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ADVISORY

Authored by

MATTHEW E. SMITH
ANDREW S. PHILBIN

If you have any questions about this Advisory, please contact:

MICHAEL T. CLEAR
203.363.7675
mclear@wiggin.com

ROBERT W. BENJAMIN
212.551.2602
rbenjamin@wiggin.com

MATTHEW C. BROWN
860.297.3706
mbrown@wiggin.com

DANIEL L. DANIELS
203.363.7665
ddaniels@wiggin.com

HELEN C. HEINTZ
203.363.7607
hheintz@wiggin.com

MICHAEL L. KENNY, JR.
212.551.2628
mkenny@wiggin.com

DAVID W. KESNER
203.498.4406
dkesner@wiggin.com

PROBATE LITIGATION ALERT: NEW GUIDANCE ON NO CONTEST CLAUSES IN CONNECTICUT

How can a Connecticut resident protect his or her estate from family members who might fight over it? The inclusion of a "no contest" clause under a will or trust may be one strategy, but does Connecticut recognize "no contest" clauses? And, if an heir initiates a litigation, would a Connecticut probate court actually enforce a no contest clause?

WHAT IS A "NO CONTEST" CLAUSE?

A "no contest" clause, also known as a "forfeiture" or "*in terrorem*" clause, directs that a beneficiary forfeits an interest under a will or trust if the beneficiary takes certain actions in violation of the clause – most commonly, by contesting the validity of the will or trust. In Connecticut, few legal cases address the enforceability of no contest clauses, which makes any legal opinion on this topic a potentially valuable datapoint for estate planners and their clients.

In addition to fending off "will contests" (that is, a fight over the validity of a will), a "no contest" clause also could be drafted to dissuade an heir from challenging a specific action by an executor or trustee. It is this less common situation that recently was considered by the Connecticut Appellate Court, and which may illustrate more broadly how a Connecticut court will respond when presented with a potential disinheritance under a no contest clause.

GUIDANCE FROM CONNECTICUT APPELLATE COURT: A RECENT CASE

In a previous update, we outlined a Connecticut Superior Court holding that provided a rare datapoint for practitioners. In *Salce v. Cardello*, No. CV176070740S, 2019 WL 6247662 (Conn. Super. Ct. Nov 6, 2019), the Superior Court in New Haven reaffirmed Connecticut Supreme Court precedent in holding that there was no violation of an *in terrorem* clause. The facts in *Salce* were unusual, including (1) an *in terrorem* clause that forbade any objections to actions taken by the fiduciary (who also was the drafting attorney) and (2) a beneficiary who did not contest the will but merely identified mistakes by the Executor/Trustee in preparing the estate tax return. The Superior Court

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LEONARD LEADER
203.363.7602
lleader@wiggin.com

STEVEN B. MALECH
212.551.2633
smalech@wiggin.com

CAROLYN A. REERS
203.363.7668
creers@wiggin.com

MATTHEW E. SMITH
203.363.7639
msmith@wiggin.com

RUTH FORTUNE
203.363.7658
rfortune@wiggin.com

ANDREW S. PHILBIN
203.363.7606
aphilbin@wiggin.com

noted several rules of construction and application when deciding whether to enforce an *in terrorem* clause, namely:

- a common expectation among Connecticut planners is that *in terrorem* clauses are disfavored and construed strictly to prevent forfeitures;
- an exception to enforcement where a contest is initiated in good faith and is supported by probable cause and reasonable justification; and
- the Court's review is not limited to the plain language of the clause, even if the triggering language is expansive and would sweep in any challenge, no matter how modest in scope or tangentially related.

Since our previous update outlining Superior Court's decision in *Salce*, that same case went before the Connecticut Appellate Court in *Salce v. Cardello*, (210 Conn. App. 66 2022). While the Superior Court's analysis was based on a finding of good faith and probable cause, the Appellate Court did not reach those grounds. Rather, the Appellate Court held that it would not enforce the *in terrorem* clause in this case as a matter of public policy, even though it found that the beneficiary had technically violated the expansive terms of the clause as written. The Appellate Court did not reach the issue of "good faith." The Court explained:

- *In terrorem* clauses are invalid if they violate public policy.
- On these facts, where a beneficiary sought to correct errors by the fiduciary, any technical violation of the *in terrorem* clause would not be recognized.
- Although oversight of the fiduciary in this case did trigger the broad language of the clause, some types of oversight must be allowed because "making sure that a fiduciary does the ministerial parts of his job correctly" is an "important interest" that should not be punished, and it would violate public policy to do so.
- The Court did not reach a good faith analysis: no "good faith" analysis is required if enforcement of the *in terrorem* clause would violate public policy.

However, in dicta, the Court suggested that *in terrorem* clauses could be effective in shielding a fiduciary from oversight by the beneficiaries, writing:

- "As a general rule, *in terrorem* clauses are valid in Connecticut."
- "We recognize that a testatrix or settlor may have a keen interest in protecting her designated fiduciary from attacks on the fiduciary's good faith exercise of judgment, such as how to invest the assets of the trust or at what price to sell assets of an estate. Under most circumstances, an *in terrorem* clause that has the effect of limiting challenges to such good faith exercises of judgment would not violate public policy."

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The Court acknowledged a "good faith" exception in the specific situation of will contests, but it explicitly "d[id] not reach the question of whether a good faith exception applies in this case," having already bounced the claim on public policy grounds. It therefore left open the possibility that "good faith" could still be raised as a second-level defense, where enforcement is not found to violate public policy.

This case is notable in several regards. First, the attempted enforcement of the *in terrorem* clause did not relate to the unusual case of a will contest, but rather to the more unusual situation of estate and trust administration. Second, the Court found that a claim to oversee the actions of the fiduciary did actually trigger the *in terrorem* clause. This finding raises the specter of unintended consequences: other Connecticut courts have been very careful to construe *in terrorem* clauses narrowly to find that they had not been triggered. Finally, although this claim was not successful, and the Court arguably reached the correct result, the Court opened the door to greater litigation over *in terrorem* clauses, making the expansive statement in dicta that "[u]nder most circumstances," if there is a challenge to the fiduciary's exercises of judgment, the application of an *in terrorem* clause "would not violate public policy." This seemingly would chill a meaningful review of a fiduciary's actions.

PLANNING CONSIDERATIONS

The text and holding of the Appellate Court decision in *Salce* likely will reaffirm the belief of most estate planning attorneys in Connecticut that *in terrorem* clauses are not a surefire solution, and that clients and planners should continue to proceed carefully in drafting documents to dissuade or disinherit problematic heirs. *Salce* also provides lessons for the beneficiary considering a claim or objection to actions taken by a fiduciary: given the broad language of the case, a beneficiary should tread carefully when challenging a fiduciary's actions.