

Invoking Fear From The Grave: An Introduction To In Terrorem Clauses

By Cheryl Katz-Erato, Esq.

As a Surrogate's Court litigation attorney, one of the first things to look for when analyzing a decedent's will offered or to be offered for probate is if an in terrorem clause (colloquially known as a "no-contest clause") has been included in the instrument. In general, an in terrorem clause provides that when a beneficiary under a will contests the validity of the will (for any number of reasons, i.e., fraud, undue influence, testamentary incapacity, or improper execution) and is unsuccessful, such beneficiary forfeits all interests they would have received under that will.

Thus, when drafting a will, a seasoned trusts and estates attorney may in certain instances strategically include the in terrorem clause in an attempt to dissuade possibly litigious distributees from objecting to the will's validity after the testator's death. Consider this fact pattern: Testator, a widower, has two children: (i) GoodSon and (ii) BadSon. Testator wants to leave his entire \$1 million probate estate to GoodSon (who will also be the nominated executor) and wholly disinherit BadSon who has been estranged from the family for years. Testator is advised by his attorney that such a testamentary plan will likely leave GoodSon, who undoubtedly wants to probate the will after death, subject to a lengthy and expensive contested



proceeding instigated by disinherited BadSon. Thus, in an attempt to prevent such litigation, the Testator could, for example, leave a specific bequest of \$100,000 to BadSon under his will, along with the inclusion of an in terrorem clause. That way, once GoodSon offers the will to probate after Testator's death, BadSon will think twice about contesting its validity. Indeed, if BadSon initiates an unsuccessful will contest, the in terrorem clause will be triggered and BadSon will forfeit any interest he had in the estate (his entire \$100,000 bequest). In this fact pattern, such a bequest and the clause together likely act as a litigation deterrent.

Alternatively, consider this fact pattern: Testator has two children: (i) GoodSon and (ii) BadSon. Testator
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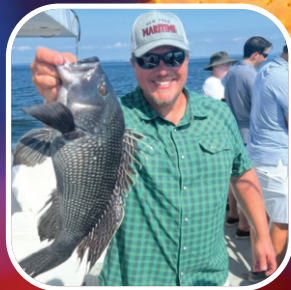
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