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The Trustworthy Advisor

IT'S NO CONTEST!

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Statistics show that less than 2 percent of will contests are successful. We know of no similar statistics for trusts (where an excluded or short-changed beneficiary brings an action to declare the trust or specific provisions invalid), but it is likely that the success rate is even less than that of will contests. And, yet, that doesn't seem to discourage disgruntled, would-be beneficiaries from launching a challenge against the will or the trust (or both). What can a client do?

In Massachusetts, a typical method of discouragement used in both wills and trusts is a forfeiture clause, also known as an "in terrorem" clause or a "no contest" clause. Uniform Probate Code section 2-517; *Old Colony Trust v. Wolfman*, 311 Mass 614 (1942); and *Hanselman v. Frank*, 77 Mass App. Ct. 1104 (2010)(unpublished opinion). This is a warning in the form of a threat that an attempt by a party to invalidate the will or trust will bring about a penalty, generally in the form of a loss of the contesting party's interest in the estate or trust. To make this work, however, the will or trust must give the contesting party something to lose. A token bequest would be of no value and would not by itself discourage a contest. As a practical matter, clients who want to disinherit a problem child, for example, are generally not inclined to leave them much of anything, let alone $25,000 or $100,000 or more. But that is what it might take to discourage a beneficiary from contesting a will or trust that is disposing of a one or two million dollar estate.

Of equal importance are the specific provisions of the forfeiture clause. If the clause simply prohibits appearing against the allowance of the will or contesting the validity of the trust, for instance, that would not prohibit objection to the appointment of the executor or the trustee, or objecting to the executor's personal bond or making a claim for services rendered to the decedent. Similarly, a petition for instructions as to the interpretation or validity of one or more specific trust provisions would not necessarily attack the validity of the trust. Therefore, in such cases, the beneficiary could "make trouble" without invoking the forfeiture clause and without losing his bequest. If the client really wants to discourage all types of attack, the clause could be drawn in such broad fashion that the beneficiary could do little more than accept the bequest and go away quietly. But is this fair?

Some states, such as Florida, do not recognize forfeiture clauses at all on the basis that it is inherently unfair and could result in the allowance of an otherwise invalid will or trust. Other states, such as New Jersey and California, do enforce a forfeiture clause but make an exception if the beneficiary had a reasonable basis for making the claim. Massachusetts makes no exception for reasonable cause, although Massachusetts courts will construe a no contest clause narrowly. *Trustees of Dartmouth College v. Quincy,* 357 Mass 521 (1970). Here, the clause is treated as any other conditional bequest, and so long as the condition is not illegal or against public policy it will be enforced, even if the contestant has a valid basis for the contest. Of course, if a contest was successful and the will (or trust) is found invalid, the contestant might be entitled to an intestate share, but the risk of loss is a great one.

Interestingly, there is nothing in Massachusetts law that prohibits the drafter from voluntarily including a reasonable basis exception to the forfeiture clause. The language could provide that even though there is a forfeiture clause, if the court finds that the beneficiary's contest of the validity of the document was based on reasonable cause, then the bequest will not be lost, even if the contest is lost. The client may want a forfeiture clause that permits a contest under certain circumstances. That does not mean, however, that the contesting beneficiary can easily convince the court that there was reasonable cause, and failure to show reasonable cause

would still result in a loss of the bequest. There is another benefit to a voluntary inclusion of a reasonable cause exception. It would render the clause enforceable in states which only enforce a forfeiture clause if it contains such a reasonableness exception. An important consideration in a mobile society.

A common drafting error is to provide for a forfeiture clause in the will but not in the inter-vivos trust. It is critical that the in terrorem clause be included in both documents, that the terms are consistent, and that it causes a loss of benefit if either document is contested or is the object of any court proceeding that interferes with its orderly administration according to its terms.

One more important thing. In drafting the forfeiture clause, it is easy to overlook including a challenge to a beneficiary designation in a document, contract, or other pay-on-death arrangement outside the will or trust. This would include, for example, a beneficiary designation under a life insurance policy or a deferred compensation contract, and should be considered in drafting the clause.

Many attorneys also suggest that a violation of the clause results not only a loss of the contestant's bequest, but also that of anyone who claims under him. So under a bequest "to James or if he is deceased to his descendants", subject to a forfeiture clause, would cause both James and his descendants to forfeit their share if James breached the condition. It has been suggested that a client who wished for his trust to be "written in stone" and not subject to decanting and other modern modifications might use such a broadly written forfeiture clause to disinherit anyone who attempts to change the trust, period.

The forfeiture clause is an important provision and should be not taken lightly nor automatically included in every dispositive document. It should be carefully explained to the client, including its many possible variations.