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Wills, Trusts & Estates

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

By **Robert Alfieri**

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(September 29, 2020, 1:43 PM EDT) -- In the first article in this series, I discussed litigating in the face of a no-contest clause that appears within the will that is having its validity challenged and the *in terrorem* doctrine (a testamentary conditional gift where the condition is a threat without any consequence). This article will discuss the three-part test and other issues.

In *Kent v. McKay* [1982] B.C.J. No. 67 (*Kent*), the British Columbia Supreme Court held that for the in terrorem doctrine to apply to a no-contest clause, the following three criteria must be satisfied:

1. The legacy must comprise personal property or a mixture of real and personal property;
2. The condition must be in restraint of marriage or one which forbids challenges to the will; and,
3. The threat must be "idle"; that is to say that the condition must be imposed solely to prevent the beneficiary 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 null.

The *Kent* case involved an application for an order under the British Columbia *Wills Variation Act* (WVA). The WVA, much like Ontario's *Succession Law Reform Act*, empowers the court with the ability to make provision for a will-maker's spouse or children if the will did not provide adequate provision for their reasonable support. The will in *Kent* contained the following no-contest provision:

"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." [Emphasis added.]

In applying the three-part test to the above no-contest clause, Justice C. Ross Lander determined that the clause was not in terrorem as the clause included a gift-over provision to the residue, which was sufficient to satisfy the third element of the test. The *Ke*nt case has been followed by multiple levels of courts in various jurisdictions including in Ontario.

The case of *Bellinger v. Fayer*s 2003 BCSC 563 (*Bellinger*) offers an example of a no-contest clause that failed to satisfy the *Kent* test. In *Bellinger*, the no-contest clause in question 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."

Justice Sherman Hood held that the above no-contest clause was invalid due to violating the *Kent* test, in particular by failing to include a gift-over provision. In arriving at this conclusion, he stated

the following: "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 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 made of what is to be forfeited."

Litigation strategies to avoid triggering no-contest clause

Simply because a will contains a no-contest clause does not mean that any legal inquiry or action will de facto trigger the clause as it may not constitute "contesting the will." For example, an application for construction or interpretation of a will does not trigger a no-contest clause. As discussed below, clauses which broadly seek to prevent a beneficiary from making *any* legal inquiry to the court or deny the beneficiary an ability to make a statutory claim are void on the basis of being contrary to public policy.

In *Kent*, the court noted that despite the no-contest clause surviving the in terrorem doctrine, the clause was nonetheless void as it was 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 would have prevented the statutory entitlement of a beneficiary to make a claim for dependant support.

The reasoning in *Kent* was followed in *Bellinger* as well as the case of *Mawhinney v. Scobie* 2019 ABCA 76, which is further discussed in the next article in this series. On the basis of these decisions it stands to reason that a no-contest clause forbidding applications for statutorily entitled benefits in other common law jurisdictions would also be void as against public policy.

Additionally, if a no-contest clause forbids the challenging of 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. Further, and in particular to the doctrine of proprietary estoppel, if an equity arises, a court will have broad discretion to fashion an appropriate remedy.

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

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