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In Terrorem Provisions That Violate Public Policy

By Robert M. Harper

In terrorem clauses generally provide that, where a beneficiary under a testamentary instrument unsuccessfully challenges the instrument's validity, the beneficiary will forfeit any interests obtained under the instrument. Testators include in terrorem clauses in their wills in order to dissuade estate beneficiaries from taking action that is contrary to the testators' wishes, as expressed in their testamentary instruments. While a paramount objective of the Surrogate's Court is to act according to testators' wishes, in terrorem clauses must be narrowly construed, and certain in terrorem provisions are violative of public policy. This article provides examples of in terrorem clauses that contravene public policy and, thus, are unenforceable under New York law.

Though in terrorem clauses are intended to prevent attacks on the validity of a will, Surrogate's Courts have recognized that in terrorem provisions which purport to preclude a beneficiary from seeking the removal or suspension of a fiduciary nominated in the governing instrument, based upon the fiduciary's misconduct, are violative of public policy. Indeed, it "is disingenuous for [a party] to contend that [a testator] intended that [a fiduciary acting under a will] serve [as a fiduciary] even if [the fiduciary] violated [his or] her obligations under [the governing instrument] and [his or] her sacred duties of undivided loyalty."


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Former Surrogate Holzman's decision in *Matter of Rimland* is highly instructive. There, the petitioner, the income beneficiary of a testamentary trust, commenced a proceeding for the appointment of a fiduciary to pursue claims against the trustee. In response, the trustee argued that the petitioner had triggered the governing will's in terrorem clause and, therefore, forfeited her interest in the trust. Surrogate Holzman was not persuaded by the trustee's arguments, holding that the trustee's interpretation of the in terrorem clause was violative of public policy.

Much like in terrorem clauses which purport to prevent a beneficiary from seeking the removal or suspension of a fiduciary on the basis of the fiduciary's wrongdoing are violative of public policy, so too are in terrorem clauses which attempt to preclude a beneficiary from questioning the fiduciary's conduct. As Surrogate Czygier has explained, "any attempt by a testator to preclude a beneficiary from questioning the conduct of the fiduciaries, from demanding an accounting from said fiduciaries or from filing objections thereto will result in a finding that the pertinent language is void as contrary to public policy and the applicable statutes of the State of New York."

For example, in *Matter of Egerer*, Surrogate Czygier construed an in terrorem clause which purported to disinherit a beneficiary under the testator's will who filed "objections to [the] fiduciaries' conduct, bad faith or for any other basis." The Surrogate found that the in terrorem clause was unenforceable as a matter of public policy, to the extent that it could be interpreted as preventing the beneficiaries from objecting to the fiduciaries' conduct.

The lesson to take away from this article is that, while testamentary intentions are entitled to great respect, there are limits to which the Surrogate's Courts will adhere to the wishes expressed by testators, especially concerning in terrorem clauses. Practitioners should be mindful of the limitations, including the public policy based concerns discussed in this article, in advising their clients with respect to in terrorem provisions.

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1. *Matter of Rimland*, 2003 WL 21302910 (Sur. Ct., Bronx County 2003).; *Matter of Fromartz*, N.Y.L.J., Oct. 22, 2005, at 29, col. 1 (Sur. Ct., Kings County).
2. *Matter of Egerer*, 30 Misc.3d 1229(A) (Sur. Ct., Suffolk County 2006); *Matter of Lang*, 60 Misc.2d 232 (Sur. Ct., Erie County 1969).