) on the grounds of forgery or revocation by a later Will;[ii]
2. Objections by the guardian of an infant (*i.e.*, minor);[iii]
3. Objections to the jurisdiction of the court probating the Will;[iv]
4. Disclosing information to the court related to any document offered for probate as a Will or relevant to the probate proceeding;[v]
5. Refusal or failure to join in the probate petition or executing a waiver of a citation;[vi]
6. Requesting preliminary examinations (*i.e.*, pre-objection discovery) under New York Surrogate's Court Procedure Act ("SCPA") 1404; and [vii]
7. Commencing a construction proceeding once a Will is probated.[viii]

From the statutory "safe harbors" listed above, preliminary examinations (*i.e.*, SCPA 1404 examinations) provide interested parties with a valuable avenue to gather information on whether a Will contest will be successful prior to the filing of objections. This is especially true when an *in terrorem* clause is included in the Will given that the request for such information will not trigger the clause.

An "interested party" in connection with SCPA 1404 examinations is broadly defined as "any person

whose interest in the property or in the estate of the testator would be adversely affected by the admission of the [W]ill to probate."[ix] When an interested party requests SCPA 1404 examinations, such interested party is able to obtain certain document discovery and pre-trial testimony of the attorney who drafted the Will and the attesting witnesses of the Will. Additionally, when the Will contains an *in terrorem* clause, pre-trial testimony of the named executor(s) and proponent(s) of the Will can also be obtained.[x] These individuals may be examined as to all relevant matters that may be the basis of objections to the probate of the Will. SCPA 1404 examinations aim to provide the requesting party with sufficient information regarding the preparation and execution of the Will, such as the decedent's testamentary capacity and the absence of undue influence, duress or fraud.

Aside from SCPA 1404 examinations and the other statutorily mandated exceptions, there are certain other circumstances that will not trigger an *in terrorem* clause, such as enforcing a valid debt where the Will directs payment of debts,[xi] enforcing a spouse's right to an elective share of the estate,[xii] or an after-born child's application seeking to be deemed a pretermitted child under EPTL 5-3.2.

Further, in order for an *in terrorem* clause to achieve the desired litigation-deterrent effect, the Will must provide the potential objectant with something "substantial" that he or she will lose if he or she triggers the *in terrorem* clause. There is a misconception that if you provide one of your heirs with nothing in your Will, but include an *in terrorem* clause, such disinherited heir will be deterred from contesting your Will upon your death. On the contrary, the *in terrorem* clause may have no effect on a disinherited heir, as they risk losing nothing by challenging the Will.

An *in terrorem* clause is only an effective deterrent to your heirs if you have provided them with a meaningful bequest in your Will. For instance, if you have an estate worth $1,000,000 and provide $1,000 to Child A and the remainder to Child B. The $1,000 bequest may not be a sufficient deterrent to prevent Child A from contesting your Will because the amount Child A stands to gain if he or she successfully challenges your Will (*i.e.*, $499,000[xiii]) is much larger than the $1,000 bequest. Therefore, if you are concerned that one of your heirs will have an issue with the terms of your Will and you include an *in terrorem* clause in your Will, the *in terrorem* clause may not have the intended deterrent effect without providing that heir with a substantial enough benefit under the Will as written. While *in terrorem* clauses do provide some deterrence from unnecessary litigation, it is not foolproof. To ensure an *in terrorem* clause is as effective as possible, or even necessary, in your Will, a quick check-in with your trusts and estates attorney is likely necessary.

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[i] *In terrorem* clauses are unenforceable in Florida and Indiana and are subject to various other limitations in other states.

[ii] *See* EPTL 3-3.5(b)(1).

[iii] *See* EPTL 3-3.5(b)(2).

[iv] *See* EPTL 3-3.5(b)(3)(A).

[v] *See* EPTL 3-3.5(b)(3)(B).

[vi] *See* EPTL 3-3.5(b)(3)(C).

[vii] *See* EPTL 3-3.5(b)(3)(D).

[viii] *See* EPTL 3-3.5(b)(3)(E).

[ix] *See* SCPA 1410.

[x] *Matter of LaMotta*, 101 A.D.3d 1009 (2d Dep't 2012). *See also* SCPA 1404(4).

[xi] *Matter of Cronin*, 143 Misc. 559 (Surr. Ct. Westchester Cnty. 1932).

[xii] *Matter of Tourneau*, 4 Misc. 2d 941 (Surr. Ct. N.Y. Cnty. 1956).

[xiii] Typically, if a Will is successfully challenged and deemed invalid, the testator will be deemed as if he or she died intestate (*i.e.*, died without a Will), and the testator's estate will be distributed under New York's default rules. Under the default rules, if a testator dies not survived by a spouse, but survived by children, the children will share equally in the testator's estate.

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