'No contest' clause not grounds to dismiss beneficiary's challenge to trust

Sister can try to prove brother unduly influenced mother

By: Eric T. Berkman January 24, 2018

An "in terrorem" clause in a family trust document did not automatically bar a beneficiary from suing her brother, the trustee, for alleged undue influence over their late mother, who had established the trust, a Superior Court judge has ruled.

An in terrorem clause — also called a no-contest clause — is a provision in an estate document that disinherits anyone who challenges its terms.

Plaintiff Faye Ginsberg accused her brother, defendant Bruce Ginsberg, of unduly influencing their mother, Shirley, into making disproportionate distributions of family assets to Bruce and his children at the expense of Faye and her children.

Bruce argued that by bringing the lawsuit, Faye automatically became a non-beneficiary under the no-contest clause, leaving her without standing to assert her claims.

But Judge Edward P. Leibensperger, sitting in the Business Litigation Session, disagreed.

"'[A no-contest] clause does not prevent a contest by the beneficiary under the will. … If the contest is successful, that clause falls with the rest of the will,'" Leibensperger wrote, quoting the Supreme Judicial Court's 1928 decision in *Rudd v. Searles*.

"In other words, it is an all or nothing venture by the challenging party," Leibensperger continued. "If Faye proves the trust instrument was procured by fraud, the entire instrument falls, including the no contest provision. If Faye fails to prove the fraud, she is subject to the no contest clause and she loses all of the interests of her and her children as beneficiaries under the trust."

Leibensperger also found that while the Massachusetts version of the Uniform Probate Code expressly recognizes the enforceability of no-contest clauses in wills without mentioning other donative documents, such recognition nonetheless extends to trusts.

The 16-page decision is *Ginsberg, et al. v. Ginsberg, et al.*, Lawyers Weekly No. 09-057-17. The full text of the ruling can be found here.

'Day in court'

Counsel for the plaintiffs, Howard J. Castleman of Boston, characterized the defense argument that Faye's mere filing of a complaint triggered the no-contest clause, requiring automatic dismissal of the claim, as an attempt to "incorrectly and unfairly" extend the law.

Castleman said the judge noted that such a result, sought in the context of a motion to dismiss, would deprive plaintiffs of even the opportunity to prove the alleged fraud or undue influence.

In so ruling, Leibensperger preserved the plaintiffs' ability to have their day in court while announcing an important limitation on the operation of no-contest provisions in the commonwealth, Castleman added.

Attorneys for the defendants could not be reached for comment, but other probate litigators who spoke with Lawyers Weekly said they agreed with the ruling.

Waltham's Leo J. Cushing said the court's confirmation that no-contest clauses in trusts are enforceable would be useful.

"It's a positive from a drafter's point of view," he said. "The court basically said it's OK to put one of these clauses in a trust. That's a nice judicial extension of the UPC."

Cushing also said it is rare to see litigation involving such types of clauses.

"We, as litigators, tiptoe around them as often as possible," he said. "There may be nothing scarier to beneficiaries than the no-contest clause. That's why this case is so interesting. This person clearly feels she has a great case for fraud because if she loses, she'll forfeit her inheritance. Not a lot of individual beneficiaries want to risk that."

David J. Correira of Boston said the case itself reflects a common misconception that an in terrorem clause on its own will prevent litigation.

"That's just not correct," he said. "From a litigation point of view, trying to rely on an in terrorem clause to dismiss a wills and trusts case is more than likely a fool's errand."

From a drafting standpoint, Correira said, no-contest clauses are still useful in wills and trusts, but it is important to document the decision-making involved by which the estate plan has been created or changed if distributions are unequal.

"What you'll find is that the judge's decision as to whether the clause is valid will, as the case progresses, impact the extent to which either of the parties are inclined to settle," he said.

Boston attorney Joseph L. Bierwirth Jr. said that because the trust in question could ultimately be voided by the court due to undue influence, it stands to reason that the matter should not be dismissed based on lack of standing.

"Otherwise, an undue influencer could insulate a trust or will from challenge simply by ensuring an in terrorem provision is included in the instrument," he said.

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>
> *— Leo J. Cushing, Waltham*

Uneven distribution

Bruce and Faye Ginsberg's father, Manny, established an ice cream distribution company that grew into a multi-million-dollar business. Manny and his wife, Shirley, who was an active business partner, also acquired real estate across the commonwealth, apparently held by a number of corporations they created.

Manny died in 2008, and Shirley died on Sept. 27, 2015. Before Manny died, he and Shirley set up four irrevocable trusts for the benefit of their children and grandchildren.

According to Faye, who along with her children was a beneficiary, her parents intended for the children to receive equal interests in the family assets.

After Manny died, Shirley apparently began relying increasingly on Bruce as a source of business and financial advice. According to Faye, Bruce took advantage of the situation, exerting undue influence over their mother as she declined physically and mentally.

The result was that Bruce allegedly caused the trusts to make disproportionate distributions to himself and his family while persuading Shirley to make an inter vivos gift to him of a 50-percent interest in a family company that held real estate in Taunton.

Faye also claimed Bruce refused to provide an accounting for any of the trusts while concealing trust transactions from her and using trust assets to further his private business interests.

Additionally, according to Faye, Bruce persuaded Shirley three months before she died to execute new estate planning documents that left him and his children certain assets Shirley had long promised to Faye, including the family home in Swampscott and a property in Truro. Faye further alleged that Bruce caused their mother to change the death beneficiary on her retirement account and other bank accounts from Faye to Bruce and his children.

Faye allegedly did not learn of those actions until after Shirley's death and was unable to get her brother to provide information surrounding the changes.

On March 20, 2017, Faye and her adult daughter filed suit in Superior Court against Bruce both individually and in his trustee capacity, alleging breach of fiduciary duty, unjust enrichment and fraud. The plaintiffs also named Bruce's children and a number of family corporations as defendants.

The defendants moved to dismiss, citing a no-contest provision in Shirley's updated trust stating that any beneficiary or descendant of hers objecting to any aspect of her estate plan, including the trust, would forfeit whatever inheritance, gift or distribution he or she was set to receive.

According to the defendants, the mere act of filing suit triggered the clause, stripping the plaintiffs of all beneficiary interests and leaving them without standing to file suit.

Still standing

Leibensperger first addressed the enforceability of no-contest clauses in trusts. He found that though the Massachusetts version of the UPC only addressed no-contest clauses in wills, their enforceability indeed extended to trusts.

Nonetheless, the judge disagreed with the defendants' characterization of how such a clause operated in the present situation.

Rather than automatically causing Faye to forfeit whatever interest she had in the trust upon filing suit, she would forfeit only her interest should her lawsuit prove unsuccessful, he said.

"But she is entitled to take the risk and pursue the claim," Leibensperger concluded, denying the defendants' motion. "The validity of Faye's claim cannot be determined on a motion to dismiss."

Ginsberg, et al. v. Ginsberg, et al.

THE ISSUE: Did an "in terrorem" clause in a family trust document automatically bar a beneficiary from suing her brother, the trustee, for alleged undue influence over their late mother, who had established the trust?

DECISION: No (Suffolk Superior Court/Business Litigation Session)

LAWYERS: Howard J. Castleman of Boston (plaintiffs)

Anthony M. Doniger of Sugarman, Rogers, Barshak & Cohen, Boston; Joseph D. Kropp of Gilmore, Rees & Carlson, Wellesley Hills; Bradley L. Croft and David W. Robinson, of Ruberto, Israel & Weiner, Boston; Mark E. Swirbalus of Goulston & Storrs, Boston (defense)

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