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Can You Create An Economic Disincentive to Litigation from Beyond the Grave

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In assessing whether to pursue estate litigation, parties must always consider who will pay the resulting legal costs.

Traditionally, in estate litigation involving the interpretation or validity of a will, costs were payable on a full indemnity basis from the estate. More recently, the trend has been to award costs to the successful litigants on a partial indemnity basis. Neither approach has been wholly satisfactory. Two recent decisions address this issue and also address whether more sophisticated estate plans, involving multiple wills and Henson trusts, effectively limit the source available within estates to pay cost awards.

In *Re Kaptyn Estate*, the deceased left a Primary and a Secondary Will. The Secondary Will had a codicil, the validity of which was at issue in the litigation.

The Court considered whether costs should be paid on a full indemnity scale to the estate trustees and whether costs should be paid from the Primary or Secondary estate. Reasoning that the Trustees were not before the Court by choice (a family member had challenged the validity of the codicil) the Court concluded that the litigation arose because of the "actions, omissions, instructions and decisions of the testator" and awarded full indemnity costs. Although the dispute related to the Secondary Will Codicil, the Court concluded that the entire estate plan was in issue because if the Codicil failed, it would affect the overall distribution plan. The Court went on to order costs payable from the Primary Estate in order to preserve the testator's intent, evidenced in the Secondary Will, that certain real property should devolve without debt attached. This suggests that, in situations with multiple wills, preservation of a testator's intent is now a factor to be considered when deciding from what source a costs award should be paid. It may therefore be possible to provide guidance in a will to the Court about which estate or legacy should be primarily liable for the payment of a costs award.

In the *Estate of Gordon Bigelow, Deceased*, the estate trustee (who was also the deceased's power of attorney) applied to pass the Estate accounts. One of the deceased's four children objected. He suffered from anxiety and depression. Under the terms of the Will, this child's bequest of one-third of the residue was payable to a Henson Trust. After a two-day hearing, the Court concluded that the Estate Trustee had provided an accurate accounting of the Estate's finances from the date of death to the passing of accounts, and for the deceased's financial affairs throughout the period of the power of attorney. The Court found that the Estate was completely successful in the litigation. The Estate was awarded its costs from the capital of the Estate on a full indemnity basis. The Estate Trustee sought costs against the Objector given the unreasonable character of the objections and the written warning the Estate had given him. The Court held the Objector and his Henson Trust should bear at least some responsibility for the Estate's costs. The Court ordered that the share of the remaining Estate assets that was payable to the Objector's Henson Trust under the Will would be forfeit and paid to the Estate. The Court held that "having agreed to sponsor the litigation, the Trust cannot shun responsibility for [the Objector's] actions". Given the Objector's depression and limited means and "to shield him from the full consequences of his actions" the Judge ordered an additional $5,000 contribution from the Henson Trust towards the Estate's costs. These cost payments were to supplement the balance in the Estate which the Court stipulated was then to be distributed among the residuary beneficiaries other

than the Objector. Query, therefore, whether a Henson Trust can any longer safeguard funds from a costs award.

These cases also raise an interesting question as to whether testators can now do indirectly through their wills what they could not do directly through the use of an *in terrorem* clause.

In the past, testators wanting to prevent litigation included a provision stating that any beneficiary who challenged the will would be deemed to forfeit his or her inheritance. However, if this provision did not contain an effective gift over, expressly vesting the gift under the will in another or including it in the residue, the clause was found to be in terrorem (i.e., a mere threat). *In terrorem* clauses are void and thus unenforceable.

To be found *in terrorem*, a clause had to meet the following three criteria: (1) the legacy was of personal property or a blend of personal and real property; (2) the condition was a restraint on marriage or a prohibition against the donee challenging the will; and (3) the condition was a mere threat, and was imposed for the sole purpose of preventing the donee from taking one of the actions in criterion (2). The lack of a gift over attached to a condition in a will generally sufficed to have a clause declared to be *in terrorem*.

The decisions in *Kaptyn* and *Bigelow* suggest that a testator may effectively realize the same result as that intended by an in terrorem clause through a costs clause, without a gift over.

In *Kaptyn*, the testator's intention respecting which assets he wanted to pass free from encumbrance guided the court to order costs be paid from property under the Primary Will. In Bigelow, the objector was ordered to bear a portion of the costs from his own portion of the estate. Based on these decisions, in a situation where the testator is clear that he or she does not want a donee to challenge the will, and yet such a challenge is brought with little or no merit, the court may order costs to be paid from the challenging donee's portion of the estate if there is a clause in the will indicating that this is the testator's intent. The impact of such statements of testator's intent would obviously depend on the donee's assessment of the risk of such a costs order (both in terms of liability and quantum) and the size of the donee's inheritance. However, the risk could easily be so significant that it would amount to a legally effective economic in terrorem clause. Such a clause might also dissuade counsel working on contingency from taking cases of questionable merit.

Whether such clauses would succeed is unclear. However, what is clear is that the consideration of who will pay the legal costs in the event of a will challenge is an issue that must be carefully considered as counsel advise clients in the pursuit of post-mortem litigation.

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