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Wills, Trusts & Estates

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

By **Robert Alfieri**

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(October 1, 2020, 8:37 AM EDT) -- In the decision of *Mawhinney v. Scobie* 2019 ABCA 76, the Alberta Court of Appeal had the opportunity to explore the law surrounding the *in terrorem* doctrine and no-contest clauses in the face of a seemingly procedural application.

Facts

James Carl Anderson (JC) passed away on Sept. 3, 2015, and left behind three adult children and his fiancée Karen Mawhinney (Mawhinney). Mawhinney claimed that JC previously made four separate wills. Under each of the four wills, she was a beneficiary, sharing equally with the adult children from the residue of the estate. However, JC subsequently prepared a codicil which altered the distribution scheme that was present through the previous four wills. Eventually, a new and final will was prepared (the last will), leaving Mawhinney a specific bequest of a parcel of property in Alberta. However, unlike previous iterations of the will, Mawhinney was no longer a residual beneficiary under the last will.

The last will, which received a grant of probate, contained a no-contest clause, which read as follows:

"21. If any beneficiary of this my Will challenges the validity of this my Will or any Codicil hereto or commences litigation in connection with any provision of my Will of any Codicil hereto, other than for:

"(a) Any necessary judicial interpretation or for the assistance of the court in the course of administration of my estate; or

"(b) Seeking to enforce or obtain any rights or benefits conferred by the laws of the Province of Alberta;

"then such beneficiary shall absolutely forfeit and lose all entitlement to benefits or to any gift to him or her hereunder, and every such benefit or gift so forfeited shall fall into the residue of my estate and the residue of my estate shall be distributed as if such beneficiary had predeceased me and left no issue surviving me."

Mawhinney alleged that prior to the execution of the last will, JC's health had deteriorated such that there were "suspicious circumstances" surrounding the execution of the last will. Under the Alberta *Surrogate Rules* Alta Reg 130/95, an individual can make an application under rule 75(1)(a) to obtain formal proof of a will. The *Surrogate Rules* involves a two-stage process. Firstly, the applicant must adduce evidence of suspicious circumstances. If successful, the burden then shifts to the propounder of the will to prove the will in solemn form. However, due to the presence of the no-contest clause, Mawhinney first made an application to the court for directions on whether an application under rule 75(1)(a) would trigger the no-contest clause and thereby disentitle her to her bequest.

The lower court decision

The lower court was satisfied that the no-contest clause itself was a valid clause and would not fail

due to the doctrine of in terrorem. More importantly, the lower court found that an application under rule 75(1)(a) of the *Surrogate Rules* would not violate the no-contest clause because rule 75(1)(a) would fall under the "rights or benefits conferred by the Province of Alberta" exception that was enumerated within the clause at paragraph 21(b). The lower court also noted that if JC wished to preclude an application under the *Surrogate Rules*, he should have drafted such an exclusion within the no-contest clause.

The holding was appealed.

The majority decision

The two questions before the Alberta Court of Appeal were as follows:

1. Does an application to obtain proof of the last will tantamount to a challenge of the validity of the will and thereby trigger the no-contest clause?
2. Is paragraph 21(b) of the last will restricted to applications for dependants' relief or is broad enough to encapsulate an application raising suspicious circumstances?

The Appeal Court overturned the lower court's decision and held that the very essence of an application raising suspicious circumstances is to ultimately challenge the validity of the last will. Consequently, the bringing of such an application would be the exact thing which the no-contest clause was intended to prohibit.

With respect to the second question, the Appeal Court answered it in the negative. In arriving to this answer, the court rejected the argument that the exception found at 21(b) of the clause applied only to dependants' relief applications, and interpreted the phrase "rights and benefits conferred by law" to refer only to a "substantive benefit or right created that the testator did not provide for, or provide for adequately." As a result, Mawhinney's "procedural right to challenge the will" under rule 75 of the *Surrogate Rules* did not fall under the exception.

At the hearing of the appeal Mawhinney also raised a public policy argument. She argued that if she was unable to bring her application without triggering the no-contest clause, then it would result in other individuals who are aware of suspicious circumstances in a case of a will with a no-contest clause in being precluded from bringing an application to put those suspicious circumstances before the court. Arguably, such an approach could lead to the unsavoury consequence of negating a court's ability to ensure that only valid wills were being probated and could result in invalid wills being administered.

In rejecting the public policy argument, the Appeal Court emphatically held that no-contest clauses do not prohibit an outright challenge to the validity of the will or in connection with any provision of the will. Rather, the clause is designed to *discourage* such challenges, not *prohibit* them. Put another way, the effect of a no-contest clause is to test the fortitude of a potential litigant and force them to assess how strongly they believe in their case. Importantly, if the challenge is successful, then the entire will, including the no-contest clause, will be invalid as well.

The Appeal Court also confirmed that a no-contest clause which either ousts the general jurisdiction of the courts or thwarts a statutory benefit is invalid, but the two exceptions found within the clause at paragraphs 21(a) and (b) ensured that the clause in *Mawhinney* did not run afoul. More specifically, paragraph 21(a) ensured that the clause would not oust the general jurisdiction of the courts for the administration of an estate, and paragraph 21(b) addressed potential statutory claims, such as dependants' relief legislation.

The dissent

Justice Brian O'Ferrall disagreed with the majority and held that the no-contest clause did not apply to an application to have the will proven in solemn form. He noted that the application would be the necessary first step in a process that could have a range of substantive outcomes, such as the will being deemed invalid. He therefore found that the right to make the application had a "substantive aspect," which would fall under the purview of "rights and benefits" under 21(b) of the no-contest

clause.

In coming to this conclusion, he noted: "What right could be more fundamental than the right to be satisfied that the testamentary instrument in question is indeed the last will and testament of the deceased?"

Additionally, Justice O'Ferrall held that in any event there was nothing to suggest that the "rights" specified under paragraph 21(b) should be narrowly construed as to be limited to a purely substantive right.

Further, he noted that the moment the testator includes exceptions to the triggering of a no-contest clause, those exceptions must be interpreted in a manner that aligns with the testator's intentions. Finally, he agreed with the lower court's finding that had the testator intended to preclude a specific right conferred by the *Surrogate Rules*, he could have excluded that right from the exception noted in paragraph 21(b).

This is the third 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.

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