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How testators can leverage Indiana's repeal of the prohibition on no contest clauses

By Sarah C. Jenkins

Following our General Assembly's last session, individuals establishing wills or trusts in Indiana will be able to include no contest clauses, *i.e.,* provisions that reduce or eliminate a beneficiary's inheritance due to that beneficiary's conduct, in their estate plans. Effective July 1, Indiana's prohibition on no contest clauses, also called *in terrorem* or forfeiture clauses, will be repealed in both the Probate Code and the Trust Code. As the name suggests, the goal of such clauses is to deter disgruntled beneficiaries from waging costly and divisive litigation after the death of the testator.

A carrot and a stick

In most instances, an *in terrorem* clause dictates that a beneficiary who contests the validity of the will or trust instrument forfeits any inheritance that he or she otherwise would have received. A clause could provide, for example: "If any beneficiary named under this Will commences or participates in a proceeding, directly or indirectly, at any time, to have this Will set aside or declared invalid or to contest any part or all of the provisions included in this Will, then that beneficiary, as well as his or her children and descendants, will forfeit any interest devised unto said beneficiary under this Will." Other versions of *in terrorem* clauses may allow the executor or trustee to charge the contesting beneficiary's share with the attorney fees and expenses incurred in defending against the claim. In short, *in terrorem* clauses allow a testator to wield control over disgruntled beneficiaries through both a carrot (*i.e.,* some inheritance) and a stick (the complete or partial forfeiture of that inheritance).

Aligning with majority of states

For years, Indiana and Florida were the only two states that prohibited their citizens from including enforceable *in terrorem* clauses in their estate plans. In fact, both the Indiana Probate Code and Trust Code directed that any clause "that provides, or has the effect of providing, that a beneficiary forfeits a benefit from the trust [or will] if the beneficiary contests the trust [or will] is void." This outright prohibition has been in stark contrast with the rest of the country for almost a century, as states like Texas were enforcing no contest clauses as early as 1908. *See Perry v. Rogers*, 52 Tex. Civ. App. 594, 114 S.W. 897, 899 (1908). However, with the General Assembly's enactment of Senate Bill 247, Indiana's amended statutes will provide that a "no contest provision is enforceable" except under enumerated exceptions. Ind. Code §§ 29-1-6-2 and 30-4-2.1-3 (as amended by Senate Bill 247).

Exceptions to enforceability

Under the revised statutes, one exception to the enforceability of a no contest clause will be if a fact-finder determines that a contest was brought for "good cause." Consequently, disinherited heirs will still be able to contest estate planning instruments that were procured through fraud or undue influence without fear of retribution. Indiana's "good cause" exception is loosely modeled after the "probable cause" rule adopted by the Uniform Law Commission's Uniform Probate Code, which has been adopted by the majority of jurisdictions. For example, Minnesota has adopted Section 2-517 of the Uniform Probate Code verbatim, providing: "A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings." Minn. Stat. §524.2-517. Because "good cause" is not defined by either Indiana's Probate or Trust Codes, courts likely will look to definitions adopted in other contexts,

such as labor law, in crafting an appropriate instruction for the fact-finder. Courts also may look to the definition of the similar "probable cause" promulgated by the Restatement of Property, which directs, in part, that "[p]robable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful." Restatement (Third) of Property: Donative Transfers §8.5 cmt. c. (2003).

Indiana's amended statutes also will exclude other types of actions from the enforcement of a no contest provision, such as a beneficiary's objection to discretionary action taken by the fiduciary (*e.g.,* an objection to a trustee's excess fees or self-dealing) or an action by the attorney general requesting clarification on the terms of a charitable trust. Actions brought to seek the construction or interpretation of an instrument also will not trigger a no contest clause and neither will non-judicial settlement agreements. Lastly, the statutes will permit a beneficiary to bring an "action to determine whether a proposed or pending motion or proceeding constitutes a contest." Thus, beneficiaries may first seek a declaratory judgment determining whether a proposed filing would trigger the no contest clause.

Estate planning considerations

As with other estate planning techniques, one size will not fit all, and no contest clauses will continue to be appropriate only under certain circumstances. Since Indiana has not yet developed a body of case law to guide practitioners on the use and enforcement of these clauses, other states' practice may be instructive. However, the difficulty is that states have varied widely in their practice of enforcing such clauses.

While most courts have held that no contest clauses must be "strictly construed," they have diverged on whether this strict construction rule should weigh in favor of forfeiture or not. In some instances, courts have allowed a clause to divest infants who have contests brought on their behalf or even to divest the testator's entire family. *See, e.g., Keener v. Keener*, 682 S.E.2d 545, 548 (Va. 2009) ("we decided to adopt the rule that a no-contest provision in a will should be strictly enforced according to its terms [for] the protection of a testator's right to dispose of his property as he sees fit"). In other instances of strict construction, courts have considered the "basic question [of] whether certain conduct will be deemed a 'contest' of the will within the meaning of the words used by the testator in the will's no contest clause" and have erred on the side of permitting the inheritance. *Jacobs-Zorne v. Superior Court*,

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46 Cal.App.4th 1064, 1073 (Cal. App. 1996).

In any event, the practitioner should consult carefully with the client on the family dynamics and his or her concerns and wishes to ensure that the instrument encapsulates the testator's intent. Here are the four primary considerations practitioners should discuss with their clients:

1. No stick without a carrot. Because no contest clauses are intended to be a deterrent, a beneficiary's potential inheritance must be substantial enough to deter the beneficiary from bringing a contest. As a result, no contest clauses are only an effective tool to use against beneficiaries named under the instrument and not those whom the testator is completely disinheriting. Thus, while a testator may be inclined to omit a beneficiary from his or her plan, including some amount of inheritance to a disfavored beneficiary may be deemed prudent to avoid the expense and divisiveness of later litigation. Practitioners seeking to protect their clients' estate plans already may have adopted a practice of having the client execute successive wills and/or trusts to require a contestant to successfully challenge multiple instruments before inheriting. Now clients will be able to execute successive estate plans in which each subsequent plan gradually increases the problematic beneficiary's inheritance, thereby providing more and more incentive not to bring a contest.

2. Indicate how the testator wishes any forfeited devise to be distributed. Georgia has enacted a statute, which the state's courts have upheld, providing that no contest clauses are void unless there is a "direction in the will as to the disposition of property if the condition *in terrorem* is violated." *See Cox v. Fowler*, 614 S.E.2d 59, 60 (Ga. 2005) (citing OCGA §53-4-68(b).) Although Indiana has not adopted any such statute, best practice would be to clarify the testator's intent as to any forfeited disposition. For example, if the forfeiting beneficiary is the testator's descendant, then the practitioner should discuss with the client whether the beneficiary's children and other descendants are to inherit despite the misconduct of the beneficiary or whether the entire branch of the family is to be disinherited instead. If the latter, then the practitioner should ensure that the language in the no contest provision will not trigger Indiana's anti-lapse statute by, for example, dictating that the forfeiting beneficiary be treated as having predeceased the testator. *See* Ind. Code §29-1-6-1(g). The better practice will be to specify which beneficiaries will inherit instead.

3. Be extremely specific about what conduct or acts are prohibited. This is particularly critical because courts in some jurisdictions have strictly construed such provisions in a manner to avoid forfeiture, enforcing them only when the beneficiary's actions "clearly fall within the express terms of the clause." *In re Estate of Hamill*, 866 S.W.2d 339, 345 (Tex. App. 1993) (internal citations omitted). Prohibited conduct could include, for example, challenging the testator's beneficiary designations or other asset transfer vehicles. Prohibited conduct also could include filing a claim in the testator's estate or pursuing any action to collect a debt against the testator's estate. In the California case of *Genger v. Delsol*, a beneficiary's challenge of a corporate stock redemption agreement, which the court determined was "the cornerstone" of the decedent's integrated estate plan, was considered to be within the purview of the no contest clause. 66 Cal. Rptr. 2d 527, 535 (Cal. App. 1997). On the other hand, courts may refuse to enforce no contest clauses that are overly broad. For example, a Pennsylvania court struck down a clause in which the testator revoked all bequests to any beneficiary who "file[d] any exception to [her] account or otherwise [took] action contrary to her interest." *In re Sand's Estate*, 66 Pa. D & C 551, 551 (Pa. Orph. 1948).

4. Consider explicitly stating the testator's intent. Because most courts consider the donor's intent as paramount in construing an instrument, it is worth considering the inclusion of a statement detailing the testator's reasons for inserting a no contest clause into the instrument. However, the practitioner should ensure that any such statement is factually accurate because any inaccuracies could serve as evidence that the testator lacked the capacity to understand the just deserts of his or her natural bounty. The practitioner also should ensure that any statement of intent is not defamatory, which could potentially subject the estate to liability for defamation. *See generally* Paul T. Whitcombe, "Defamation by Will: Theories and Liabilities," 27 *J. Marshall L. Rev.* 749 (1994). In some circumstances, including a carefully worded statement would ensure that a court can look to the "four corners of the instrument" to distill the testator's intent.

Conclusion

The repeal of Indiana's no contest clause prohibition provides a new tool for testators to deter litigation over their estates. However, when using no contest clauses, practitioners should be specific about which beneficiaries may be disinherited by the clause, what actions are prohibited and will trigger the clause, and how any forfeited devise will be distributed. Because states across the country vary widely on their rules in enforcing such clauses, it remains to be seen how Indiana courts will interpret these new statutes. Although these provisions are not an absolute safeguard against will or trust contests, coupled with other preventative estate-planning techniques they may provide a testator with greater peace of mind that his or her wishes will be carried out without challenge. ⚖

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