

Taming the Terror

Why “In Terrorem” Clauses Might Not Really Be So Scary

By Geoffrey S. Weed



The definition is simple and, for those in love with the legal lexicon, undeniably attractive: “*in terrorem*... *adv.* & *adj.* [Latin ‘in order to frighten’] By way of threat; as a warning.”¹ The *in terrorem* clause—also “terror clause” or “no-contest clause”—is a longtime favorite of estate planning attorneys.² The concept behind the clause is so striking that it seems ingrained in the popular consciousness; ostensibly, it allows testators to disinherit quibbling heirs from beyond the grave.³ As a result, many lawyers include a boilerplate terror clause in every will or trust.⁴ But the truth is that a combination of misuse and lenient legislation has largely defanged the once-fearsome clause—“terror” may no longer be an apt description.

When effective, a terror clause penalizes a beneficiary of a will or trust for challenging the document or its provisions.⁵ The penalty is generally the loss of “all or most” of the beneficiary’s gift.⁶ Thus, a challenger stands to lose only the gift already provided by the terms of the challenged document.⁷

A fundamental problem with the terror clause, then, is that it is only effective in deterring challenges made by beneficiaries with gifts to be forfeited.⁸ This means that those most likely to bring a challenge—intentionally omitted heirs—have nothing to

fear from a terror clause.⁹ To provide a true disincentive, the drafter must provide “a gift to the potential contestants large enough to make them think about whether the amount they would gain through a successful contest” outweighs the risk of losing everything if the challenge fails.¹⁰ In other words, effective use of the terror clause requires the testator to reward the very people he or she would prefer to omit. To the layperson, this can be an elusive concept.

Unfortunately, the other issues associated with terror clauses are no easier to explain to clients. While the problem of motivating potential contestants is an innate one, other issues have resulted from legislation specifically meant to temper the clause’s effect. For example, under the Estates and Protected Individuals Code (EPIC), which adopted the lenient approach favored by the Uniform Probate Code,¹¹ a terror clause only penalizes the challenger of a will or trust if the challenger lacks “probable cause...for instituting proceedings.”¹² As we all learn studying criminal procedure, the probable cause standard is a low one—skilled practitioners can usually dream up some probable cause justification for any given fact set. As a result, the terror clause is effectively muzzled under EPIC; even if a beneficiary has a sizable gift at stake, in most cases he or she can bring a challenge without much risk.¹³

This statutory treatment is exacerbated by the fact that, by rule of construction, terror clauses must be interpreted “strictly.”¹⁴ Since the terror clause is, in essence, a forfeiture clause, it must be narrowly construed with the avoidance of forfeiture a primary goal.¹⁵

Ultimately, such strict construction, coupled with the probable cause standard under EPIC, tends to negate the effectiveness of even the best-drafted terror clause. An illustrative recent case is *In re Perry Trust*, decided February 19, 2013.¹⁶ In *Perry*, a trust’s settlor died, leaving his daughter as successor trustee and the primary beneficiary.¹⁷ The settlor’s nephew was also a named beneficiary, but he was unhappy with the 12.5 percent gift he would receive.¹⁸ The trust agreement contained a standard terror clause, which had apparently been inserted to dissuade the nephew from bringing a challenge:

If any beneficiary under this trust or any heir of mine, or any person acting, with or without court approval, on behalf of a beneficiary or heir, shall challenge or contest the admission of this trust to probate, or challenge or contest any provision of this trust, the beneficiary or heir shall receive no portion of my estate, nor any benefits under this trust. However, it will not be a “challenge or contest” if my personal representative, trustee or a beneficiary seeks court interpretation of ambiguous or uncertain provisions in this trust.¹⁹

Notwithstanding the plain language of the trust agreement, the nephew was determined to bring a contest on the basis of undue influence.²⁰ He also wanted to keep his 12.5 percent share if the contest failed.²¹ But in the face of such fearsome language, what could the spurned nephew do? How could he have his challenge and no risk, too?

Unfortunately for the trustee in *Perry*, the nephew’s attorney devised a sound strategy. Instead of bringing a challenge and risking forfeiture under the terror clause, the nephew asked the probate court for a declaratory judgment as to whether he *would* have “probable cause” if he later brought a challenge.²² The probate court ultimately denied the nephew’s request for declaratory relief, but also ruled that his petition was not a forfeiture-causing challenge under the trust’s terms.²³ The Court of Appeals later affirmed, reasoning that the nephew had merely “asked the probate court to examine his evidence and determine whether that evidence *would* give him probable cause—as that phrase is understood under MCL 700.7113—if he were to challenge the trust.”²⁴ The obvious issue of justiciability was not properly before the Court on appeal.²⁵

Perry demonstrates just how loose the rules in this area have become. The nephew’s behavior was precisely the sort of probate posturing terror clauses are designed to combat. The goal is to maintain harmony between heirs by avoiding adversarial proceedings,

Fast Facts

Terror clauses can only deter named beneficiaries who receive a gift under the terms of the document; they do nothing to dissuade intentionally omitted heirs.

Under the Estates and Protected Individuals Code, beneficiaries who challenge a will or trust containing a terror clause will not forfeit their gifts if they had “probable cause” to bring the contest.

Because terror clauses are strictly construed forfeiture clauses, recent caselaw indicates that beneficiaries can generally bring some legal challenge without much actual risk of forfeiture.

To provide a true disincentive, the drafter must provide “a gift to the potential contestants large enough to make them think about whether the amount they would gain through a successful contest” outweighs the risk of losing everything if the challenge fails.

Even though it often has no teeth for enforcement and EPIC has effectively neutered it, the terror clause will likely live on in wills and trusts in Michigan for years to come.

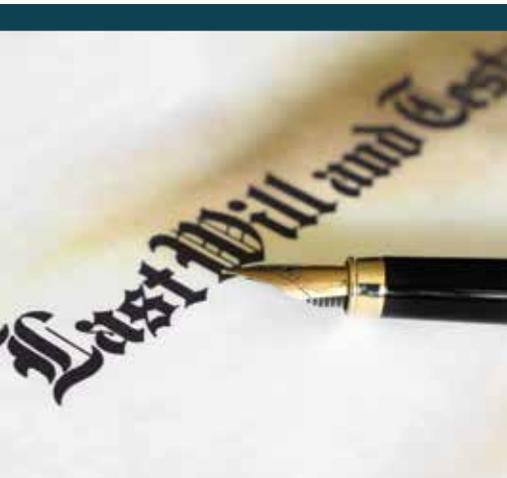
preventing so-called "strike suits" intended to force a trustee to either settle or submit to familial litigation.²⁶ But if a beneficiary can—without risk of forfeiture—force the trustee to expend all the time and expense associated with defending a probate petition, that beneficiary holds all the cards. With a knowledgeable attorney, almost any beneficiary can now accomplish a terror clause end-around.

And perhaps that is the true lesson here. Despite its innate limitations, the terror clause's intimidating reputation has earned it a spot in estate plans since the beginnings of the common law.²⁷ And even though it often has no teeth for enforcement and EPIC has effectively neutered it, the terror clause will likely live on in wills and trusts in Michigan for years to come. At best, it will be nothing more than an antiquated hunk of boilerplate that might scare a layperson. But at worst, the terror clause may end up terrifying a new group: estate planning attorneys. For those who put too much faith in the terror clause and count on it to protect their documents from later challenge, the fear—and liability—might be all too real.

On second thought, "terror" fits pretty well. ■



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ENDNOTES

1. Black's Law Dictionary (3d pocket ed).
2. See Kenner, *Non-contesting clauses in wills*, 3 *Ind LJ* 269 (1928).
3. See Beyer, Dickinson & Wake, *The fine art of intimidating disgruntled beneficiaries with in terrorem clauses*, 51 *SMU L R* 225, 245–246 (1997–1998).
4. See Supina & Cohen, *Michigan Probate Litigation: A Guide to Contested Matters* (2d ed), § 3.44.
5. *Id.*
6. *Id.*
7. Andersen, *Understanding Trusts and Estates* (4th ed), § 7(i), pp 37–39.
8. *Id.*
9. See *id.*
10. *Id.*
11. See UPC § 3-905.
12. MCL 700.2518; MCL 700.7113.
13. See, e.g., *In re Mary E. Griffin Revocable Grantor Trust*, 281 Mich App 532; 760 NW2d 318 (2008); *In re Perry Trust*, 299 Mich App 525; 831 NW2d 251 (2013).
14. *Perry*, n 13 *supra* at 530.
15. *Saier v Saier*, 366 Mich 515, 520–521; 115 NW2d 279 (1962).
16. *Perry*, n 13 *supra*.
17. *Id.*
18. *Id.*
19. *Id.* at 528.
20. See *id.*
21. See *id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. Andersen, n 7 *supra* at 37–39.
27. Beyer, n 3 *supra* at 230–240.