Court Finds No Violation of Public Policy Where Challenge to Trust Causes Minors to Forfeit

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You might have heard before that the sins of the father shall be visited upon the sons. This was certainly the case in a decision recently handed down by the Wyoming Supreme Court.

In *E.G.W. v. First Federal Savings Bank of Wyoming*, 413 P.3d 106 (3/15/18), the Court upheld and enforced a "no-contest" clause in a grandfather's Revocable Trust, which resulted in two minor grandchildren forfeiting their shares of the Trust due to their father filing a trust contest.

Here, a Wyoming grandfather ("Grandfather") created a Revocable Trust for his own primary benefit during his lifetime, and then for the primary benefit of his son Spencer and Spencer's two children after Grandfather's death. Several years after establishing the Trust in 2001, Grandfather amended the Trust to remove Spencer as a beneficiary of the Trust, opting instead to leave a larger portion of the Trust to Grandfather's wife (presumably not Spencer's mother) and her daughter. Although Grandfather removed Spencer as a beneficiary of the Trust, he did not remove Spencer's children as beneficiaries.

Understanding the revised distribution scheme of the Trust would likely not sit well with Spencer, Grandfather included in his Trust an *"in terrorem"* clause (also called a no-contest clause), which provides that, "[a]ny challenge to this Trust made directly by or on behalf of [Spencer] or [my] grandchildren shall immediately terminate any interest in the Trust of any descendant of mine." Thus, the clause provided that a challenge by Spencer would forfeit his children's Trust shares too. Such broad wording is not uncommon. The desire is to prevent a contestant from still inheriting or otherwise receiving benefits through his or her own children.

Despite the *in terrorem* provision, Spencer later filed a Complaint against Grandfather, individually and as Trustee of the Trust, asking the Court to remove Grandfather as Trustee based on incapacity and alleging that Spencer's exclusion as a beneficiary under the Trust was the result of undue influence exerted over Grandfather by Grandfather's wife ("Spencer's Action"). Grandfather died shortly after Spencer's Action was filed. The district court ultimately ruled against Spencer, with a jury finding that the amendments to the Trust were not the product of undue influence. Spencer appealed, and the appellate court later upheld the district court's ruling.

While Spencer's appeal was pending, E.G.W. and A.W. (collectively, "Spencer's Children") filed another suit through Spencer, acting as "next friend" for his children. In this action, Spencer's Children claimed, in relevant part, that the *in terrorem* clause in the Trust was unenforceable as a matter of public policy. The district court granted summary judgment against Spencer's Children, and this appeal ensued.

In their appeal, Spencer's Children claimed that it is against Wyoming public policy for an *in terrorem* clause to be enforced so as to result in the forfeiture of beneficiary rights of a non-participating beneficiary who is a minor. In considering this as a case of first impression, the Court carefully balanced the well-established rule that a testator is free to distribute his estate as he wishes so long as in compliance with the law and provided he has capacity to make such a decision, against the more amorphous concept of public policy.

The Court first noted the long-standing general rule that *in terrorem* clauses are enforceable in Wyoming. The Court also made clear that it does not recognize an exception to this rule for claims brought in good faith, such as is the case under the Uniform Probate Code ("UPC"). The Court noted that the Wyoming legislature was surely aware of the UPC and, nonetheless, chose to not adopt its strictures; so, the Court declined to do so now judicially.

The Court continued its analysis by citing previous opinions establishing a testator's right to dispose of his property by Will, regardless of whether such disposition is wise or fair. "It rarely happens that a man bequeaths his estate to the entire satisfaction of either his family or friends."

Spencer's Children argued that Grandfather had the opportunity to amend the Trust to remove them as beneficiaries of the Trust because he was still living when Spencer's Action was initially filed. Apparently, their claim relied on the supposition that Grandfather's failure to further amend the Trust expressed his true desire that Spencer's Children remain as beneficiaries of the Trust. The Court dismissed this argument, stating that the intent of the testator must govern, and where the testator's intent is set forth unambiguously in a testamentary instrument, that instrument must be interpreted within its 'four-corners.'

Because this case is one of first impression in Wyoming, the Court looked to decisions from other jurisdictions that enforce *in terrorem* clauses and offer no exception for challenges determined to be brought in good-faith. In particular, the Court relied on cases from California (holding that an in terrorem clause providing that a challenge by any of three daughters would result in forfeiture by all three daughters was not contrary to public policy) and Pennsylvania (finding that public policy was not offended by an *in terrorem* clause requiring forfeiture of sons' shares if testator's wife challenged testator's Will). In each case, the ruling court questioned the wisdom and fairness of letting one party trigger the in terrorem provision to the detriment of non-participants to the challenge, but ultimately ruled that such provisions were neither contrary nor offensive to public policy in the state where the case was decided. "While the wisdom of including such a clause . . . may be open to question the law does not require that the distribution provided by will be wise or even equitable provided the testator has clearly expressed his intention."

Based on the clear authority in Wyoming relating to the enforceability of *in terrorem* clauses and the persuasive authority from other states that view and enforce in terrorem clauses in a manner similar to that of the Wyoming courts, the Court ultimately upheld the enforcement of the in terrorem provision in the Trust, necessarily finding that it was not offensive to Wyoming public policy.

Any beneficiary contemplating a contest to or otherwise challenging a testamentary instrument containing an *in terrorem* clause should review closely its operative terms before moving forward with such a contest or challenge.

Your Key Contacts

Ben (Benjamin) M. Jakubowicz
Senior Managing Associate,
Louisville
D +1 502 587 3243
benjamin.jakubowicz@dentons.com

John R. Cummins
Partner
john.cummins@dentons.com