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Wills, Trusts & Estates

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

By **Robert Alfieri**

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(September 25, 2020, 8:29 AM EDT) -- There are certain situations in which one already knows that a will is going to be challenged. It may be on the basis that there is some question about the testator's capacity or their relationship with a new romantic partner who suddenly appeared or the bequests are unusual. Whatever the case might be, one might find yourself litigating in the face of a no-contest clause that appears within the will that is having its validity challenged.

In this series of articles, I will provide the reader with a brief history of law surrounding no-contest clauses, its interplay with the *in terrorem* doctrine, and examine an example of a recently litigated no-contest clause that was upheld by the Alberta Court of Appeal in its decision of *Mawhinney v. Scobie*, 2019 ABCA 76 leave to appeal refused. Finally, this article will canvass litigation strategies in the face of no-contest clauses.

Terminology

In terrorem literally means "in fear" or "as a warning." In law, it refers to a testamentary conditional gift where the condition is a threat without any consequence. If the condition in the testamentary gift is found to be in terrorem, it may be void and inoperative. Often the term "in terrorem clause" is used interchangeably with "no-contest clause."

This doctrine often arises in the context of no-contest clauses in wills — that is a clause which stipulates that a beneficiary will lose an entitlement if they challenge the will. Not all no-contest clauses will be invalid due to the in terrorem doctrine, only clauses that a court determines to be a *mere* threat will be invalid due to the doctrine; that is, a threat unaccompanied by a consequence. Where there is, say, a gift-over in consequence of the condition being breached, the clause is enforceable. One should note that the concern is less about the condition itself, and more about certainty as to the disposition of the property given on condition.

Why the doctrine exists

The in terrorem doctrine is the result of a doctrinal bifurcation between canon law and equity. The ecclesiastical courts, following principles of canon law held that all testamentary clauses in restraint of marriage were abhorrent, whereas the courts of Chancery were not as sure. The difference of opinion centred upon the "partial" restraints on marriage, i.e. the clauses not forbidding an individual to marry, but forbidding an individual to marry a particular person or a member of a particular class in equity; these partial restraint clauses were not necessarily void. 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.

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 null and void. In arriving at this conclusion, the courts breathed life into a legal fiction which held that if a testator really meant to impose the impugned condition, as opposed to a mere *threat* of imposing the impugned condition, the testator would manifest this intention through the inclusion of an explicit gift-over clause. What has emerged from this fiction is 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. One should also note that conditions restraining marriage or promoting divorce are void on account of public policy, whether there is a consequence in the form of a gift-over or otherwise.

This is part one of a four-part series.

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