

Should You Use a No Contest Clause in Your Will or Trust?

5/10/2010

[David L. Skidmore](#)

Are you concerned that a family member might be dissatisfied with how you have chosen to distribute your property after you die? Do you worry about the possibility of litigation over your estate plan? Nobody wants his or her estate to be diminished by litigation expenses. In order to reduce the likelihood of litigation, you may choose to insert a "no contest clause" in your estate-planning documents.

A no contest clause provides that the recipient of a gift from your estate will forfeit the gift if he or she takes action to challenge the validity of the document. A no-contest clause is also known as an "in terrorem clause" because the threat of taking away the gift is intended to instill terror in the recipient. The clause will only be effective if the disappointed family member is deterred from litigation. The clause would have no effect on a family member who is completely disinherited or is to receive only a nominal gift.

This penalty provision is activated by a challenge to the validity of the will or trust. So the no contest clause could be triggered by several types of claims, including:

- the author lacked mental capacity
- the author was unduly influenced
- the document is defective, or
- the document is a forgery

But not all Probate Court disputes would trigger the no-contest clause. Some examples of disputes that would not trigger the clause include:

- litigation over whether the fiduciary administering the estate or trust has breached a fiduciary duty
- litigation to compel a fiduciary to prepare and serve accountings
- litigation to have the Probate Court interpret an ambiguity in the document

Ten years ago, the Michigan Legislature passed a law that a no contest clause shall not take effect if, and

only if, the gift recipient had good reason (or "probable cause") for challenging the validity of the will. It says:

"A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings." (MCL 700.2518)

After some confusion in the courts about whether this statute applied to trust agreements as well as wills, the Legislature recently enacted a new statute applying a similar rule to trusts. (MCL 700.7113)

On one hand, the Legislature has weakened the effectiveness of the no contest clause. On the other hand, if there is probable cause to believe that your documents are tainted by mental incapacity or undue influence, then those concerns probably should be brought to the attention of the Probate Court.

Ultimately, you can't stop your family from challenging your will or trust, but you can draft your estate planning documents in a way that reduces the risk of litigation.