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Wills, Trusts & Estates

In terrorem doctrine and no-contest clauses in wills: Part four

By **Robert Alfieri**

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(October 2, 2020, 1:29 PM EDT) -- As we discussed in the third article in this series on litigating in the face of a no-contest clause in a will being challenged, *Mawhinney v. Scobie* 2019 ABCA 76 reaffirms that a no-contest clause will be invalid on the grounds of public policy if that clause:

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• Seeks to oust statutory benefits (such as maintenance and support under dependants' relief legislation); or,
• Deprives the court of its jurisdiction to deal with requests for assistance in interpreting a will, which do not impugn the will.

Additionally, no-contest clauses which fail to comply with the *Kent v. McKay* [1982] B.C.J. No. 67 test will be voided due to the *in terrorem* doctrine.

Accordingly, drafters of no-contest clauses should ensure that any clause does not infringe a beneficiary's entitlement to seek statutory benefits or attempt to strip the court of its jurisdiction for such matters. As Mawhinney was denied leave to appeal to the Supreme Court of Canada, this area of law is unlikely to undergo any major developments in the foreseeable future.

Key takeaways from Mawhinney for will drafters

Mawhinney provides an excellent example of a no-contest clause that has survived appellate litigation. One of the largest takeaways is that drafters of no-contest clauses should be mindful to contain language that ensures that the clause does not restrict or oust the general jurisdiction of the courts for the administration of an estate or similarly prohibit a beneficiary's entitlement to seek a statutory benefit such as a dependant's relief claim.

Out of an abundance of caution, non-Albertan will drafters may wish to pay particular attention to Justice Brian O'Ferrall's dissenting remarks. More specifically, if a testator intends to preclude a specific right conferred by the legislature, then the testator should manifest this intention through the inclusion of explicitly clear language in the no-contest clause.

Beneficiaries who litigate a will with no-contest clause

The presence of a no-contest clause in a will does not mean that a litigant is prohibited from bringing an outright challenge to the validity of the will or in connection with any provision of the will. These clauses are only meant to discourage would-be litigants and force them to assess how strongly they believe in their case.

Importantly, if a litigant is successful in a will challenge, the entire will, including the no-contest clause will be invalid. However, prior to commencing a legal application related to the will and thereby risking forfeiting any entitlements under the will, potential litigants would be wise to follow Karen Mawhinney's approach to seek directions from the court to determine whether the no-contest clause is valid or even applies to the prospective legal application that is being considered. If it does apply, then a litigant can make an informed cost-benefit analysis on whether they wish to play a zero-sum game.

For counsel instructing potential litigants in such situations, it is prudent to ensure that one's clients are fully informed of the pros and cons of litigation in the face of a no-contest clause. In the event that a litigant unsuccessfully rolls the dice against a no-contest clause and loses their designation as a beneficiary, it is possible that counsel may be exposed to a claim for solicitor negligence if they failed to properly explain the ramifications of litigating a no-contest clause.

Takeaways for executors of a will with no-contest clause

One of the largest lessons from *Mawhinney* is even if a legal manoeuvre or application may only be the first step in a series of actions that *might* lead to a range of substantive outcomes, such as a will's validity being challenged, such a step may trigger a no-contest clause. As noted by the Great One, Wayne Gretzky, one should skate to where the puck is *going* to be, not where it has been. Equally, an executor should examine where a particular legal manueuvre by a beneficiary may end up and more specifically, whether it is possible that it may lead to the crystallization of a will challenge. In the event an eventual outcome of a beneficiary's action may result in the imputation of a will's validity, an executor should seek to rely on the no-contest clause as early as possible.

This is the fourth in a four-part series. Read the first article: In Terrorem doctrine and no-contest clauses in wills: Part one; second article: In terrorem doctrine and no-contest clauses in wills: Part two; third article: In terrorem doctrine and no-contest clauses in wills: Part three.

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