



Addressing Relevant Issues Affecting Seniors and Ones who Love Them.

Should There Be An *In Terrorem* Clause in Your Will or Trust?

You would like to make sure that your children get along after you are no longer around to tell them to behave, wouldn't you? Although you may not anticipate any disagreements, you know that money can change relationships, and you have seen how the death of a parent can interfere with sibling relationships. Perhaps you have considered including a "no-contest" provision in your will or trust, and you wonder: Would that help maintain family harmony?

The name lawyers usually apply to such no-contest provisions is revealing. We call them "in terrorem" clauses — meaning that they are intended to terrorize anyone who would otherwise receive a share of the estate from filing any contests. But do they actually work? They can, but they seldom do. Why not?

The primary reason is simple. Say your plan is to leave everything to your three children, in equal shares. Since that is exactly what would happen if you had no will (or trust — in terrorem provisions can be used in trusts, too), there is no incentive for any of them to contest your estate plan anyway. No one else would receive anything even if your documents were successfully challenged, so there is simply no need to include a no-contest clause.

Maybe your plan is different. Say one of your children has already received a significant share of your property, or you disapprove of his or her life choices. You want to disinherit

that child, and you want to make sure he or she does not contest your plan. In this situation the in terrorem provision is not going to make much difference — since the disinherited child receives nothing anyway, providing that they will be disinherited if they contest the documents is not much of a deterrent.

All right. Let's say you really want to make the point. You agree to leave a small share of your estate — perhaps a few thousand dollars — to the disfavored child, and then include an in terrorem provision. Will this work?

It might. Obviously, the beneficiary who is slated to receive something but who will lose it for contesting will have to think twice about filing any objections. You should know, however, that Texas law (like the law of a number of other states) limits the effectiveness of the provision. If your disgruntled heir has "probable cause" to file an objection — even if he or she is ultimately unsuccessful — the in terrorem provision will not be enforced. We do include some no-contest clauses in wills and trusts we draft for our clients but we tell our clients that this might be creating a false sense that they had protected against family conflicts. If conflict avoidance is important to you, we need to come up with a better plan — like including a requirement that any contest be submitted to arbitration or mediation. We can discuss specific ideas for your particular situation.