

## 'In terrorem' clause is one way to cut heir out of will

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Curry Glassell, the daughter of oilman and arts benefactor Alfred Glassell, is disputing his last will in a high-profile Houston court battle that will have serious consequences for Houston's arts groups as well as for the Glassell family. One of the issues at stake is what is called an "in terrorem" clause in the will (also known as a forfeiture clause) that provides that anyone who contests the will is to lose whatever bequest has been granted to him or her — hence, the "terror" that will result if one does not follow the directives of the will. The will of the recently and tragically deceased John O'Quinn also contains a no contest clause.

Many people who are not specialists in estate planning law would tend to take such a clause at face value and believe that, if their lawyer includes such a clause in their will, their chosen heirs will be protected forever from the possibility of litigation challenging the will. Unfortunately, this is not the case.

An "in terrorem" clause sounds great and offers apparent reassurance to those who rely on a will, but it is no panacea. In fact, a new Texas law that went into effect on June 19, 2009, reduces the effectiveness of these clauses even further by clarifying that they do not apply if an attack on the will is made and maintained in good faith and on the basis that probable cause exists. On the other hand, an "in terrorem" clause may still apply if a lawsuit challenging a will is deemed to be just a frivolous nuisance suit designed to extort more money from the beneficiaries.

Unhappy heirs or potential heirs who decide to challenge a will often do so either on the basis that the testator was unduly influenced by a beneficiary, or that he or she was suffering from diminished capacity at the time the will was made and did not really know

what he was doing — as in the recent New York case involving the estate of wealthy socialite and philanthropist Brooke Astor. In that case, the jury agreed with prosecutors that Brooke Astor's son took advantage of her reduced mental capacity to trick her into changing her will to his benefit.

There are other, better ways to protect a will from a challenge than just relying on an "in terrorem" clause. One method is to, in a sense, buy off a potential challenger by leaving him or her something of value so that he or she will be tempted to take the money rather than file a lawsuit and await the uncertain outcome of litigation.

Another tactic is for the testator (the person making the will) to be entirely frank with heirs and potential heirs while he or she is still alive, and let them know exactly what to expect, so there will be no nasty surprises or disappointment down the road. If a potential heir is to be disinherited or left very little in comparison to others, the will should state that fact plainly, so that a challenger cannot claim that the testator was not in his or her right mind and simply forgot about his oldest son or youngest grandchild. Such a clause might state that the testator had adequately provided for the heir during his lifetime, or that he is leaving the potential heir some small amount, or even that the potential heir is to receive nothing, in the words of the infamous Leona Helmsley will, "for reasons well known to them."

In every case, all the required formalities should be carefully observed, such as, for example, making sure the will is signed in the presence of impartial witnesses. It's also a good idea for any testator to design and execute a plan to provide for heirs well in advance of serious illness and death so there can be little question later that he or she didn't know what he was doing.

Testators should also consider a living trust as a

valuable tool to minimize the possibility of a contest. Typically, living trusts are harder to contest than wills.

Few testators have \$500 million to bequeath, as did Alfred Glassell, or the many millions probably involved in the John O'Quinn estate.

But whatever amount a testator may have to leave to loved ones, whether large or small, a proper will should include every possible protection to ensure that his or her wishes will be observed.

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