The Six Minute Estates Lawyer 2008
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Introduction

The common law affords testators great freedom to dispose of their property on their death as they see fit (subject to certain restrictions). Testators who wish to ensure that their property dispositions are shielded from attack by dissatisfied heirs view in terrorem or no contest clauses as representing one method of ensuring that their wishes and intentions are given effect.

An in terrorem clause is a provision inserted into a will in an attempt to prevent or deter a contest of a will or certain provisions of a will Under such clauses, a beneficiary risks forfeiting some or all of his interest if he or she contests the will or participates in the contestation of a will

Such clauses are also found in inter vivos trusts.

In a recent article, "No Contest Clauses in Wills and Trusts,[1] Mr Justice David Hayton provides a succinct summary of the various circumstances in which such clauses come to the attention of the courts. He notes that such clauses may cover:

1. Contesting the will for all the various reasons wills are contested (lack of testamentary capacity, failure to observe the formalities of execution etc);

2. Contesting the provisions in the will as void due to uncertainty, public policy reasons etc;

3. Contesting the administration and distribution of the estate.

This article will briefly review the validity and effect of such clauses in wills and the insertion of such clauses in inter vivos trusts and their effect.

(a) English Jurisprudence

While provisions in wills and trusts providing for the forfeiture of a beneficiary's interest in the event of legal challenge have not frequently been litigated in Commonwealth courts, their history is a long one. Perhaps the earliest case considering the enforceability of such a clause was *Cleaver v. Spurling*,[2] decided in 1729. The testator provided that his daughter should receive a

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[1] Delivered at the STEP conference in Toronto in June 2007.

[2] (1729), 2 P. Wms. 526 (Ch.)

legacy of only £35 in light of the fact that he had advanced a significant sum to her upon her marriage. The will further provided that if the daughter sought to contest this, she would forfeit even this amount. Her action in challenging the will was regarded as having the effect of vesting the legacy in the beneficiaries who were to take under the gift over. The court found "it is a good condition by our law, and when the legacy is vested in the devisee over, equity cannot fetch it back again".

More thorough consideration was given in *Cooke v. Turner*[3]. The testator had been adjudged a lunatic, some fifteen years before executing the disputed will. Perhaps because the testator anticipated a legal challenge to the will on the grounds of his competency, his will included a provision provided for a substantially reduced entitlement for the testator's daughter if she or anyone on her behalf contested the will. The court refused to accept the defendant's argument that such clauses were void for public policy reasons. Unlike other void conditions in wills, the state did not have a policy interest in seeing wills contested and their validity confirmed.

The court noted that conditions in wills in restraint of marriage or gifts contingent upon the commission of a crime were void because there was a societal interest in favour of marriage and discouraging crime. However, the court went on to note that:

> "in the case of a condition such as that before us, the state has no interest whatever apart from the interest of the parties themselves. There is no duty on the part of an heir, whether of perfect or imperfect obligation, to contest his ancestor's sanity. It matters not to the state whether the land is enjoyed by the heir or the devisee, and we conceive, therefore, that the law leaves the parties to make just what contracts and what arrangements they may think expedient, as to the raising or not raising questions of law or fact among one another, the sole result of which is to give the enjoyment of property to one claimant rather than another."

The decision in *Rhodes v. The Muswell Hill Land Co.*[4] reveals certain limitations to the doctrine developed in *Cleaver v. Spurling* and *Cooke v. Turner*, and illustrates the need for clarity in drafting a no contest clause. The testator's will made certain dispositions and went on to provide that all disputes between the devisees and legatees "relating to the estate and effects" devised under the will should be arbitrated by the trustees and further that should any devisee commence a suit at law or in equity "relating to the matters and things aforesaid" any gift to that devisee would become null and void, the subject property falling into the residue of the estate. The question arose, in a subsequent sale of real property devised under the will, whether the devisee could make good title in light of this continuing condition subsequent. The court found the condition void because of its breadth.

Romilly M.R. illustrated the repugnancy between the gift and the forfeiture condition:

> "The effect would be that if the devisees commenced or instituted any proceedings at law or in equity in relation to the property devised to them, the

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[3] (1846), 15 M. & W. 727 (Ch.)

[4] (1861), 29 B. 560 (Ch.)

> devise to them would become void, and the estate would fall into the residue. It is impossible for the court to make any distinction between one action or another, so that no devisee could take any proceedings to compel the payment to him of the rent, or bring an action of ejectment to establish his right to the property as against a stranger … nay, more, if a servant was to embezzle the effects bequeathed, he could not indict the man for the offence, or take proceedings of a civil character for compensation or damages, without the property going over. The testator says, I give you the property, but if you resort to any proceedings whatever respecting it, even to secure its enjoyment, I give it to someone else; the thing is absurd."

The Rhodes decision illustrates the need to distinguish between legal actions which challenge the testator's dispositive decisions and the validity of will, and actions taken for the purpose of enforcing legal rights conferred by the testator or existing otherwise. While the testator may have a legitimate interest in discouraging disputes between beneficiaries under a will, beneficiaries should not be barred from invoking the court's assistance to enforce legal rights which are consistent with or unrelated to the testator's wishes. This distinction was relevant in another case decided the same year as *Rhodes*. In *Warbrick v. Varley* (No. 2)[5], a dispute had arisen between the testator and his nephew, before the testator's death, as to the ownership of certain cottages. This dispute, also involving the tenants of the cottages, was finally settled after the testator's death, where it was determined that the cottages had belonged to the testator and formed part of his estate. The testator's will provided that if any devisee "shall commence, take, institute or carry on any suit or proceeding whatever against my said trustees…or make any claim or demand against my estate" that devisee's share would lapse. Subsequently, the residuary legatees argued that the action involving the cottages had triggered this provision with the effect that the nephew's devise under the will was forfeit. Citing *Cleaver v. Spurling* and *Cooke v. Turner*, counsel for the legatees argued "it is now too late to raise a doubt on the legality of conditions of forfeiture". While Romilly M.R. did not take issue with this proposition, he held that the provision was not engaged by the nephew's action. That action had been commenced before the testator's death and was not the type of "claim or demand against [the] estate" to which the condition was directed.

In *Adams v. Adams*[6] it was again undoubted that a forfeiture clause in a will was valid and enforceable. The subject provision was not directed at challenges to the will's validity or provisions but rather to the trustees in the execution of their duties. By the terms of the will, the plaintiff, to whom certain annuities were to be paid, was to forfeit that entitlement if he "should in any way intermeddle with or interfere in, or attempt to intermeddle with or interfere in, the management of the testator's real and personal estate". The plaintiff brought an action alleging that his annuities were not being paid and that the trustees were wasting the estate out of which those annuities were raised. The court found the plaintiff's charges entirely unsubstantiated and his actions frivolous, resulting in the forfeiture for which the will provided. However, it was the groundless nature of the plaintiff's complaint that triggered the forfeiture, a beneficiary under a will could not jeopardize his or entitlement by bringing an action in good faith for the legitimate enforcement of legal rights. Affirming the conclusions of the trial judge, Kay L.J. said:

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5 (1861), 30 B. 347 (Ch.)

6 [1892] 1 Ch. 369 (C.A.).

> "I entirely concur in what Lord Justice Fry said in his judgment to the effect that if this had been a bona fide action brought in defence of Plaintiff's rights, it should not be held to be an attempt to interfere with the management. If this had been a bona fide action brought for the protection of the annuitant if, for example, the annuities had been improperly withheld from him, and he could not get them without suing for them, even if he had asked for a receiver in a case of that kind, I am not at all prepared to say that that would have been such an attempt as would have come within the proviso, and for that again there is distinct authority in the case which was cited, I observe, I the Court below, namely, Powell v. Morgan, in 1688. There was a similar provision in that case and the judgment is given in two lines: "There was *probabilis causa litigandi*, and it was not a forfeiture of the legacy." Those are pregnant words, and they show that if there had not been an excuse for litigation, *probabilis causa*, the Court in that case would have held that it was a forfeiture."

The same approach was taken in *In re Williams*[7]. The subject provision did not call for an absolute forfeiture of the litigating beneficiary's share, but merely that the costs of any action commenced in respect of the administration of the estate should be paid first out of any gift to that beneficiary. An action was brought alleging that the trustees had engaged in wilful default. The trustees submitted to judgment upon this claim but took the position that costs could not be awarded against them because of the aforementioned provision of the testator's will.

Relying on *Rhodes and Adams v. Adams*, the court concluded that the provision could not effect a diminution of the beneficiary's share where the action was taken in good faith and on probable grounds, Swinfen Eady J. said:

> "In the present case if the clause applied the testator would in effect say "I give you certain shares of property, but if you resort to any proceedings to secure their enjoyment I give so much of those shares as is necessary to pay the costs of those proceedings to some one else. This would be repugnant to the gift."

From the foregoing jurisprudence, one text distils the following summary of principle: A condition not to dispute a will is not void for uncertainty, nor as being contrary to good morals or public policy, nor prohibited by any positive law, but, on the other hand, it is not broken if the proceedings taken by the legatee are necessary for the protection of his rights[8]. Notwithstanding that no contest clauses have the practical effect of limiting access to the courts by discouraging litigation, they have not been held to be contrary to public policy on this basis. As Rolfe B. Pointed out in *Cooke v. Turner* there is no public policy in favour of encouraging beneficiaries to litigate testamentary entitlements. Absent such a countervailing public policy it is appropriate to give effect to the testator's wishes and penalize a beneficiary that challenges the validity of a will or the trustee's actions thereunder. At the same time, however, the beneficiary must remain free to invoke the court's assistance to enforce those rights that the testator has conferred. The English courts have reconciled these interests holding no contest clauses to be valid and

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[7] [1912] 1 Ch. 399.

[8] C.H. Sherrin, R.F.D. Barlow, R.A. Wallington, Williams on Wills, 7th ed. (London: Butterworths, 1995), vol. 1, pp. 366-67.

enforceable but finding that they are not triggered by an action to enforce a beneficiary's legitimate rights.

(b) Canadian Jurisprudence[9]

As in many other areas of the law, with respect to the validity and enforceability of no contest clauses Canadian courts have tended to adopt the approach developed by English courts. *Evanturel v. Evanturel*[10] was a Quebec case which fell to be decided under the provision of the Civil Code of Canada. The testatrix' will provided for the equivalent of a life interest over the entirety of her estate in favour of her son, the appellant, subject to small annuities in favour of each of her four daughters and her sisters. The will further provided for forfeiture of the entitlement of any of the daughters who sought to contest the will. Immediately after the testatrix' death, one of the daughters (and her husband) proceeded to commence such an action, challenging the validity of the will on the grounds that the testatrix was without testamentary capacity because of the fraud and undue influence of the appellant and that the will was not properly executed.

The Civil Code provided that all conditions in wills and inter vivos gifts are valid with the exception of those which are impossible, contrary to good morals, or contrary to public order. The forfeiture provision was clearly neither impossible nor contrary to good morals, and the Privy Council was prepared to regard the civil law concept of public order as equivalent to common law public policy. On the public policy considerations, the court noted that the prohibition cannot be absolute, and can be invoked only where the validity of a will has been unsuccessfully contested.

The court also went on to note that, while the case was governed by civil law, the conclusion was consistent with common law authorities, most notably, *Cooke v. Turner*.

The decision in *Harrison v. Harrison*[11] confirms that the under the law of Ontario, no contest clauses are valid and enforceable, but must be regarded as being limited to actions which seek to challenge a will and not as extending to prohibit actions for the enforcement or interpretation and construction of a will. In the Harrison case, the will provided for an accumulation of the estate's income until a specified date, at which time the son of the deceased would be fifty years of age. If the son was alive at that time, the corpus would be paid out to him absolutely; if he died before that date, other distributions were provided for.

The son brought an action seeking the court's interpretation of the accumulation provision, arguing that it was contrary to legislated prohibitions against lengthy accumulations and arguing that pursuant to the rule in *Saunders v. Vautier*[12] he could call for the corpus immediately. The court held against the son. With respect to the forfeiture clause, the court concluded that the son

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[9] For a recent article that reviews the law with respect to in terrorem/no contest clauses please see Peter G. Lawson "The Rule against "in terrorem" conditions: What is it? Where did it come from? Do we really need it?", Estates, Trusts and Pensions Journal (2005) vol 25, p 71

[10] (1874), L.R. 6 P.C. 1.

[11] (1904), 7 O.L.R. 297.

[12] (1841) 4 B. 115.

had not forfeited his gift because the scope of the action was to obtain a construction of the will and a declaration of the plaintiff's rights as to a present payment. This was an action, not to modify or change the will, but to ascertain its proper and correct meaning and effect.

In *Kent v. McKay*[13], the testator, concerned about his children's ability to manage large sums of money, provided in his will that they should only receive the income from certain trusts during their lives, and thereafter the capital was to be distributed to the children's children. To protect this disposition, the testator included a no contest clause providing for forfeiture upon the commencement of any litigation other than for an interpretation of the will or for the court's direction in the administration thereof. The children intended to bring an action under the *Wills Variation Act*,[14] but concerned about the risk presented by the no contest clause, sought a preliminary determination as to (1) whether such an action constituted "litigation" within the meaning of the clause, and (2) whether the clause was enforceable. The court had little difficulty in determining the act was litigation then had to consider the petitioners' three arguments against the clause's validity: (1) it was invalid as an attempt to deprive the court of jurisdiction; (2) it was invalid pursuant to the common law doctrine of *in terrorem*; and (3) it was invalid because it purported to deny the petitioners' rights under the Wills Variation Act.

The court acknowledged that in some circumstances, an attempt to curtail the court's supervisory jurisdiction will be found to be invalid. The court must always retain supervisory jurisdiction to ensure that legal and equitable rights are properly observed[15].

The court noted, that for the common law doctrine of *in terrorem* to apply, three criteria had to be satisfied:

1. The legacy must comprise personal property or a mixture of real and personal property;

2. The condition must be in restraint of marriage or one which forbids challenges to the will; and

3. The threat must be "idle"; that is to say that the recipient of the gift must be prevented from undertaking what the condition prohibit. Thus a forfeiture that provides for a divestiture without providing for a gift over of the gift on the breaching of the condition is void.

However, the court agreed that a no contest clause which interfered with the operation of the Wills Variation Act was contrary to public policy and therefore invalid. A similar view was taken by an Australian court in *Re Gaynor*[16], a decision upon which Lander L.J.S.C. relied heavily. The case involved a similar no contest clause and similar legislation directed at the

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[13] [1982] 6 W.W.R. 165 (B.C.S.C.)

[14] R.S.B.C. 1979, c. 435, now R.S.B.C. 1996, c. 490.

[15] The court cited in this regard, *In re Raven; Spencer v. National Association for the Prevention of Consumption & Other Forms of Tuberculosis*, [1915] 1 Ch. 673 and *Re Bronson*, [1958] O.R. 367 (H.C.); both of these cases involved provisions purporting to make the trustees the final arbiters of any dispute arising with respect to the wills' provisions.

[16] [1960] VLR 640 (S.C.).

relief of dependants. O'Bryan J. recognized the same public interest objectives which testators should not be allowed to thwart:

> "If it is correct to say that this part of the Act now in question is designed to serve a public purpose as well as to benefit individuals, and that the authority conferred upon the court was so conferred not merely in the interests of the widow, widower or child as the case may be, but of the public, because it is a matter of pubic concern that they should not be left without adequate provision for their proper maintenance and support, surely a condition whose object and purpose appears from its very language to be to deter such a beneficiary under a will from making such an application is one that is opposed to public policy."[17]

Thus, it is clear that a no contest clause will be found invalid and unenforceable where the operation of the clause interferes with or undermines a particular public policy objective. Presumably, such a case is especially strong where the public policy is expressed in statutory form. Unfortunately, the scope of this principle is difficult to determine from the decision in *Kent v. McKay* and *Re Gaynor*. Specifically, when will the conflict between dependants' relief legislation and a no contest clause render the latter invalid? Is the mere possibility of a conflict sufficient; is it enough that the chilling effect of the clause might discourage a claim from being brought? Or must the claimant establish a prima facie entitlement under legislation such as the Wills Variation Act[18] before it may be said that there is a conflict? Is it necessary to show the claim was groundless to render the claim void or to demonstrate that the testator intended to forestall the application of the statute?

It is also not clear from *Re Gaynor* and *Kent v. McKay* whether invalidity requires a specific intention on the part of the testator to forestall the operation of the subject statute. In the earlier case, the court found the condition's "object and purpose" to be to deter the commencement of an application under the applicable relief legislation; in the latter, it was held to be the testator's "intent…to prevent any such application". Will a condition be void where the testator intended only to discourage groundless lawsuits and wasteful litigation between beneficiaries, executors and trustees, but which can be construed as incidentally interfering with some public policy objective? This question is left open by these decisions; arguably, however, on the basis of these cases, such specific intent is required.

Notwithstanding the decision to invalidate the no contest clause in *Kent v. McKay*, it may still be concluded that under the law of Ontario and other common law provinces, no contest clauses are prima facie valid and enforceable. The operation of such provisions is subject to the same limitations as noted in connection with the above review of English jurisprudence. They have no effect where the challenge is successful in striking down the will in its entirety, and they cannot negate the court's jurisdiction to interpret a will and enforce its terms. To these must be added a further limitation of uncertain scope where the provision is intended to be, or has effects, contrary to public policy.

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[17] See also *Bellinger v. Nuytten Estate* (2003), 50 E.T.R. (2d) 1, 13 B.C.L.R. (4th) 348, (2003) B.C.J. No 828 (S.C.).

[18] In Ontario, similarly, applications for dependants' relief may be made under Part V of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26.

(c) American Jurisprudence

Perhaps not surprisingly, the question of the validity and enforceability of no contest clauses in wills and trust deeds has been frequently litigated in the United States[19]. Arguably, because of the society's generally more litigious nature, testators and settlors have a stronger incentive to include provisions discouraging challenges. In turn, the more frequent inclusion of such clauses results in a larger body of jurisprudence considering their validity and applicability. While it is not intended to canvass this jurisprudence in any detail, it is interesting to note that, in general, American courts have adopted an approach comparable to that developed in the Commonwealth.

Some interesting points to note in the American jurisprudence. Virtually all American courts now recognize the need to allow challenges in good faith and on probable grounds. It is obvious that where a beneficiary has evidence that a will may be a forgery or that it has been superceded by a subsequent will that beneficiary should not be coerced into remaining silent by a no contest clause. In such circumstances, public policy clearly favours that the matter be brought to court to ensure that any dispositions of property are made in accordance with the testator's true will.[20]

The American courts have also had the opportunity to consider whether an unsuccessful good faith challenge will trigger a forfeiture. The American jurisprudence illustrates that a good faith challenge is not an "all-or-nothing" gamble; a plaintiff may be unsuccessful in establishing that a will is a forgery or that the testator was incompetent, and yet retain the legacy that would have been lost had the will's no contest clause been applied.[21] .

There is one other interesting tendency in the American jurisprudence which warrants comment as it appears to have no equivalent in the Commonwealth jurisprudence. The applicability of a

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[19] A useful collection of this jurisprudence may be found in the annotation "Validity and Enforceability of Provision of Will or Trust Instrument for Forfeiture or Reduction of Share of Contesting Beneficiary", 23 A.L.R. 4th 369 (1983). And see also the following articles Sharon J. Ormond, "No Contest Clauses in California Wills & Trusts: How Lucky do you feel playing the Wheel of Fortune" 18 Whittier Law Review 613 (1996-7); JoAnn Engelhardt "In Terrorem Inter Vivos: Terra Ineognita" 26 Real Prop. Prob & Jr. J. 535 (1991-2); Berger, Dickinson, & Wake "The Fine Art of Intimidating Discreditable Beneficiaries with In Terrorem Clauses" 51 S.M.U. L. Rev. 225 (1997-8); Ronald Domsky "In Terrorem Clauses: More Bark Than Bite?"

[20] The matter was put forcefully in a dissenting judgment by Evans C.J. in Moran v. Moran, 123 N.W. 202 at 208: "I am convinced…such provision in a will is contrary to public policy, unless it be limited in its application to those contests wherein an element of bad faith enters. Under the law no will can become effective in any of its provisions until it shall have been admitted to probate by the court. Before admitting it to probate, it is the duty of the court to investigate the facts and circumstances attending its execution and bearing upon its validity, and to find judicially therefrom that such will was executed in due form, voluntarily, and understandingly by the purported testator. If the court should find otherwise, it must reject the will and refuse its probate. Manifestly, in order to attain true judicial results, the court has need to learn true facts. These must come, if at all, from those who are or were in a position to know them. If the court is to learn the truth from outside sources of information, it is manifestly important that the highway of information to the court be kept open, and that there shall be no lion in the way. But here is a forfeiture provision in the purported will itself which may be a roaring lion intended to terrorize every beneficiary of the will. Its demand is that no adverse evidence be volunteered. Its tendency is necessarily to suppress material facts, and thus to impede the administration of the law according to its true spirit. […] On principle, therefore, and in the interest of good public policy, it seems clear to me that the contest of a will in good faith and for probable cause should not be forbidden nor penalized, nor should it be permitted to work a forfeiture of a legacy."

[21] Re Cocklin's Estate, 17 N.W. 2d 129 (Iowa S.C. 1945); Geisinger v. Geisinger 41 N.W. 2d 86 (Iowa S.C. 1950)

no contest clause to a particular legal action has sometimes turned on the question of whether the action is of the type that the testator truly intended to discourage; that is, even if the action falls within the express terms of the prohibition it may not result in a forfeiture if the court takes the view that it was not the testator's objective to preclude such action[22]. *Cox v. Fisher*[23] involved an inter vivos trust which provided for forfeiture of a beneficiary's interest if "any beneficiary under this trust shall contest the validity thereof or attempt to vacate, alter or change any of the provisions thereof", the trust further provided for certain distributions among his "heirs at law" upon the settlor's death. The settler had been judged of unsound mind prior to the execution of the trust deed and an action challenging competency was commenced during the settlor's lifetime. While, as a formal matter, this action engaged the no contest clause, the court was of the view that it was not the type of challenge contemplated. What the settlor had intended to discourage was any actions by his "heirs at law" challenging certain dispositions to non-relatives; the action having been commenced during the settlor's lifetime, the plaintiffs were not then heirs at law and the action, upon a strict construction of the forfeiture provision, did not trigger its operation.

A more striking example is offered by *Re Estate of Zarrow*[24]. The testator's will provided, as in most cases, for a forfeiture of the interest of "any person" who commenced proceedings asserting the will's invalidity or interfering with the estate's administration. However, the court was prepared to look behind these words and conclude that they could not have been intended to be operable against the principal beneficiary, a daughter who, because she had received fewer advancements during the testator's lifetime, was to be compensated by a legacy more generous than that granted to her brothers. While the actions in question might have come within the express words of the no contest condition, they did not result in forfeiture because such a forfeiture, and not the legal action, would thwart the testator's intentions[25].

Another point which is clarified by the American jurisprudence is that the foregoing principles apply equally to wills and inter vivos trusts. All of the Commonwealth cases considered above involved wills perhaps leaving open the question of whether a different rule should be applicable in the case of an inter vivos disposition[26]. It is clear that American courts have not treated these

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[22] This may be contrasted with the Commonwealth position that follows from the decision in *Rhodes v. The Muswell Hill Land Co*., supra. There, the clause prohibited, on threat of forfeiture, all actions "relating to the estate and effects" devised under the will. While it is likely that the testator sought only to discourage challenges to the will's validity, the court declared itself powerless to "make any distinction between one action or another"; that is, between actions challenging the will and actions in legitimate defence of the legatee's rights.

[23] 322 S.W.2d 910 (Missouri S.C., 1959).

[24] 688 P.2d 47 (Okla. S.C., 1984).

[25] The court wrote:

"We agree with the appellants that the scenario of events and the changes the testator made in his will lead to the conclusion that he did not intend any forfeiture to act against Dorothy's interest and in favor of his son Henry, whom he had removed as co-executor, and his son Jack, to whom he had devised only his personal jewelry. […] The testator's paramount reason for adding the no contest clause was to protect the distribution to Dorothy in order that he would have provided equally for his children in his overall lifetime plan."

[26] In respect of other types of potentially invalid conditions, Commonwealth courts have not hesitated to import wills principles into the field of inter vivos dispositions. In *Re Whiting's Settlement*, [1905] 1 Ch. 96 (C.A.) the court considered the validity of a condition in an inter vivos settlement providing for forfeiture upon the marriage of a beneficiary. After considering numerous wills cases, Cozens-Hardy L.J. noted at p. 125: "I will only add

as distinct classes of cases, applying the same rules and looking to the same authorities without regard to whether the disposition in question was inter vivos or testamentary[27].

The issue of the validity of no contest clauses in inter vivos trusts has, however, arisen in the recent case of *AN v. Barclays Private Bank and Trust (Cayman) Limited*, Cayman Grand Court, [28] which dealt with a no contest clause in an inter vivos trust.

The Plaintiff in this case was a beneficiary of two discretionary family trusts (her siblings and if they were not alive, their children were also discretionary beneficiaries) and after a falling out with her siblings and the Trustee and Protection Committee, she brought an action alleging that the Trustee and Protection Committee had made decisions to her detriment and asking for the no contest clause to be set aside as void. The court in this case was asked to review as a preliminary point whether the clause was invalid.

The relevant clause was the same in both trusts and provided as follows:

> "Whosoever contests the validity of this deed and the Trust created under it, of the provisions of any conveyance of property by any person or persons to the Trustee to form and be held as part of the Trust Fund and of the decisions of the Trustee and'or of the Protection Committee shall cease to be a Beneficiary of any of these Trusts and shall be excluded from any benefits direct or indirect deriving from the Trust Fund."

The gift over provided that in such an event, the children of the complaining party would be substituted as beneficiaries.

The court noted the three components of the no contest clause: (1) challenges to the validity of the trust (2) challenges to the validity of property transfers and (3) challenges to the validity to the decisions of the Trustee /Protection Committee.

After reviewing the case law, the court held that the clause was valid because it did not oust justifiable challenges that were taken "bona fide, not frivolously or vexatiously and with *probabilis causa litigandi*".

The court also commented on the fact that the interest in this case was a discretionary interest and not a vested interest and noted that discretionary interests had some value and that the test for certainty that applies with respect to vested interests would have application in the case of discretionary interests as well. As long as the court can determine with certainty the event that

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that, although our attention has not been called to any case in which the rule has been applied to a deed, as distinct from a will, I can see no ground for drawing any distinction between the two." See also, *Re Nicholls* (1987), 57 O.R. (2d) 763 at 771-72 (C.A.) on the transferability of principles from one area into the other. There would appear to be no reason that a Canadian court would apply different principles to determine the validity of no contest clauses in inter vivos and testamentary trusts.

[27] *Cox v. Fisher*, supra, and *Hillyard v. Leonard*, 391 S.W.2d 211 (Mo. S.C., 1965) are two examples of cases applying the governing principles to inter vivos trusts.

[28] July 17, 2006 (2007) WTLR.

will trigger forfeiture that is sufficient, even though it may be difficult to determine whether in any fact situation the event has in fact occurred.

Summary

So what have we gleaned from this brief review of the case law in the various jurisdictions? In very brief terms, the following should be noted:

1. A condition not to dispute a will is not void for uncertainty nor as being contrary to public policy nor prohibited by any positive law. It is not effective if the proceedings taken by the legatee are necessary for the protection of his rights.

2. The courts will give effect to a testator's wish and penalize a beneficiary who challenges the validity of a will. At the same time the beneficiary must remain free to invoke the assistance of the court to enforce those rights the testator has conferred or which have been conferred by law (such as the Wills Variation Act or the dependant relief provisions of the Succession Law Reform Act).

3. The no contest clause must provide for a gift over in the event of divestiture or the court will make a finding that the no contest clause is "idle" or void.

4. Where the issue in the litigation is the validity of a will, if the beneficiary is successful, the will is rendered invalid and along with it the no contest clause.

5. As Mr Justice Hayton notes, in cases where the challenge is to a particular provision in the will or a challenge to the administration of the estate, if the challenge is successful, the no contest clause will not be permitted to void the interest of the claimant.

6. He goes on to note that where the challenge is to a particular provision of the will or the administration of the estate and the challenge fails, then generally the no contest clause will kick in and forfeit the interest of the claimant "unless the court is prepared to construe the clause as applying only to "unjustifiable"contests and also to find the contest justifiable".

7. US courts are prepared to consider the intentions of the testator in determining whether a no contest clause should be invoked in certain cases such that, while an action by a beneficiary may be clearly within the ambit of the no contest clause, (for example a clause providing for the forfeiture of the interest of any person who commenced proceedings asserting the invalidity of the will or interfering with the administration of the estate) the court may not invoke the clause if it feels that with respect to that particular beneficiary the testator could not have intended to apply that provision (see earlier comment concerning Re Estate of Zarrow).

8. The case law with respect to no contest clauses in inter vivos trusts in Canada is sparse, but the US jurisprudence clarifies that the principles that apply to no contest clauses in wills apply equally to inter vivos trusts and one can infer from Canadian decisions in respect of other types of potentially invalid conditions, that the Canadian courts may be prepared to import wills principles into the field of inter vivos dispositions.

Drafting Considerations

A lawyer who is asked to draft a no contest clause should consider in detail with the client what provisions and family circumstances might warrant including such a clause. For example, the client may want to prevent a potential contest where a will or trust favours one child over another for reasons that the client believes are justified (ex. One child received more benefits inter vivos) but may not want or need to prevent another relative/beneficiary from contesting the terms of a will or trust that are unrelated to the particular gift. A general no contest clause in such a case would therefore spread the net too widely.

Thus a no contest clause should describe specifically and inclusively all the actions that will trigger the operation of the clause.

It is necessary to provide for a gift over provision. As has been noted above, a no contest clause will be void unless it includes a gift over provision

The no contest clause should expressly cover all assets which are to be subject to the provision to the extent it is possible to do so. Consideration should be given to whether it is possible to insert such a clause to invalidate beneficiary designations of life insurance, pension rights and the like

Conclusion

In terrorem or no contest clauses continue to enjoy popularity. Frank Sinatra's will apparently contained such a clause, as did the will of Jerry Garcia, the Grateful Dead guitarist.

And an article that appeared on March 26, 2008 in the National Post, reports on the preliminary proceedings relating to the wills of the late Mr Foote, an Alberta born lawyer who made a fortune selling soap in Japan. While the case dealt with the preliminary issue of jurisdiction (the court held that Alberta was the right jurisdiction) the substantive issue which will be the subject of the next legal wrangle relates to the interpretation and validity of a provision in the wills that states that anyone contesting the wills would lose their share of the inheritance. The amounts at stake are significant and we will watch for the decision with interest.