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## **In Terrorem Provisions - Them's Fightin' Words!**

While there are no absolutes, steps can be taken to help ensure a client's disposition plan will be followed.

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By Geoffrey Taylor

Some clients tell me there is no way their children or other beneficiaries will fight about their inheritance. Sometimes they are right. The rest of the time they are not.

Other clients fully expect the beneficiaries to fight. They tell me to make sure the estate plan is “airtight” and can never be challenged. I explain that while there are no absolutes, steps can be taken to help ensure the client’s disposition plan will be followed.

Enter the “in terrorem” or incontestability provision, which generally disinherits or reduces the benefit of a beneficiary who challenges a will or trust.

Last year, the Wyoming Supreme Court enforced incontestability provisions against Allen F. Willey’s son, who brought a contest against Mr. Willey’s trust, and against the son’s two minor children, *who did not participate in the contest*. Mr. Willey’s trust provided “[a]ny challenge to this Trust made directly by or on behalf of [my son] or [my] grandchildren shall immediately terminate any interest in the Trust of any descendant of mine.” Seems unfair, right? The court rejected the grandchildren’s claims that the provisions violated public policy, noting that decedents rarely bequeath their estates to the entire satisfaction of family and friends and that it is not up to the court to address the wisdom or fairness of a decedent’s estate plan.

Michigan has several statutes regarding incontestability provisions, including MCL 700.7113, which provides a “provision in a trust that purports to penalize an interested person for contesting the trust or instituting another proceeding relating to the trust shall not be given effect if probable cause exists for instituting a proceeding contesting the trust or another proceeding relating to the trust” (MCL 700.2518 and 700.3905 provide likewise for wills).

There are several key concepts in the statute. Are there provisions that “penalize” the beneficiary for “contesting the trust” (e.g., claiming incompetence or undue influence) or “instituting another proceeding” (e.g., claiming improper administration)? If so, those penalty provisions are enforceable *unless* the beneficiary has “probable cause” (this exception does not exist under Wyoming law). The statute does not define probable cause, but Michigan courts have stated it in terms of evidence that would lead a reasonable person to conclude that there was a substantial likelihood that the challenge would be successful.

The statute balances competing interests. Decedents’ wishes regarding who benefits from trust assets and under what conditions should be respected and enforced. However, courts need to be able to oversee trustee conduct and, in order to do so, need beneficiaries to bring claims of negligence or intentional bad acts; beneficiaries will not do this if it means they will be disinherited. On the other hand, courts also need to enforce a decedent’s legitimate desire to discourage frivolous claims and the resulting

delay and expense borne by the other beneficiaries. The probable cause exception provides courts considerable latitude in settling these conflicts.

If someone were to challenge your client's plan, would you want to penalize the person? If so, how? Does it depend on what the person does? In *terrorem* clauses may provide an answer, but be sure to check the law.

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