SINGER CONTRA *COHN*, NEW YORK'S EVOLVING APPROACH TO IN TERROREM CLAUSES

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Over the past two years the New York Courts have taken increasingly nuanced positions in the interpretation, enforcement, and denial of In Terrorem clauses in a variety of contexts. A more expansive reading of Estates, Powers and Trusts Law (EPTL) § 3-3.5(b) advocated by the Court of Appeals in the 2009 case Matter of Singer[1], has lead to a broader discovery process, and arguably, a narrower interpretation of a testator's intent. Alternatively, in 2010 the Appellate Division, First Department, declined to broaden the application of EPTL § 3-3.5(b), surprisingly yielding a more expansive interpretation of an In Terrorem clause in the Matter of Cohn[2]. Each of these cases are instructive on how to better drat and use the In Terrorem clause when trying to preserve a client's Estate plan, and offer insight into the Courts' approach to determining a testator's intent regarding its use.

An In Terrorem, or no-contest clause, is an indispensible tool for most trusts and estates practitioners. Clients often not only want to protect their assets and legacy through estate planning, but the specific terms and conditions of the Estate plan as it has been created.

The In Terrorem clause is the primary mechanism used for protecting an Estate plan from challenges by dissatisfied beneficiaries who may be subject to unequal or less than hoped for bequests.

Generally, an In Terrorem clause defines a condition that will constitute a challenge to the Estate. If the condition is triggered, the challenging beneficiary will forfeit his or her share under a Testamentary or Trust instrument. The challenger will be treated as though he or she had predeceased the testator, denying them and their heirs a bequest, legacy or devise.

The In Terrorem clause has great latitude in dealing with challengers and objectants. If effectively invoked, it does not only forfeit a distribution, but it can re-allocate the forfeited shares as the testator sees fit, prevent intestate distributions, block the invocation of the anti-lapse statute, and provide for a host of alternative distributions in the event that the objectant is deemed subject to its provisions.

The In Terrorem clause itself serves a dual purpose. Ostensibly, the clause is used to preserve a Will, Trust, or Estate plan as the testator envisioned it. It is a protective measure, literally meaning "in order to frighten," which attempts to scare off those who would challenge the testator's intentions regarding how their Estate shall be distributed. The threat that such a challenge, if unsuccessful, will be met with a complete forfeiture of the beneficiary's interest under the instrument, effectively dissuades many from filing objections or even exerting leverage to force a settlement between beneficiaries, or dissipating the assets of an Estate in an attempt to frustrate co-beneficiaries. Additionally, the In Terrorem clause is a device that

fosters judicial economy by filtering out those objections that may be unfounded, unsustainable, or downright frivolous as it forces those who would challenge an instrument to be sure they have the necessary evidence to back up their allegations.

Make no mistake though, the In Terrorem clause is not a silver bullet that can prevent all potential objectants from challenging an Estate plan and Will. For example, those that may be excluded from an Estate plan entirely have nothing to loose by challenging a Will which includes an In Terrorem clause. After all the threat of disqualification has no practical effect on someone that was disinherited in the first place. Such an objectant will not only drain the assets of the Estate, but effectively circumvents the protective intent of the In Terrorem clause in its entirety. However, now that the Court of Appeals has overturned Dillon[3] and itself in the Matter of Hyde[4], also in June 2010, wherein it now permits the Surrogate to apportion liability for a fiduciary's attorney's fees on the beneficiary party who unjustifiably generates it, this is another reason why a beneficiary objectant will have to carefully consider whether to litigate at all.

The general case law has held that as the enforcement of an In Terrorem clause results in a harsh punishment of an objectant, they are disfavored, and must be strictly construed.[5] Furthermore, an In Terrorem clause, no matter how well drafted when defining the conditions that will trigger forfeiture, is limited by statute.

EPTL § 3-3.5(b), places direct limitations on the circumstances that can trigger the In Terrorem clause. Commonly referred to as the "safe harbor provisions," EPTL § 3-3.5(b) dictates that:

> "The following conduct, singly or in the aggregate, shall not result in the forfeiture of any benefit under the will
>
> (A) The assertion of an objection to the jurisdiction of the court in which the will was offered for probate.
>
> (B) The disclosure to any of the parties or to the court of any information relating to any document offered for probate as a last will, or relevant to the probate proceeding.
>
> (C) A refusal or failure to join in a petition for the probate of a document as a last will, or to execute a consent to, or waiver of notice of a probate proceeding.
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> (D) The preliminary examination, under SCPA 1404[6], of a proponent's witnesses, the person who prepared the will, the nominated executors and the proponents in a probate proceeding.
>
> (E) The institution of, or the joining or acquiescence in a proceeding for the construction of a will or any provision thereof."

Another important factor that determines the scope and application of an In Terrorem clause is of course the testator or grantor's intent[7]. Indeed, determining a grantor or testator's

intent is one of the most common yet difficult tasks that a Surrogate or Judge must determine from whatever facts are shown and available. The primary means by which intent can be determined is by a plain reading of the clause itself. Hopefully the clause is clear and simple. Precisely because an In Terrorem clause will be strictly construed, it must be crafted with great care. The draftsperson must consider all of the contingencies that might arise which would threaten the client's Estate plan and include them in the clause in order to ensure that it will effectively prevent a challenge, or ensure a forfeiture of an objectant's share. Failure to include likely contingencies that would trigger forfeiture will result in permissible challenge that can upset the Estate plan.

Two of the New York Judiciary's recent decisions involving In Terrorem clauses have revolved around the interplay between the limitations imposed by EPTL 3-3.5(b) and the articulated intent present in the In Terrorem clause itself.

In the Matter of Singer[8], the Court of Appeals concluded that the "statutory safe harbor provisions of SCPA 1404 and EPTL 3-3.5 are not exhaustive" [9] and therefore the enumerated protections they offer to an objecting beneficiary who would otherwise be subject to an In Terrorem clause are not exclusive. Singer involved a situation where testator's Will included two In Terrorem clauses, the first directed to all beneficiaries, and the later to testator's son:

> "If any beneficiary shall, in any manner, directly or indirectly, contest, object to or oppose, or attempt to contest, object to or oppose, the probate of or validity of this Will or the revocable trust agreement created by me, or any part of my estate plan or any gifts made by me, or any of the provisions of this Will or of the revocable trust agreement created by me, in any court or commence or prosecute any legal proceeding of any kind in any court to set aside this Will or the revocable trust agreement created by me or any part of my estate plan or any gifts made by me, then in that event, such beneficiary, and all of such beneficiary's issue, shall forfeit and cease to have any right or interest whatsoever under this Will or under the revocable trust agreement created by me, or in any portion of my estate, and, in such event, I hereby direct that my estate and the trust estate under such revocable trust agreement shall be disposed of in all respects as if such beneficiary had predeceased me without issue."[10]

> "I specifically direct that my son, Alexander I. Singer, not contest, object to or oppose this Will or The Joseph Singer Revocable Trust Agreement, or any part of my estate plan or any gifts made by me, and I specifically direct that my son not take my daughter, Vivian S. Singer, to a Bet Din (religious court) or to any other court for any reason whatsoever; and I specifically direct that if my son takes any such action or brings on any such proceeding, neither my son nor any of his issue shall receive any share of my estate, whether passing under this Will, under The Joseph Singer Revocable Trust Agreement or otherwise."[11]

Each clause contained the pro forma language that they shall not "contest, object, or oppose"[12] the Will in any way. The clause that applied to all beneficiaries generally, included a prohibition on direct or indirect challenges to the Will, and the specific direction that no beneficiary oppose the Estate plan "in any court or commence or prosecute any legal proceeding of any kind in any court."[13] Additionally, the In Terrorem clause which was specifically directed to the decedent's son provided that the son shall not take his sister, another named beneficiary, "to a Bet Din (religious court) or to any other court for any reason whatsoever."[14]

Shortly after the Will was offered for probate, testator's son sought discovery under both Article 31 of the Civil Practice Laws and Rules (CPLR) and SCPA § 1404 of several witnesses, including testator's previous attorney. Predictably, testator's daughter asserted that depositions of individuals not enumerated in SCPA § 1404, i.e.: the former attorney of the testator, had triggered the In Terrorem clause. Both the Surrogate and the Appellate Division, Second department agreed and revoked the son's bequest.

Conversely, the Court of Appeals reversed the lower Courts and determined that no such violation of the In Terrorem clause had taken place due to the enlarged scope of depositions undertaken. The Court of Appeals stated that:

> "Although the statutes include only a few particular groups, certain circumstances may exist such that it is permissible to depose persons outside the statutory parameters without suffering forfeiture…. the trend has been for courts 'to allow broad latitude in discovery of matters that could provide the basis for objections' and that the Legislature intended to balance the testator's right to prevent unwarranted will contests against the beneficiary's right to investigate in order to evaluate the risk involved in contesting the will notwithstanding the in terrorem clause."[15]

Furthermore, the Court of Appeals noted that "the crucial inquiry is whether the conduct violated the testator's intent…these In Terrorem provisions can reasonably be interpreted to express testator's wish that Alexander (testator's son) not commence court proceedings of any type against the estate plan." [16]

As the Court of Appeals determined that testator's intent was readily ascertainable, ie: that he wanted to ensure that a contest of his estate plan would not take place in any Court, a narrow construction of the In Terrorem clause itself would not consider the taking of depositions beyond those permitted by SCPA § 1404 amounted to an "attempt to contest, object to or oppose the validity of the estate plan"[17] and thus did not require a forfeiture.

Importantly, Justice Graffeo's concurrence offers further clarity into the way the Court navigates the interplay between a testator's intent and statutory limitations of EPTL § 3-3.5.

> "Because we are required to construe the in terrorem clause narrowly, we found it reasonable to conclude that the language of this will did not specifically impose forfeiture…the fact that the testator's former attorney does not fall into one of the categories of persons listed in the statutes is irrelevant in this case. I believe however, than an in terrorem clause can be drafted to prevent this specific type of inquiry…for example, draft an in terrorem clause that incorporates the statutorily authorized preliminary examinations by explicitly stating that a beneficiary who makes or attempts to make an inquiry about the will other than those permitted by EPTL 3-3.5 and SCPA 1404 shall forfeit his or her bequest."[18]

Alternatively, the Matter of Cohn[19] offers another, less forgiving approach when balancing the strict construction of an In Terrorem clause and the limitations of SCPA § 3-3.5(b). In Cohn, the In Terrorem clause triggered disinheritance against "beneficiaries who commence proceedings to "void, nullify or set aside all or any part of the will."[20] One of the beneficiaries brought a construction proceeding to determine if the In Terrorem clause would apply to a proposed SCPA § 711 proceeding (Suspension, modification, or revocation of letters or removal for disqualification or misconduct) against two non-familial co-executors/co-trustees. Petitioner's theory was that as there were no bequests made to the co-executors/co-trustees, that the In Terrorem clause must only apply to the familial beneficiaries under the Will.

The Appellate Division, First Department, disagreed. They stated that: "As the proposed proceeding does not fall within the safe harbor provisions of EPTL § 3-3.5(b), the applicability of the in terrorem clause is a matter of the decedent's intent."[21] Testator's intent, the Appellate Division determined, was that "The decision of decedent not to leave his estate outright to his children and grandchildren, but set up lifetime trust for their benefit, is consistent with an intent that they not have unfettered control over his fortune."[22] Thus the removal of non-familial fiduciaries via a SCPA § 711 proceeding would be in contravention of the testator's intent, and would trigger the In Terrorem clause as such a proceeding was outside the safe harbor of EPTL § 3-3.5(b). As such, any attempt to gain greater control over the Trust by the familial beneficiaries was seen as contrary to testator's intent, and therefore a trigger of the In Terrorem clause.

Importantly, the Cohn Court noted that the petitioner's alternative argument, that an In Terrorem clause could not forfeit a beneficiary's share for pursuing a SCPA § 711 proceeding based on public policy grounds, was not valid. The Appellate Division reasoned that such an argument "assumes that the safe harbor provisions of Estate Powers and Trusts Law § 3-3.5(b) are not exhaustive. Although a recent decision of the Court of Appeals expressly so states (Singer, supra. Citation omitted), that statement appears to be dictum"[23]

Although the Cohn decision challenges the more expansive interpretation of EPTL 3-3.5(b) posited by the Court of Appeals in Singer, it nevertheless focuses on the testator's intent when determining if the In Terrorem clause has been violated. Based on these two cases, it remains unclear where the Jurisprudence regarding the interpretation and application of In Terrorem clauses is heading. One thing that can be gleaned from these decisions though, is that close attention to the drafting of the terms in the clause itself, coupled with the guideline for a narrow construction, can be used to a client's advantage to deter challengers to an Estate plan.

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[1] Matter of Singer, 13 N.Y.3d 447,452; 892 N.Y.S.2d 836, 2009.
[2] Matter of Cohn, 72 A.D. 3d 616, 899 N.Y.S.2d 233 (App. Div. 1st Dept. 2010)
[3] In re Dillon's Estate, 28 N.Y.2d 597, 319 N.Y.S.2d 850 N.Y. (1971)
[4] Matter of Hyde, 15 N.Y.3d 179, 906 N.Y.S.2d 796N.Y. (2010)
[5] In re Baugher, 906 N.Y.S.2d 856, 2010 N.Y. Slip Op. 20359.
[6] Witnesses to be examined; proof required….
[7] Singer, 13 N.Y.3d 447,452
[8] Ibid.
[9] Ibid., 449
[10] Ibid., 450
[11] Ibid., 450
[12] Ibid., 450
[13] Ibid., 450
[14] Ibid., 450
[15] Ibid., 452; citing Turano, Practice Commentaries, McKinney's Cons Laws of NY, Book 58A, SCPA 1404, at 178-179; Turano, Practice Commentaries, McKinney's Cons Laws of NY, Book 17B, EPTL 3-3.5, at 451-452
[16] Ibid., 452
[17] Ibid., 453
[18] Ibid., 454
[19] Cohn 72 A.D. 3d 616
[20] Ibid., 616
[21] Ibid., 617
[22] Ibid., 617
[23] Ibid., 617