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Are "Poison Pill" Clauses in Wills Valid?

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"Poison pill" clauses or "*in terrorem*" clauses are clauses in a will that forbid beneficiaries from contesting the will under threat of losing their inheritance.[i] The late Frank Sinatra famously included such a clause in his will in an attempt to prevent his spouse and children from fighting over his estate. The rule against *in terrorem* clauses, known as the *in terrorem* doctrine, was established in English law as early as the seventeenth century, and forbids conditions in a will that are idle threats to induce a beneficiary to comply, but have no real effect on the gift.[ii] In addition, the rule only applies to gifts of personal property, or gifts out of a mixed fund of real property and personal property, and the rule applies to both conditions precedent and conditions subsequent in a will.[iii]

The English rule against *in terrorem* clauses has been adopted in Canada but is more limited in scope, as it is restricted to conditions which prohibit common law proceedings to insulate the testator or testatrix's will from attack. Conditions which prohibit proceedings pursuant to dependants' relief legislation and conditions which attempt to usurp the jurisdiction of the Courts will instead be held to be void against public policy.[iv] British Columbia's *Wills Variation Act*, R.S.B.C. 1979, c 435 (the "WVA") which has been the source of much litigation in that beautiful province, has also produced instructive case law concerning *in terrorem* clauses, showing that the *in terrorem* doctrine is very much alive and that barristers have been vigilant in scrutinizing clauses in wills that purport to limit a beneficiary's rights.

Applicable Case Law

In *Kent v. McKay*, 1982 CarswellBC 187 (*Kent*), the British Columbia Supreme Court outlined the test for determining whether a clause is void for contravening the *in terrorem* rule. In this case, the testator provided in his will that his two children would be entitled to receive income from separate trusts established for their benefit, with

the remainder going to their children upon their death. The will also included the following clause:

> I HEREBY WILL AND DECLARE that if any person who may be entitled to any benefit under this my Will shall institute or cause to be commenced any litigation in connection with any of the provisions of this my Will other than for any necessary judicial interpretation thereof or for the direction of the Court in the course of administration all benefits to which such person would have been entitled shall thereupon cease and I HEREBY REVOKE all said benefits and I DIRECT that said benefits so revoked shall fall into and form part of the residue of my Estate to be distributed as directed in this my Will; PROVIDED that if such person whose benefits are so revoked would otherwise share in the residue of my Estate his or her benefits so revoked shall be divided equally among the remaining shares into which the residue of my Estate may be divided or as if such person had predeceased me and had left no issue surviving me.[v]

The apparent motive of the testator for including this clause was to ensure that the children's shares of the estate be limited and to ensure that they did not contest the will to subvert his intentions.[vi] In finding that the provision noted above was not void for violating the *in terrorem* rule, the Court stated that three criteria must be met for a clause to be invalid pursuant to the *in terrorem* doctrine:

> (1) the gift must be of personal property or blended personal and real property;
>
> (2) the condition must be either a restraint on marriage or one which forbids the beneficiary to dispute the will; and
>
> (3) the threat must be idle in that it must be imposed solely to prevent the beneficiary from undertaking that which the condition forbids; therefore, a provision that provides only for a bare forfeiture of the gift on breach of the condition is bad.[vii]

However, if the testator indicates that they intend not only to threaten the beneficiary, but also to make a different disposition of the property to fix the benefit on another person in the event of a breach of the condition, then the threat is no longer idle and the provision can stand.[viii] In other words, if the testator provides for a gift over in the event of a breach of the condition stated, then the threat is not an idle one, and the clause is not considered to violate the rule against *in terrorem* clauses. In *Kent*, the Court was able to find in favour of the applicants, granting an Order voiding the above-noted provision, as it held that the clause in question deprived the applicants of their right to apply for relief under the WVA and was therefore void for being contrary to public policy. The Court commented that "[i]t is important to the public as a whole that widows, widowers and children be at liberty to apply for adequate maintenance and support in the event that sufficient provision for them is not in the will of their spouse or parent."[ix]

In *Bellinger v Nuytten Estate*, 2003 BCSC 563, the Court considered an application to find a clause in the will of the testatrix void, which the Court did, both for violating the rule against *in terrorem* clauses and for being against public policy. The clause read:

> IT IS MY FURTHER DESIRE, because of an expressed intention of one of the legatees to contest the terms of this my Will, that should any person do so then he or she shall forfeit any legacy he or she may be otherwise entitled to.[x]

The Court considered *in terrorem* doctrine and determined as follows:

> The gift must be accompanied by an effective gift over which vests in the recipient on the condition being breached. If there is no gift over, then the condition will be treated as merely *in terrorem*, that is a mere threat, and will be found to be void. And nothing short of a positive direction of a gift over, of vesting in another, even in the case where the forfeited legacy falls in the Residue, will suffice. There must be an express disposition made of what is to be forfeited.[xi]

The Court affirmed the law from *Kent* and held that a clause in the will which states that in the event of a breach of the clause the gift, will fall into and form part of the residue of the estate, will constitute a sufficient gift over and be upheld as valid.[xii] The Court also affirmed that a clause of such a nature will be void where it attempts to deprive an applicant of their right to apply to the Court for relief under the applicable dependents' relief legislation.

In *Ketcham v Walton*, 2012 BCSC 175, the Court considered the will of the testator who left nothing to his estranged children. The will included provisions that specifically authorized and required the executor to take an active role in defending the will against any claims raised by the estranged children, and further, authorized the executor to take funds from the estate for legal costs.[xiii] The children challenged the validity of the will and raised the argument that provisions in the will amounted to *in terrorem* clauses for attempting to divest them of their inheritance if they tried to challenge the distribution under the WVA.[xiv] The executor sought direction from the Court as to whether he had the right and duty to defend the will.

The Court determined that although there were no provisions in the will that prevented the children from receiving an inheritance if they were to bring a claim, the provisions that instructed the executor to resist their claim and deplete the estate to any extent necessary could have the effect of erasing the entire value of the estate.[xv] In ultimately finding the clause void, the Court commented:

> If the clause is not repugnant for directing the executor to take an active role in the litigation, then I would find it void as amounting to an *in terrorem* clause. Alternatively, it should also be void as contrary to public policy as it purports to deny [the testator's] children their

> recourse to the courts. The clause does not directly divest the children of an inheritance, but it does have the potential to deny them the fruits of a victory. Since they have a statutory right to challenge the will under the WVA, any clause that attempts to deny them this right (or, by extension, any effective remedy under this right), should offend public policy and be void.[xvi]

Practical Considerations

In Alberta, Justice Graesser commented on the *in terrorem* doctrine in his costs decision in *Foote Estate, Re,* 2010 ABQB 197 (*Foote Estate*). In this case, the spouse and children of the testator brought proceedings to determine the testator's domicile as well as the enforceability of *in terrorem* clauses in the will that essentially disinherited a beneficiary who challenged the will.[xvii] The Court determined the issue of domicile but did not rule on the validity of the *in terrorem* clauses. However, in assessing costs for the litigation, Justice Graesser provided the following guidance:

> In Alberta, poison pill clauses such as that contained in Mr. Foote's wills (without deciding the point) are very arguably contrary to public policy and are at a minimum mean spirited. The validity and enforceability of such a provision is a significant matter of interpretation, and in my view fits within the first exception to the "modern rule" of costs in estate litigation: interpretation of the will. I have already ruled that it was appropriate that the Applicants seek advice or directions in Alberta. The interpretation of this provision is within the scope of public interest in the administration of estates and is a significant factor in assessing costs.[xviii]

For the barrister examining an *in terrorem* clause and a possible contest by the beneficiary in question against the testator or testatrix's will, it could be argued that the estate should bear the costs of an unsuccessful litigant. In *Foote Estate*, Justice Graesser stated that the payment of an unsuccessful party's costs out of the estate requires analysis of the following factors:[xix]

> A. Did the testator cause the litigation?
> B. Was the challenge reasonable?
> C. Was the conduct of the parties reasonable?
> D. Was there an allegation of undue influence?
> E. Were there different issues or period of time in which costs should differ?
> F. Were there offers to settle?

Included within the category of cases arising out of the "fault" of the testator or testatrix, Justice Graesser noted that these cases include cases involving the validity of a will, cases involving the interpretation of a will or trust, and cases involving dependant or family relief claims.[xx] It could be argued that litigation relating to the interpretation, validity and enforceability of an *in terrorem* clause falls into this particular category of cases.

For the drafting solicitor, special care should be taken if a client provides instructions for the inclusion of a "poison pill" clause in his or her will, so as not to create post-mortem litigation concerning the interpretation, validity or enforceability of the clause. The client should be advised as to the risks involved given the case law in this area and the comments of Justice Graesser in *Foote Estate*. The case law indicates that clauses that threaten to divest a beneficiary of a gift if they contest the will are *prima facie* valid; however, if an *in terrorem* clause is to be included in a will, such a clause must be drafted carefully to ensure that:

> (a) the gift in question does not only include personal property or a blend of personal and real property;
>
> (b) the clause does not prohibit proceedings pursuant to dependants' relief legislation;
>
> (b) the clause does not attempt to exclude the jurisdiction of the courts entirely; and
>
> (c) the clause provides for an express gift over in the event that the beneficiary in question contests the will, and a specific direction that the gift is revoked and falls into and forms part of the residue of the estate to be distributed as a part thereof constitutes a sufficient gift over.

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[i] This article was prepared with the research assistance of Kasey Anderson, law student with Vogel LLP.
[ii] Peter G. Lawson, "The Rule Against *In Terrorem* Clauses" [2005] Estates, Pensions and Trust Journal 71 [Lawson] at p. 72.
[iii] Lawson at p. 77 and p. 79.
[iv] Lawson at p. 86.
[v] *Kent v. McKay*, 1982 CarswellBC 187 [*Kent*] at para 3.
[vi] *Kent* at para 4.
[vii] *Kent* at para 11-14.
[viii] *Kent* at para 15.
[ix] *Kent* at para 20.
[x] *Bellinger v. Nuyttpen Estate,* 2003 BCSC 563 [*Bellinger*] at para 2.
[xi] *Bellinger* at para 9.
[xii] *Bellinger* at para 15.
[xiii] *Ketcham v. Walton*, 2012 BCSC 175 [*Ketcham*].
[xiv]*Ketcham* at para 18.
[xv] *Ketcham* at para 19.
[xvi] *Ketcham* at para 20.
[xvii] *Foote Estate, Re,* 2010 ABQB 197 [*Foote Estate*] at para 5.
[xviii] *Foote Estate* at para 50.
[xix] *Foote Estate* at para 16.
[xx] *Foote Estate* at para 21-24.