

No Contest Clause Ignored

Take-Away: Many courts seem to be reluctant to enforce a *in terrorem*, or no-contest, provision in a Trust or Will.

Background: The Michigan Trust Code makes it clear that a no contest provision in a Will or Trust will not be enforced if there is probable cause to initiate the challenge. [MCL 700.2518; MCL 700.7113.] This probable cause exception to a no-contest provision in a Trust is one of the few provisions of the Michigan Trust Code that cannot be altered by the trust settlor. [MCL 700.7105(2)(q).] Often arising from the appearance of a no-contest provision in a Will or Trust is the question whether some action, short of a direct challenge to the Will or Trust's validity, is sufficient to trigger a forfeiture under a no-contest clause. That was the situation in a recent decision from New York's highest court.

Carlson v. Colangelo, New York Court of Appeals, 2025 NY Slip Opinion 02264

Facts: The decedent never married but he was survived by a romantic partner, Carlson. The decedent was also survived by a daughter, Crissy, from a prior romantic partner. The decedent had executed a pour over Will to a revocable Trust about a month prior to his death. The decedent's Trust left his residence to Carlson. The Trust left the decedent's "interest" in an LLC, which owned real estate, to Crissy, along with a statute that *"it is Grantor's sincere wish and desire that Crissy provide a stream of income, not to exceed the sum of \$350,000 in total, to Carlson."* Crissy was named as the successor trustee of the trust.

Both the Will and the Trust contained a no-contest clause. The Trust's clause read: *"In the event that any heir, distribute, beneficiary... shall contest any aspect of this Trust, or the distribution of the Grantor's assets pursuant to his Last Will, inter vivos Trust agreement, beneficiary designations, or shall attempt to set aside, nullify, contest, or void the distributions thereof in any way..."* the challenger would forfeit benefits under the instrument.

Dispute: Carlson, after some attempts to resolve some disputed issues, then filed a action in the New York trial court seeking to compel Crissy to distribute the residence to her, a declaration that Carlson was a 50% owner of the decedent's LLC, a direction that Carlson was entitled to the \$350,000 income stream, an accounting for the LLC, and punitive damages. Crissy responded that Carlson's action was a violation of the no-contest clause and therefore Carlson forfeited her interest in under the Trust. Carlson responded that her action was meant to construe and enforce the Trust, not contest it.

Trial Court: The trial court found that Carlson had violated the no contest clause stating, "it cannot be disputed that Carlson contested the distribution of the Grantor's 100% interest in Dempsaco [the LLC] to Crissy under the Trust."

Appellate Court: The trial judge's decision was sustained on appeal, but it denied Crissy's request for legal fees.

New York 'Supreme Court:' New York's highest court, in a 4-3 decision, modified the Court of Appeals decision finding that Carlson's action did not trigger the no-contest clause *"because Carlson's lawsuit seeks to enforce the trust provisions as written and intended by the Grantor, and that Carlson did not attempt to nullify the Trust or challenge its terms... [I]t would be contrary to the Grantor's intent to hold that a party cannot file an action to receive exactly that which the Grantor set aside for transfer to their named beneficiary."*

Dissent: As noted above, this was a close decision. One dissenting judge wrote that because Carlson's lawsuit challenges the decedent's intended distribution of his assets as provided for in the trust, Carlson triggered the no-contest clause. The dissenting Judge then went to on address the public policy concerns that underly a no-contest clause:

Taken to its logical end, under the majority's approach, a challenger could claim, without any support, that decedent had no interest in any of the Trust property, that the Trust had no property at all to distribute, and that challenger owned all the Trust property- and then avoid the consequences of an in terrorem clause by claiming that the suit was merely an effort to ensure that the Grantor's intent was fulfilled. This is not how in terrorem clauses work, nor how they have been enforced."

Comment: New York's probate law provides a 'safe harbor' identifying a series of actions taken that will not trigger a no-contest clause. Unfortunately, that New York statute only applies to Wills and not to Trusts. One would like to think that Michigan's Trust Code would benefit from a similar safe harbor feature, such as providing that a court proceeding to construe the terms of the Trust instrument, or a petition to compel the trustee to file an accounting, or a proceeding to compel the trustee to discharge its duties under the trust instrument would not be a violation of the trust instrument's no-contest provision.

Conclusion: While no-contest provisions are generally intended to prevent challenges to the validity of a trust instrument, all too often the no-contest provision is written very broadly with sweeping language that seeks to cover all post-mortem actions in the probate court. That means that innocent questions posed to the trustee or the court by a beneficiary could be construed as a violation of a no-contest clause. While a settlor may want to protect their trust from expensive and public challenges which can often tear a family apart by using a no-contest clause, I suspect that many settlors also would want to empower their heirs and beneficiaries to ask questions with the probate court without fearing that a simple question or clarification will trigger a no-contest challenge.

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