

Amendment to the Decedent Estate Law in Relation to "In Terrorem" Clauses

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CURRENT LEGISLATION

AMENDMENT TO THE DECEDENT ESTATE LAW IN RELATION TO "IN TERROREM" CLAUSES.—Effective as of April 15, 1946, Article 4 of Chapter 18 of the Laws of 1909 entitled "An act relating to estates of deceased persons, constituting chapter 13 of the consolidated laws" was amended by adding thereto a new section to be Section 126, to read as follows:

Sec. 126. Limitations on conditions attached to a legacy or devise.

No forfeiture of any benefit under a will shall be occasioned by disclosure on the part of the beneficiary to any of the parties or to a court of information relating to any paper propounded as a last will; or by disclosure by such beneficiary to any party or to a court of information relevant in a proceeding for probate of such propounded paper.

No forfeiture of a benefit under a will shall be occasioned by refusal or failure of the beneficiary to join in a petition for the probate of a paper propounded as a will or by refusal or failure of the beneficiary to execute a consent to or waiver of notice of such probate.

An infant or incompetent party may affirmatively oppose the probate of a propounded instrument without forfeiting any benefit thereunder.

This piece of legislation was recommended by the Executive Committee of the Surrogate's Association of the State of New York, its purpose as stated being to codify certain elementary and fundamental principles of public policy, for the guidance of testators and members of the bar.

A provision in a will that if any beneficiary contests the will, directly or indirectly, his legacy shall become null and void is a condition *in terrorem* and is ordinarily held good where there is a gift over. Where there is no gift over on breach of the condition, the condition is generally held to be invalid. In recent years these *in terrorem* clauses have grown broader and broader, and have attempted not only to provide for forfeiture of the legacy if the beneficiary should commence litigation but also if he should make disclosure to the court or to any person of any facts tending to show that the will was not entitled to probate or if he refused to consent to the probate. Thus it became "easy for the draftsman of a will to use words that would meet an objectant at the very threshold of the probate proceeding. Testators have sought to exclude legatees from sharing an estate and have succeeded, because the forfeiture is made effective at the start of the probate proceeding, by the use of these phrases: 'if any objection is filed to the probate of my will'; 'if my child resists the probate' (*Donegan v. Wade*, 70 Ala. 501); 'if any one should take any legal steps to set aside this will' (*Drennen, v. Heard*, 198 Fed. 414 [N. D. Ga. 1912]); 'if any relative contests the probate of my will, or makes any attempt to prevent the carrying out of my intentions' (*Matter of Arrowsmith*, 162 App. Div. 623, 147 N. Y. Supp.

1016 [1st Dep't 1914], *aff'd*, 213 N. Y. 704); 'if any beneficiary thereunder should directly or indirectly institute or become an acting party to any proceeding to set aside, interfere with, or make null any provision of the will' (Syllabus, *Matter of Stewart*, 5 N. Y. Supp. 32 [Surr. Ct. N. Y. Co. 1889]); 'in case . . . prevents or opposes the execution of my will . . . ' (*Matter of Bratt*, 10 Misc. 491, 32 N. Y. Supp. 168 [Surr. Ct. Erie Co. 1894]); 'if any legatee contests or attempts to contest the will' (*Matter of McCahan*, 221 Penn. St. 188, 70 Atl. 711 [1908]); 'if an heir goes to law to break his will' (*Bradford v. Bradford*, 19 Ohio 546). By the use of such words, the filing of objections might well violate the condition."¹

A provision in a will that all costs, disbursements and allowances awarded to all parties in any contest or attempt to set aside the probate of the will should be charged against the amount coming under the will or otherwise from the estate to the legatees commencing or joining in such legal proceedings against the probate or validity of the probate of the will as though that amount of money had been paid directly to them by the executors was held to be valid.²

A stipulation in a will giving a legacy only on condition that no contest be interposed was held to be valid.³

Such conditions against contest do not inhibit an heir from showing testator's want of testamentary capacity or his other non-compliance with the Statute of Wills. He is at entire liberty to show such matters; such condition merely inhibits his taking if he participates in a contest and fails to show them. The only effect of such a condition is to compel him to act at his peril.⁴ It is this peril to his legacy that characterizes the clause as one *in terrorem*. It has been held that such conditions in a will are not against public policy, that the owner of the property may give or refrain from giving, that he may attach to his offer such lawful conditions as his reason, caprice or malice may dictate because he is dealing with his own and the donee must take it, if at all, upon the terms offered.⁵

Before admitting a will to probate, the Surrogate must be satisfied in respect to all the elements enumerated in Section 144 of the Surrogate's Court Act, whether objections have been filed to the will or not. It must be shown that the paper offered as a will is proper in form as to the location and genuineness of the decedent's signature, the number of witnesses and their signatures, the circumstances under which the paper was executed, the decedent's soundness of mind, and whatever other facts the statute requires as constituting a valid will.

¹ *Matter of Cronin*, 143 Misc. 559, 564, 257 N. Y. Supp. 496, *aff'd*, 237 App. Div. 856 (1932).

² *In re Vom Saal's Will*, 82 Misc. 531, 145 N. Y. Supp. 307 (1913).

³ *In re Estate of John S. Brush*, 154 Misc. 480, 277 N. Y. Supp. 559 (1935), *aff'd*, 247 App. Div. 760, 287 N. Y. Supp. 151 (1936).

⁴ *In re Estate of John S. Brush*, 154 Misc. 480, 490 (1935).

⁵ *Moran v. Moran*, 144 Iowa 451, 462, 123 N. W. 202 (1909).

In a footnote to the new Section 126, the Executive Committee of the Surrogate's Association has said, "The administration of justice requires that any party to litigation have the untrammelled right to make a fair investigation of the facts and that the lips of a necessary witness be not sealed through bribery or threats. A beneficiary ought not to be compelled to join in a petition for probate or to consent to probate when he is in possession of knowledge of fraud, undue influence or imposition upon the testator by the proponent." The effect of such *in terrorem* clauses, forbidding the beneficiary from making any disclosures to the court or any person of facts of which he might have knowledge and which might or would keep the will from being admitted to probate, was to make the beneficiary hesitate to take any step which would so penalize him even though he believed the knowledge he possessed laid on him the duty to speak. If he consulted his attorney for advice, the attorney was faced with the onus of making a decision which he knew might very well cost his client a substantial legacy, or of advising him to remain silent when he as an attorney knew that the information should be disclosed to the court so that the surrogate could satisfy himself as required by the statute. The footnote continues, "Experienced probate practitioners have felt obliged to advise their clients to remain mute even when in possession of relevant evidence which parties to litigation sought to elicit by proper and regular procedure."

Section 126 has been added to the Decedent Estate Law to correct this situation by giving to the attorneys a statute on which they could rely and thus be enabled to properly advise their clients as to their rights and obligations, without assuming the risk of loss of benefit to the client.

The new section does not change the present law as to the validity of clauses containing conditions as to the active participation by legatees in any proceeding to contest a will. It does provide, however, that no forfeiture of any benefit under a will shall be occasioned by: (1) a disclosure by the beneficiary to any other party or a disclosure to the court, of any information relating to any paper offered for probate purporting to be a last will; (2) a disclosure to any party or the court of information relevant in a proceeding for probate of such propounded paper; (3) refusal or failure of the beneficiary to join in a petition for the probate of the will; or (4) the refusal or failure of the beneficiary to execute a consent to or waiver of notice of such probate. In other words, hereafter a person who may stand to benefit under a will shall not be penalized because he takes some action or furnishes some information in the course of the probate proceedings which his conscience dictates in order that the surrogate may be enabled to properly determine the issues involved, and an attorney whose advice he may have sought in the matter will not be placed in the ambiguous position of having to advise his client that if he takes the action which he desires to take he will be running the risk of being

deprived of any benefit which he might expect to derive under the will.

The bill further restates the principal that a special guardian of an infant or incompetent may take such steps for the protection of his ward's interest as he deems necessary, even to opposing affirmatively the probate of the instrument, without forfeiture of his ward's legacy.

Whether or not the legislation should have gone farther and dealt with other injustices which may grow out of *in terrorem* clauses is a moot subject. Those who oppose *in terrorem* clauses *in toto* do so on the ground that they are against public policy and tend to oust the courts of their proper jurisdiction. Those who favor such conditional bequests do so on the ground that the testator is dealing with his own property and that he has the right to deal with it as he wishes. It is sufficient to say that the passage of Section 126 leaves the general subject of *in terrorem* clauses as it was heretofore, *i.e.*, that a condition against contest of a will is a condition *in terrorem* and is invalid where there is no gift over on breach of the condition, but where a will expressly directs that the share of a person violating the condition against contest shall pass to another, the condition will be upheld.

MARY K. BLAIR.

ATTORNEY'S LIEN UPON CLIENT'S JUDGMENT.—During the last session, the Legislature of the State of New York amended Section 475 of the Judiciary Law of New York to include the attachment of an attorney's lien on his client's claim in any proceeding before a Municipal Department. The text of the law, including the amendment, is as follows: ¹

Section 1. Section four hundred seventy-five of chapter thirty-five of the laws of nineteen hundred nine, entitled "An act in relation to the administration of justice, constituting chapter thirty of the consolidated laws," as last amended by chapter thirty-four of the laws of nineteen hundred thirty-eight, is hereby amended to read as follows:

Sec. 475. Attorney's lien in action, special or other proceeding. From the commencement of an action, special or other proceeding in any court or before any state, *municipal*, or federal department, except a department of labor, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien.

Section 2. This act shall take effect September first, nineteen hundred forty-six.

Prior to this amendment, an attorney who was retained by a client to act in a special proceeding or to negotiate a claim before a

¹ N. Y. Laws 1946, c. 105, effective September 1, 1946.