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## TRUSTS AND ESTATES

# Triggering In Terrorem Clauses

**By Robert M. Harper**


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In terrorem provisions, which are commonly called "no contest" clauses, generally state that beneficiaries forfeit their interests in estates and trusts by contesting the validity of the governing instruments.[i] While strictly construed, in terrorem clauses are enforceable under New York law.[ii] They serve several important purposes, not the least of which are to discourage challenges, preserve the testator or grantor's plans, and prevent the harassment of beneficiaries.[iii] The cases discussed in this article illustrate when in terrorem clauses are triggered.

In *Matter of Singer*, the decedent's will contained two in terrorem provisions, which barred the decedent's son from taking anything under the will or a revocable trust, if he objected to or attempted to contest the admission of the will to probate. Notwithstanding the in terrorem clauses, however, the son conducted a pre-objection examination of the attorney draftsman of a prior will, purportedly pursuant to Surrogate's Court Procedure Act section 1404.

Following the examination, the decedent's daughter, the proponent of the will, argued that the son triggered the in terrorem clauses by deposing the attorney draftsman of the prior will. The son responded by asserting that he did not trigger the in terrorem clauses because his conduct was protected by the safe harbor provisions of Estates, Powers and Trusts Law section 3-3.5. Both the Surrogate's Court, Kings County, and the Appellate Division, Second Department, rejected the son's contention, noting the safe harbor provisions in EPTL section 3-3.5 do not apply to examinations of attorneys who draft prior wills. Accordingly, since the safe harbor provisions did not apply, the son's examination of the attorney draftsman of a prior will constituted an attempt to contest the will and triggered the in terrorem clauses. The matter is now before the Court of Appeals.

In *Tumminello v. Bolten*, the petitioner commenced a proceeding to compel the respondent to account as trustee of a trust established by their father. The respondent moved to dismiss the proceeding, arguing that the petitioner forfeited her interest in the trust by triggering the in terrorem clause contained therein and therefore lacked standing to seek an accounting. In support of the motion, the respondent explained that the petitioner sought to have the trust declared "null and void" in a prior Article 81 guardianship proceeding.

The Supreme Court, Richmond County, dismissed the proceeding and the Appellate Division, Second Department, affirmed. In doing so, the Second Department opined that the petitioner "clearly attacked the validity of the Trust in direct contravention of the [father's] apparent intention to prevent such actions by including an in terrorem clause." Accordingly, the petitioner forfeited his interest in the trust and lacked standing to maintain the accounting proceeding.

Most recently, in *Shamash v Stark*, the petitioner commenced a proceeding to compel an accounting and removal of the trustees of a New York trust.[iv] The respondent trustees moved to dismiss the petition, arguing that the petitioner triggered the trust's in terrorem clause by contesting the validity of said instrument in a Florida proceeding. In opposition, the petitioner noted that the Florida trust contest was dismissed on jurisdictional grounds and that in terrorem clauses are not enforceable under Florida law.

However, the Surrogate's Court, New York County, was not persuaded, holding that the petitioner triggered the in terrorem clause by contesting the trust's validity in Florida. The fact that in terrorem clauses are not enforceable in Florida was immaterial, since New York law governed the trust. Accordingly, the petitioner lacked standing to maintain the proceeding, and the Surrogate's Court dismissed it.

Though strictly construed, in terrorem clauses are enforceable in this state. Attorneys should take great care to avoid triggering in terrorem clauses, as the failure to do so may result in the forfeiture of interests in estates and trusts. The cases discussed in this article demonstrate that much quite clearly.

*Note: Robert M. Harper is an associate at Farrell Fritz, P.C., concentrating in Trusts and Estates litigation.*

[i] *Matter of Kalikow*, 23 Misc.3d 1107(A) (Sur. Ct., Nassau County 2009).

[ii] *Matter of Ellis*, 252 A.D.2d 118 (2d Dept 1998).

[iii] *Matter of Singer*, 17 Misc.3d 365 (Sur. Ct., Kings County), *aff'd*, 52 A.D.3d 612 (2d Dept 2008), *leave granted*, 11 N.Y.3d 716 (2009); *Tumminello v. Bolten*, 59 A.D.3d 727 (2d Dept 2009).

[iv] *Shamash v. Stark*, N.Y.L.J., 6/16/2009, at 38, col. 2 (Sur. Ct., New York County). The author's firm represented the respondents in this case.