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TAB 3

Practice Gems: Administration of Estates 2015

Litigating No-Contest Clauses in Wills

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There are times when you already know that a will is going to be challenged. Perhaps the bequests are unusual or the children have already started skirmishing. Perhaps there is some question about the testator's capacity or his relationship with a new girlfriend. Whatever the case might be, as a lawyer you might find yourself litigating in the face of a no-contest clause.

In this paper, the authors provide a brief history of the law surrounding no-contest clauses. The authors then review the *in terrorem* doctrine and look at how no-contest clauses can be drafted to minimize the risk of being declared void. Finally, this article will canvass litigation strategies in the face of no-contest clauses. Depending on the specific wording of the clause, it might be open to challenge. Alternatively, while challenging the will might not be feasible, equitable or statutory relief might still be available.

Terminology

In terrorem is Latin for "in order to frighten."[1] It is a threat. An "*in terrorem* clause" is a term sometimes used synonymously with a no-contest clause in a will – that is, a clause that provides that a beneficiary will lose some entitlement if he or she challenges the will.[2] But the case law suggests an important distinction in terminology. Not all no-contest clauses are necessarily *in terrorem*. It is only a no-contest clause that the court determines to be a <u>mere</u> threat that is *in terrorem*.

For the sake of clarity, this paper uses the terms "no-contest clause" and "*in terrorem*" as defined above rather than synonymously.

History

To understand the concept of no-contest clauses and the *in terrorem* rule, we should start with some history. An excellent resource is the 2006 article written by Peter Lawson, which provides a very thorough treatment.[3]

The *in terrorem* rule was born of a doctrinal divergence between canon law and equity. The ecclesiastical courts, following in the footsteps of Rome, held that all testamentary clauses in restraint of marriage were abhorrent. The court of Chancery was not so sure. The difference of opinion centred upon the "partial" restraints on marriage, *i.e.*, the clauses not forbidding *B* to marry, but forbidding *B* to marry a particular person or a

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[1] B. Garner, ed., *Black's Law Dictionary*, 9th Ed. (Thomson Reuters, 2009) see '*in terrorem*.'

[2] Also called an anti-contest clause or just a *terrorem* clause, B. Garner, ed., *Black's Law Dictionary*, 9th Ed. (Thomson Reuters, 2009) see 'no-contest clause.'

[3] P. Lawson, "The Rule Against *In terrorem* Conditions: What is it? Where Did It Come From? Do We Really Need It?" (2006) 25 *Estates, Trusts and Pensions Journal*, 71-94. See also E. Hoffstein and R. Roddey, "No contest Clauses in Wills and Trustees" presented at the Six Minute Estate Lawyer Seminar 2008.

member of a particular class, or a condition requiring *B* to obtain consent from *C* before kissing the bride. In equity, these partial restraint clauses were not necessarily void.[4]

The other problem, which appears to have arisen later, was the proliferation of no-contest clauses in wills. These were viewed as efforts to circumvent the authority of the courts.[5]

The solution to both problems was the development of the *in terrorem* doctrine. Under this doctrine, equity held that certain partial restraints on marriage and no-contest clauses were mere threats and therefore void. This was based on the legal fiction that the testator had not really meant to impose the impugned condition, and that therefore the condition could only be valid if the testator demonstrated, by the inclusion of an explicit gift-over clause, that he was indeed in earnest.[6] What emerged was the rule, which survives to this day, that for a no-contest clause to be valid, there must be a clear and explicit gift-over if the condition is breached.[7]

One might ask why the inclusion of a gift-over clause should have any bearing upon the court's determination. After all, there is no practical difference between (a) an explicit gift-over to the residue, and (b) the absence of a gift-over clause. This is because, as a general rule, a failed gift falls into the residue.[8] Or, one might ask why the courts in 21st-century Canada are still bound by this vestige of a quarrel between canon law and equity. After all, most of the American jurisdictions have long since abandoned the *in terrorem* doctrine. In most of the United States, a no-contest clause is presumptively enforceable, unless the challenger is acting in good faith and with probable cause.[9] Or, more importantly, one might ask how the *in terrorem* doctrine adequately resolves the fundamental tension between testamentary freedom and access to justice. These are all excellent questions. Lawson writes that courts and commentators have long viewed the rule against *in terrorem* clauses with puzzlement and even mild contempt. [10] Nevertheless, until the Ontario Court of Appeal or the legislature says otherwise, the *in terrorem* doctrine still appears to be good law in Ontario.

The law in Canada today

One of the leading cases in Canada today on the *in terrorem* doctrine is *Kent v. McKay*.[11] The *Kent* case involved an application for an order under the British Columbia *Wills Variation Act*, R.S.B.C. 1996, c. 490 (the "WVA"). Much like Ontario's *Succession Law Reform Act*, R.S.O. 1990, c. S.26 (the "SLRA"), the WVA permitted the court to make provision for a will-maker's spouse or children if the will did not make adequate provision for their proper support.[12] The will in *Kent* contained the following no-contest clause:

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[4] Lawson at pp. 73-74.
[5] Lawson at p. 76.
[6] Lawson at p. 75.
[7] See, *e.g.*, C. Sherrin, *Williams on Wills,* 8th ed. (London: Butterworths, 2002) at para. 34.13.
[8] See, *e.g.*, *Bellinger* v. *Fayers*, 2003 BCSC 563 at para. 9.
[9] Lawson at p. 80, citing *In Re Hite's Estate*, 101 P. 433 (Cal. Sup. Ct. 1909). The exact definition of probable cause may differ from case to case in state to state.
[10] Lawson at p. 72, citing, *e.g.*, *Stackpole* v. *Beaumont* (1796), 3 Ves. 89 at p. 95.
[11] *Kent* v. *McKay*, 1982 CanLII 788 (B.C.S.C.).
[12] *Wills Variation Act*, R.S.B.C. 1996, c. 490, s. 2. See the new *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13, s. 60.

> I HEREBY WILL AND DECLARE that if any person who may be entitled to any benefit under this my Will shall institute or cause to be commenced any litigation in connection with any of the provisions of this my Will other than for any necessary judicial interpretation thereof or for the direction of the Court in the course of administration all benefits to which such person would have been entitled shall thereupon cease and I hereby revoke all said benefits and I DIRECT that said benefits so revoked shall fall into and form part of the residue of my Estate to be distributed as directed in this my Will.[13]

In his decision, Mr. Justice Lander of the B.C. Supreme Court set forth the following test to determine whether the clause was, in fact, *in terrorem* and therefore void:

1. The legacy must be of personal property or blended personal and real property;
2. The condition must be either a restraint on marriage or one which forbids the donee to dispute the will; and
3. The "threat" must be "idle"; that is the condition must be imposed solely to prevent the donee from undertaking that which the condition forbids. Therefore, a provision which provides only for a bare forfeiture of the gift on breach of the condition is bad.[14]

In applying the above test to the no-contest clause in *Kent*, Justice Lander determined that the clause was not *in terrorem*. The existence of the gift-over provision to the residue was sufficient to satisfy the third element of the test.

Both parties and the court relied on *Kent* in the recent Ontario case of *Budai* v. *Milton.*[15]

Bellinger v. *Nuytten Estate*[16] is an interesting case in that it appears to open the door to an alternative line of inquiry for the *in terrorem* doctrine. The no-contest clause in question in *Bellinger* read as follows:

> IT IS MY FURTHER DESIRE, because of an expressed intention of one of the legatees to contest the terms of this my Will, that should any person do so then he or she shall forfeit any legacy he or she may otherwise be entitled to.

This no-contest clause failed to meet the requirements set out in *Kent*, in particular as there was no gift-over provision, and was set aside. Mr. Justice Hood expressed the doctrine emphatically:

> "The gift must be accompanied by an effective gift-over which vests in the recipient on the condition being breached. If there is no gift-over, then the condition will be treated as merely *in terrorem* that is a mere threat, and will be found to be void. And

[13] *Kent* v. *McKay*, 1982 CanLII 788 (B.C.S.C.) at para. 3 (emphasis added).
[14] *Kent* at para. 11
[15] *Budai* v. *Milton*, 2014 ONSC 5530 (S.C.)
[16] *Bellinger* v. *Fayers*, 2003 BCSC 563 (S.C.).

> nothing short of a positive direction of a gift-over, of vesting in another, even in the case where the forfeited legacy falls in the residue, will suffice. There must be an express disposition of what is to be forfeited."[17]

But the court in *Bellinger* also alluded to another possibility. What if there had been evidence before the court that it was the intention of the testator to merely threaten the legatee using the no-contest clause? (In other words, what if there was proof that the old legal fiction was real?) In such an event, according to Justice Hood, the no-contest clause would be held *in terrorem* and void, even if otherwise valid.[18] On this analysis, the court in *Bellinger* reasoned:

> "While I am satisfied that [the testatrix's] intention by [the no-contest clause] was to coerce Roy because of his threat to challenge the will as regards Beverly's entitlement to the Pine Street property, I am not satisfied in the circumstances that [the testatrix] intended to do more than threaten him, using the terminology of the cases […] And the lack of the slightest suggestion of any gift-over supports my conclusion."[19]

The court in *Bellinger* did not specify what kinds of evidence would be sufficient to show that the testator intended to merely threaten the legatee. There was no inquiry on this point in the more recent case of *Budai* v. *Milton.*[20] Nevertheless, it might remain open, on the right facts and admissible evidence, to argue that a no-contest clause, however carefully drafted, was not truly intended as anything more than an idle *in terrorem* threat.

Litigation in the face of a no-contest clause

The above-referenced cases seem to make one point very clear: it is easy enough to draft a no-contest clause that can get around the *in terrorem* doctrine.

1. Make sure the legacy is for personal property or blended personal and real property;
2. Create a condition that forbids the donee from disputing the will; and
3. Draft a very clear and explicit gift-over clause if the no-contest clause is triggered.

But it is important for the solicitor drafting a no-contest clause to ensure that he or she does not overreach and make the bequest conditional on the donee not commencing any litigation.

A. Knock the no-contest clause out on the basis of public policy

Remember that the *in terrorem* doctrine is not the only basis upon which to invalidate a no-contest clause. The following are some potential avenues of attack.

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[17] *Bellinger* v. *Fayers*, 2003 BCSC 563 (S.C.) at para. 9

[18] *Bellinger* v. *Fayers*, 2003 BCSC 563 (S.C.) at para. 12. The court in *Bellinger* was following *Feeney's Canadian Law of Wills*, loose leaf 4th Ed. at §16.64.

[19] *Bellinger* v. *Fayers*, 2003 BCSC 563 (S.C.) at para. 22.

[20] *Budai* v. *Milton*, 2014 ONSC 5530.

First, it is well established that a no-contest clause preventing a beneficiary from instituting any litigation whatsoever concerning the estate is void, not as *in terrorem*, but on the basis of public policy.[21] Thus, arguably, if a no-contest clause is so broad that it would prevent the beneficiaries from seeking the advice and direction of the court on a matter of construction or administration, the clause would be void.

Similarly, a no-contest clause broad enough to be triggered by support claims under dependant's support legislation could also be void. In *Kent*, even though the no-contest clause was not held to be *in terrorem*, it was still held to be void as against public policy. Justice Lander observed that the no-contest clause purported to forbid "any litigation in connection with any of the provisions of this my Will." It therefore encompassed even applications under the WVA. Justice Lander found an Australian case called *Re Gaynor*, [1960] V.L.R. 640, in which the applicant had applied for support under the *Administration and Probate Act*, 1958 (No. 6191), Pt. IV, another piece of legislation designed to ensure the proper maintenance and support of specified individuals. The court in *Re Gaynor* found that it would have been against public policy to enforce the no-contest clause in the face of such legislation, and Justice Lander agreed. Following *Re Gaynor*, Justice Lander found the no-contest clause in *Kent* void.

The reasoning in *Kent* was followed in *Bellinger*,[22] discussed above, which also involved a claim under the WVA. The authors suggest that, on the basis of these B.C. cases, it stands to reason that a no-contest clause forbidding applications for support under Part V of the SLRA would also be void as against public policy.

B. Work around the no-contest clause

Depending on how the no-contest clause is drafted, it might be possible to develop a workaround. This is what happened in the 1904 case of *Harrison* v. *Harrison*, in which the court held:

> "The last clause but one of the will directs that if any beneficiary refuses to accept the portion or provision allotted to him and shall take any proceedings to set aside, cancel, or modify in any manner any part of the will, or to obtain any benefit other than that plainly and distinctly given to him, then any benefit given to him shall absolutely cease, and his share shall be divided equally among the other beneficiaries. This action, to obtain a construction of the will and a declaration of plaintiff's rights as to a present payment, is not within the meaning of the prohibition against adverse action."[23]

If, for example, the no-contest clause forbids challenging the will itself, one might still commence a claim on the basis of contract, unjust enrichment or proprietary estoppel. These claims seek relief as against the estate but do not call into question the validity of the will itself.

Consider, for example, the doctrine of proprietary estoppel. An equity will arise where the claimant can establish the following elements:

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[21] *Feeney's Canadian Law of Wills*, loose leaf 4th Ed. at §16.62.
[22] *Bellinger* v. *Fayers*, 2003 BCSC 563 (S.C.).
[23] *Harrison* v. *Harrison*, 1904 CarswellOnt 131 (Ontario Trial).

1. The owner of certain land induced, encouraged or allowed the claimant to believe that he or she had or would enjoy some right or benefit over the property;
2. in reliance upon this belief, the claimant acted to his or her detriment to the knowledge of the owner; and
3. the owner then sought to take unconscionable advantage of the claimant by denying him or her the right or benefit which he or she expected to receive.

If an equity arises, the court has a broad discretion to fashion an appropriate remedy.[24]

Similarly, there might be a tort claim against other parties. For instance, suppose that the will forbids a disappointed beneficiary from seeking to set aside the will on the basis that the testator lacked capacity. There might still be a claim in negligence against the solicitor who drew the will for permitting the testator to sign. At law, a solicitor who undertakes to prepare a will has a duty to inquire into his or her client's testamentary capacity and to satisfy himself or herself that testamentary capacity exists and is being freely and intelligently exercised.[25] Although a solicitor ordinarily only owes a duty of care to his or her clients, there is an exception for "disappointed beneficiaries" who do not receive a bequest as the testator intended due to the negligence of the solicitor.[26] Thus, on the right facts, there might be a claim against the solicitor.

Another possibility might be the tort of intentional interference with inheritance rights. This tort does not challenge the validity of the will, but instead targets those who, by fraud or tortious means, interfered with the testator's decision. In the United States, where the case law is more developed, the tort is defined as follows:

> "One who by fraud or other tortious means intentionally prevents another from receiving from a third person an inheritance or gifts that he would otherwise have received is subject to liability to others for the loss of the inheritance or gift."[27]

A plaintiff must prove (1) the existence of an expectancy, (2) a reasonable certainty that the expectancy would have been realized but for the interference, (3) intentional interference with that expectancy, (4) tortious conduct involved with the interference, and (5) damages.[28] The tort has been pleaded and discussed in the Ontario case law, but not yet recognized.[29]

[24] *Clarke* v. *Johnson*, 2014 ONCA 237 at para. 52.
[25] *Hall* v. *Bennett Estate*, 2003 CanLII 7157 (C.A.).
[26] See, *e.g.*, *Harrison* v. *Fallis*, 2006 CanLII 19457 (S.C.)
[27] *Restatement of the Law (2nd) Torts*.
[28] *In re Marshall*, p. 11. See also Gaslowitz Frankel LLC, "Tortious intereference with expectancy: a new solution to an age old problem?" (Atlanta Bar Association, Estate Planning Section Breakfast, August 1999) http://www.gaslowitzfrankel.com/news/tortious-interference-with-expectancy-a-new-solution -to-an-age-old-problem/
[29] *Dryden v. Dryden* (2012), 210 A.C.W.S. (3d) 174 (Ont. S.C.) at para. 6.

C. Challenge the will

Challenging a will is always a risky business. In "Setting Aside the Will,"[30] Susan Stamm summarizes recent case law with respect to will challenges, and concludes quite simply that will challenges are difficult to win at trial. In particular, Ms. Stamm notes that:

> "… except in the clearest of cases, it is hard to have a will, properly executed, set aside. Allegations of lack of testamentary capacity, lack of knowledge, and approval and undue influence are frequently pleaded but infrequently proven. Even in cases where suspicious circumstances are found to exist, it remains difficult to have a will set aside."[31]

Thus, the decision to challenge a will should never be taken lightly.

The only difference between challenging a will and challenging a will with a no-contest clause is that, in the latter situation, the risk to the claimant is greater. In the latter situation, the claimant has a specific legacy to lose. Certainly, the claimant should consider the existence of a no-contest clause in his pre-litigation cost-benefits calculus. But if, after seeking competent legal advice, the potential claimant is confident in his case, then there is always the option to power through, risking not just the legal fees but the legacy as well.

[30] Susan J. Stamm, "Setting aside the will," 9th Annual Estates and Trusts Summit, Law Society of Upper Canada, November 2, 2006

[31] Stamm at p 22