

FEBRUARY 2022 NEWSLETTER

POZZUOLO RODDEN POZZUOLO, P.C.
COUNSELORS AT LAW
THE BYE-BENSON HOUSE
2033 WALNUT STREET, PHILADELPHIA, PA 19103
215-977-8200
www.pozzuolo.com



ESTATE PLANNING:

CAN A NO-CONTEST CLAUSE IN WILL AND TRUST BE ENFORCED?

1. BLOGS:

The following are a few of the business, tax, employment, estate planning and business litigation blogs posted on our main website www.pozzuolo.com:

- a. Can You Use A 529 Plan To Pay For SAT Prep?;
- b. Trusts In Estate Planning; and,
- c. Choosing A Retirement Plan.

Please visit our website www.pozzuolo.com for more information on these and other relevant business, tax, estate, business litigation and employment topics.

CAN A NO-CONTEST CLAUSE IN WILL AND TRUST BE ENFORCED?

In continuation of last month's newsletter, [Can You Disinherit Your Child?](#), this month we will discuss the enforceability of "no-contest" clauses which are also referred to as "in terrorem"/"forfeiture"/"penalty" clauses. These clauses in a will or trust can act to reduce or eliminate the interest the beneficiary and any beneficiaries who aid in the will/trust contest would receive under the will or trust if that individual initiates an action to challenge the validity of the subject will or trust or any part of it - thus preventing frivolous litigation over an estate after the testator is deceased.

While these clauses act to prevent an individual from challenging a will or trust, they are not necessarily helpful when completely disinheriting a child or other beneficiary. In order for "no-contest" clauses to be most effective, the individual whom you wish to prevent from challenging your will or trust should be given something meaningful under the will or trust, i.e. a sum of money or other property. If you completely disinherit someone, he/she has nothing to lose or forfeit in challenging the will or trust so the no-contest clause has little to no effect. If the individual whom you are concerned about challenging your will or trust is given a sum of money under the will or trust, they run the risk of forfeiting that money or property by challenging the will or trust. Simply put, the challenger should have more to lose than \$1.00.

Across the country, states treat these types of clauses differently. Some states such as Florida have found these clauses to be unenforceable while other states such as Pennsylvania and New Jersey permit them with certain caveats. In the Commonwealth of Pennsylvania, no-contest/in terrorem clauses are enforceable against beneficiaries and those beneficiaries who aid in the will contest, even if they are not nominally parties to the contest.

The Pennsylvania Superior Court concluded in the Estate of Simpson case that the no-contest rule was beneficial for two reasons: First, the rule honors the idea that the will is to be construed so as to promote the intentions of the testator. Second, the rule promotes the favorable public policy of limiting costly, time-consuming litigation against the estate when such litigation is not founded upon probable cause but rather upon disappointment over amount received.

As implied, the Pennsylvania law does impose certain restrictions on these clauses. Specifically, Pennsylvania has what is referred to as a probable cause exception when it comes to the enforceability of no-contest clauses. To fall under this exception, there must be reasonable grounds of suspicion that are supported by circumstances that are sufficient to warrant the belief that a wrong doing has occurred relating to the creation of the will or trust. This means that if the court determines there is a good reason for the contest of the will or trust by a beneficiary, the clause won't prevent the challenging beneficiary from inheriting.

Similarly to Pennsylvania, New Jersey law also provides that a no-contest clause is enforceable unless the applicable facts and law provides a legitimate basis for the challenge

(i.e. if probable cause exists for initiating the contest). The courts in New Jersey have interpreted the probable cause exception to mean that no-contest clauses can be enforced for frivolous claims made against an estate without any basis in fact or law. However, legitimate claims that have probable cause, such as lack of testamentary capacity and/or undue influence, will not be subject to no-contest clauses.

Kindly contact our office to speak with one of our Estate Planning attorneys to discuss the specific facts of your situation and to determine whether a no-contest clause would be an effective tool in your estate planning.

This newsletter is courtesy of Pozzuolo Rodden Pozzuolo, P.C.

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