

What is a Ulysses Clause?

Quick-Take: Ever heard of a Ulysses Clause in estate planning? Admittedly, it is a rare provision sometimes found in either a will or a trust.

Background: The name comes from the Greek myth of Ulysses and the Beautiful Sirens of the sea. The Sirens were beautiful women whose singing would hypnotize sailors which would cause them to wreck their ships in a narrow sea-strait. According to the myth, no sailor could resist the Sirens' musical lure, mesmerizing them, and thus causing the sailors' ship to become wrecked on the strait's rocky shores. Ulysses wanted to hear the Sirens' song, but he also needed to navigate the same dangerous strait on his way home from the Trojan War. Accordingly, Ulysses told his crew to put wax in their ears to cancel the Sirens' song, and to tie him to the ship's mast. Most importantly, Ulysses told his crew to ignore whatever he said to them as their captain while he was under the influence of the Sirens' song. Ulysses was thus tied to the mast at his own direction. He later pleaded with his crew to untie him upon hearing the song, but his men tied the ropes even tighter holding Ulysses to the mast so he could not break free until the Sirens' song became too distant.

Ulysses Clause: Such a clause found in a will or trust bars the testator/settlor from making changes to their governing instrument without the consent of a third-party. For example, a settlor could direct in his/her trust that even though he/she has testamentary capacity, no change could be made to their trust without the consent of the named third-party. Such clauses attempt to address, in advance, concerns of future undue influence, lack of testamentary capacity, or any future action that might contradict the settlor's long-held plans or intent.

Example: One infamous decision where a Ulysses Clause was challenged was in *Dunn v. Patterson*, 395 Ill. App.3d 914 (November 18, 2009.)

- **Facts:** The Dunns had a revocable trust. The trust contained a provision that any amendment or revocation of their trust could only occur with the written consent of the Dunns' estate planning attorney, Patterson, if he was still their attorney, or as authorized by a court order. Subsequently, Patterson received a letter from another attorney in which he

was informed that the other attorney had been engaged to modify the Dunns' estate planning documents. Patterson responded to that letter with one of his own in which he stated that for the Dunns to make any changes to their documents it was first necessary that both Mr. & Mrs. Dunn first meet to discuss with Patterson the proposed changes, and that he then had to determine if the proposed changes were consistent with their interests and with the protections contained in the original estate planning instruments. Patterson concluded his letter with the observations that if the Dunns were not willing to meet with him, they could always seek the permission from the 'probate' court.

-Dispute: Rather than seek the court's permission to modify the terms of their estate planning documents, the Dunns filed a declaratory action in the court claiming that they had the absolute right to amend their estate planning documents, notwithstanding the Ulysses-type clause, and that Patterson had a duty to follow their instructions to provide his consent.

-Court: The appellate court found that requiring the consent of a third-party to amend or revoke the Dunns' trust was a proper and valid protective measure.

-Third-Party Consent: The Illinois court held that the required third-party consent in the Dunns' trust is *"a recognized method of protecting grantors and principals from making changes based on mental incompetency or undue influence...[we] routinely see cases in the court where people take advantage of the elderly, take them to see a lawyer of their choice with the end result being that the elderly person's assets are stolen by the one asserting undue influence. The sad fact is that the elderly are particularly susceptible to being taken advantage of and, clearly, the provision in question was tailored to try to reduce that risk for the plaintiffs. The documents provided that if the plaintiffs did not want to seek the consent of Patterson, they could have asked the court to authorize the change."*

-Patterson: Of additional interest, Patterson had argued that by designating himself, the estate planning attorney, as the person required to give any consent to future changes, modifications, or revocations, was consistent with the duties an attorney owes to his clients. The court agreed with this statement. At a minimum, the court concluded, Patterson would have had to meet the Dunns personally to assess their capacity and the

possible existence of undue influence, or whether the proposed changes were in their best interests.

Conclusion: With the world becoming more and more aware of elder abuse and the financial exploitation of the elderly, some individuals might consider the utilization of some type of a Ulysses Clause to provide both a defined procedure and more protection for their estate planning documents.

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