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When an In Terrorem Hits the Interstate

Enforcing no-contest clauses across state lines

In terrorem, or no-contest, clauses in estate-planning instruments have been the subject of much discussion and debate, including in this publication. Because such clauses carry with them the threat of forfeiture, and because equity abhors a forfeiture, in terrorem clauses also have caught the attention of legislative bodies. An article in the November 2020 issue of this journal canvasses the differing approaches taken by states to the enforcement of in terrorem clauses, including the public policies that animate those differences.[1] We'll discuss a corollary issue: the enforcement of in terrorem clauses across state lines and, in particular, across states whose public policies toward such clauses differ.

Imagine a revocable trust settled in Florida; it has no in terrorem clause. The settlor then moves to New York and, in light of recent animus with a family member, amends the trust to add an in terrorem clause. The settlor also changes the trust's situs and place of administration to New York. But the settlor doesn't amend the trust's governing law provision, which continues to provide that Florida law governs the "validity, effect, and construction" of the trust. Assuming conduct then occurs that violates the in terrorem clause, can the settlor enforce the clause against the offending beneficiary in a New York court?

Fact patterns that yield such conundrums are endless; we accordingly don't purport to address all or even most of them. Instead, we set forth the factors that should guide the analysis, for lawyers and courts alike, no matter the facts at play.

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To frame our analysis, we use Florida and New York as our hypothetical states. They're good examples not just because of our familiarity with them but also because, with regard to in terrorem clauses, they stand at opposite ends of the spectrum. In Florida, in terrorem clauses in both wills and trusts are unenforceable as a matter of statutorily codified public policy.[2] In New York, by contrast, in terrorem clauses are enforceable, albeit, in light of their draconian effect, strictly construed.[3]

Governing Law Provision

Determining which state's law governs the enforcement of an in terrorem clause depends on several factors. The inquiry begins, as it always does, with the intent of the testator or, in our example, the settlor and, in particular, with the words they used. Specifically, does the instrument containing the in terrorem clause also contain a "governing law" or similar provision? If so—and such provisions are common—the language of the provision matters. (If not, default choice-of-law principles, like those found in the *Restatement*, will apply.[4])

A typical governing law provision states that the "validity, effect, and construction" of a will or trust "shall be determined" according to the law of the state specified. In our example, that state is Florida, but the settlor, having moved to New York and added an in terrorem clause, changed the trust's situs and place of administration to New York, too. So which state's law would govern the settlor's attempt to enforce the in terrorem clause in a New York court? The likely, but not definite, answer is New York.

Situs and Place of Administration

The change in the trust's situs and place of

administration is a helpful—but by no means a dispositive—factor for the application of New York law to the attempted enforcement of the in terrorem clause. As a matter of settlor intent, the change reflects a clear desire to make the trust a New York trust. And as a matter of law, the change automatically results in a change of the trust's governing law.[5] That's the good news. The bad news is that the automatic change applies only to the law governing the trust's administration.[6] Matters concerning a trust's "validity, effect, and construction" are generally not matters of administration, and enforcement of an in terrorem clause—like most matters involving the disposition of trust property and the extent of beneficiaries' interests therein—is generally a matter of construction.[7] The safest course would therefore be for the settlor to also amend the governing law provision itself, replacing Florida with New York as the state whose laws govern the trust's "validity, effect, and construction."

But even without such an amendment, New York law should still apply to the attempted enforcement of the in terrorem clause. To be sure, the beneficiary seeking to oppose enforcement could argue that the failure to change the governing law provision—especially in light of the change in the trust's situs and place of administration—should be deemed intentional, on the theory that the settlor knew exactly how to make such a change if they had wanted to.[8] But that argument would conflict with the settlor's addition of the in terrorem clause on their move to New York: If the settlor intended Florida law to continue governing construction of the trust, they never would have added the in terrorem clause, as it would have been unenforceable the moment they did so. Like any contract, of course, a trust can't be interpreted in such a way as to render any of its provisions meaningless, much less intentionally so. Settlor intent, in short, is paramount, and courts may not use a technical reading of a settlor's language to defeat that intent.

Relevancy of Clause Itself

Then there's the issue of the in terrorem clause itself. Florida's statutory prohibition against the enforcement of in terrorem clauses applies, on its face, only to clauses that punish a beneficiary for "contesting the trust instrument or instituting other proceedings relating to a trust estate."[9] Drafting an in terrorem clause with other triggers—such as harassment of a trustee—therefore might well escape the statutory prohibition. Likewise, vesting the determination of an in terrorem clause's violation in a settlor's or trustee's discretion might well convert the enforcement of such a clause from a matter of construction to one of administration, thereby allowing the law of the trust's situs and place of administration—in our example, New York—to prevail over the law governing the trust's construction—in our example, Florida.[10]

> Even if you're positive that you have the answer as to which state's law will govern your attempted enforcement of an in terrorem clause, be sure to double check the public policy of the state where you plan to file your lawsuit.

Finally, the reason courts typically treat enforcement of in terrorem clauses as a matter of construction is because it's often unclear whether the conduct at issue violates the clause's language. But that isn't always the case. If the beneficiary's conduct without question violates the plain meaning of the clause—for example, commencing a lawsuit to set aside the trust—then enforcing the clause is likely a matter of interpretation (that is, when determining the settlor's intent as to a particular fact pattern is possible from the words they used), not a matter of construction (when, by contrast, such a determination is "impossible" and a "gap" must be "fill[ed] out" by the court to "carry out what was probably [their] intention").[11] That distinction could be significant because courts—in our example, a New York court—will always make their own interpretations according to

their own laws.[12] By contrast, courts will construe a trust according to the law governing construction—in our example, Florida.[13]

State's Public Policy

So you've gone through the foregoing multi-factor analysis and concluded, with confidence, that a given state's law will govern the attempted enforcement of an in terrorem clause. That just leaves the simple matter of filing your enforcement lawsuit and letting it play out as planned, right? Not so fast. In some cases, the state where you file your lawsuit—the forum state—might also have something to say about the governing law, and that something could well be dispositive, notwithstanding the multi-factor analysis.

At best—even in states with the most lenient laws—enforcement of in terrorem clauses is tricky business.

Consider the inverse of our example: a revocable trust settled in New York with an in terrorem clause, a New York situs and place of administration and a New York governing law provision, but the settlor subsequently moves to Florida and, while still living there, seeks to enforce the in terrorem clause. Although, under the factors set forth above, New York law would govern the settlor's attempted enforcement of the in terrorem clause, Florida law makes such clauses unenforceable as a matter of public policy.

Whether that public policy trumps the intent-based multi-factor analysis depends largely, but not exclusively, on where the settlor seeks to enforce the in terrorem clause. If in a Florida court, then, yes, Florida public policy would almost certainly override the settlor's intent, and Florida law would apply to the attempted enforcement. This is the well-settled public policy exception to choice-of-law rules: When application of a foreign state's otherwise-applicable law would contravene, or be repugnant to, the fundamental public policy of the forum state, the forum state's law will apply instead.[14] Because the exception applies most often when the forum state's public policy pertains to the subject matter of the litigation, an easy workaround would be simply to file—if possible based on jurisdictional requirements—in New York or another state where in terrorem clauses are enforceable.

On occasion, however, the exception applies so long as the state whose public policy is implicated by the subject matter is involved in the litigation at all—that is, whether that state is the forum state or not. Indeed, even when, as in our original example, New York has "sufficient contacts" with the subject matter of a litigation, a New York court "will still apply the law of another state if (1) that state has a materially greater interest in the litigation than New York, and (2) application of New York law would be contrary to a fundamental policy of that state."[15]

In short, even if you're positive that you have the answer as to which state's law will govern your attempted enforcement of an in terrorem clause, be sure to double check the public policy of the state where you plan to file your lawsuit. Not unlike non-compete clauses in employment contracts, in terrorem clauses in estate-planning documents, as noted, engender fierce passions within the halls of state legislatures, and those passions might well ruin your best-laid plans.

Tricky Business

At best—even in states with the most lenient laws—enforcement of in terrorem clauses is tricky business. It becomes exponentially more so when states with conflicting laws regarding such clauses are at play. But there's a way out of the thicket that such conflicts inevitably create. A few basic factors, not dissimilar from those relevant to the typical choice-of-law conundrum, should guide the analysis for the settlor, the settlor's counsel/draftsperson, and the court alike: (1) the existence, together with the specific language of, a governing law provision; (2) the trust's situs and place of administration; (3) the settlor's domicile; (4) the language of the in terrorem clause; and (5) the public policy of the forum state with respect to in terrorem clauses.

If, as a settlor or a settlor's counsel/draftsperson, you want to do everything you can to maximize the

enforceability of an in terrorem clause, make sure to research the law regarding such enforcement in the states you or your client frequent, and draft or amend the governing law provision—and perhaps the forum selection clause, too—in the corresponding estate-planning instrument accordingly. And of course, good luck.

Endnotes

1. Benjamin N. Feder and Rebecca A. Levin, "A Modern Look at the Enforceability of No-Contest Provisions," *Trusts & Estates* (November 2020).
2. Fla. Stat. Ann. Sections 732.517 (wills), 736.1108 (trusts).
3. *In re Singer*, 13 N.Y.3d 447, 451 (2009) ("In th[e construction] context, while in terrorem clauses are enforceable, they are not favored and must be strictly construed.") (certain brackets and quotation marks omitted).
4. *See, e.g., Restatement (Second) of Conflict of Laws (Restatement Second)* Sections 268, 271, 272 (citing factors such as the settlor's domicile, the state that the settlor "would probably have desired to be applicable" and the state to which the trust is "most substantially related").
5. *In re Peierls Family Inter Vivos Trusts*, 77 A.3d 249, 264 (Del. Sup. Ct. 2013) ("[A] change in the place of administration . . . will result in a change of the law of administration, unless the change would be contrary to the testator's intent.") (adopting the *Restatement Second* Section 271 cmt. g (1971)).
6. *Peierls, ibid.*, at pp. 259, 264.
7. *Restatement Second* Sections 271 cmt. a, 268 cmts. d, e; *Singer, supra* note 3.
8. *See, e.g., In re Cendant Corp. Sec. Litig.*, 569 F. Supp. 2d 440, 444-45 (D.N.J. 2008).
9. Fla. Stat. Ann. Section 736.1108(1).
10. *Restatement Second* Section 271 cmt. a (1971) (defining "matters of administration" to include "the exercise of discretionary powers").
11. *See, e.g., Restatement Second* Section 268 cmt. a (1971).
12. *Ibid.*
13. *Ibid.*
14. *See, e.g.*, Monrad G. Paulsen and Michael I. Sovern, "'*Public Policy*' *in the Conflict of Laws*," 56 *Colum. L. Rev.* 969 (1956).
15. *TGG Ultimate Hldgs., Inc. v. Hollett*, 224 F. Supp. 3d 275, 282 (S.D.N.Y. 2016) (citing *S. Leo Harmonay Inc. v. Binks Mfg. Co.*, 597 F. Supp. 1014, 1025 (S.D.N.Y. 1984) and applying *Restatement Second* Section 187(2)(b) (1971)).