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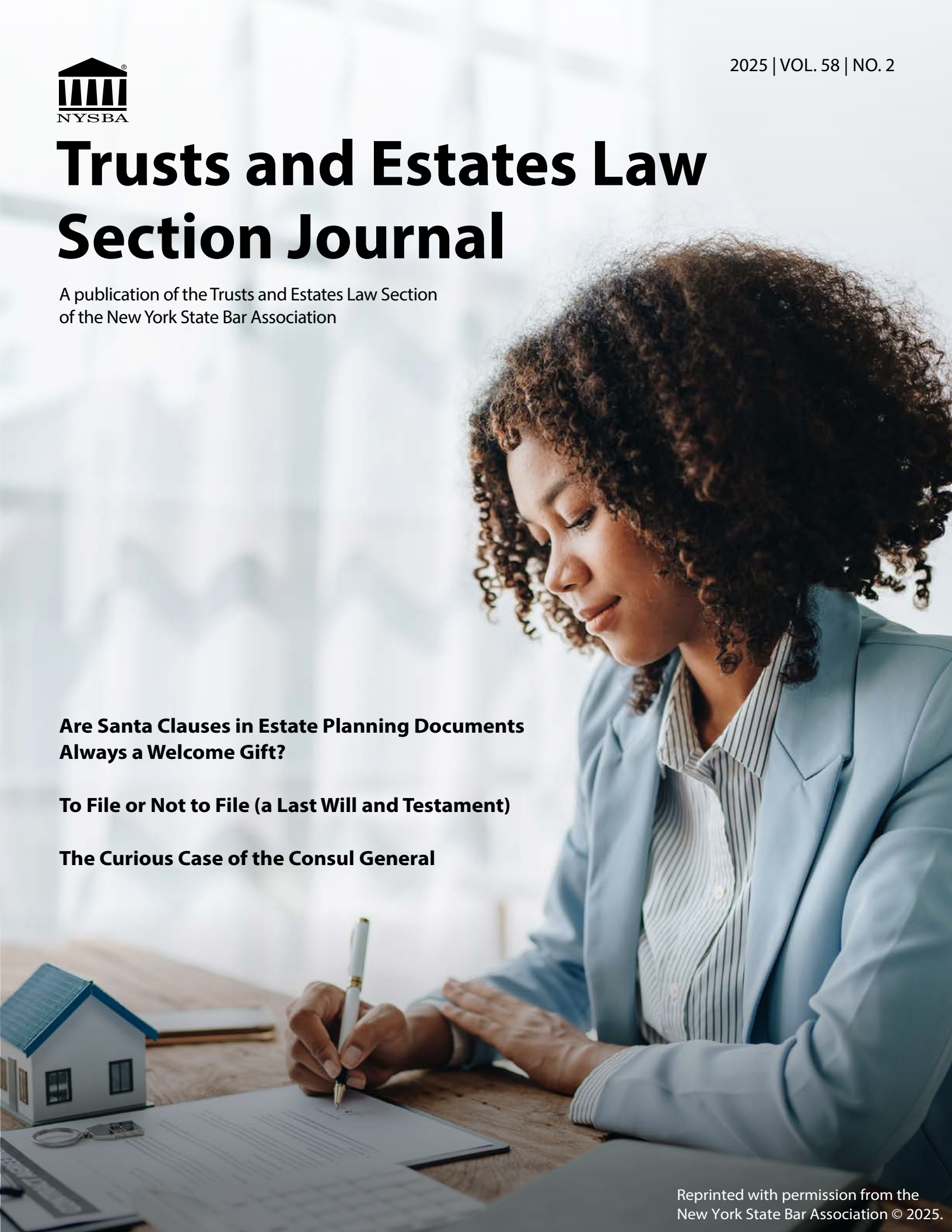

Are Santa Clauses in Estate Planning Documents Always a Welcome Gift?

To File or Not to File (a Last Will and Testament)

The Curious Case of the Consul General

The Strict Construction of No Contest Clauses in New York

By David A. Bamdad and Ross Katz

Introduction

Trusts and estates practitioners who litigate in the Surrogate's Courts in New York State are familiar with a common phrase employed by Surrogates when discussing *in terrorem* clauses, which are used to discourage beneficiaries from asserting a challenge to the validity of a will: *In terrorem* clauses, while valid and enforceable, are not favored by the courts and will be strictly construed.[1] This phrase and others similar to it seem to indicate that New York courts will attempt to limit the use and scope of *in terrorem* clauses commonly referred to as "no contest clauses," when given the chance, but how has it actually played out in practice? More specifically, have courts sanctioned their use to disinherit beneficiaries who wage a challenge to the validity of a will? This article will explore a brief history of no contest clauses, how courts have navigated the increased use of such clauses in wills and trusts, and the impact on potential litigants.

History of No Contest Clauses

Translated from Latin as, "no fear," *in terrorem* clauses originated centuries ago in England. These clauses are rooted in the right of a testator (or grantor) to attach a condition to the receipt of a benefit under his/her will or trust. In 1966, the New York State Legislature enacted a section of the Estates, Powers & Trusts Law (EPTL) that provides certain exceptions to the application of no contest clauses.[2] EPTL 3-3.5 has expanded over the years, but, in its current form, the "safe harbor" provisions protect certain conduct from triggering a no contest clause in a will, including, but not limited to, conducting discovery under Surrogate's Court Procedure Act (SCPA) 1404 in a probate proceeding and seeking a construction of a will.[3]

The expansion of EPTL 3-3.5 has, in some cases, evolved from court decisions. For example, in *Matter of Singer*, the Court of Appeals expanded such safe harbor to permit the examination of the testator's former long-time attorney because the attorney "was clearly a person whom one would expect to have knowledge that was relevant to whether [the later will] was the product of undue influence.[4]" Thereafter, the Legislature expanded EPTL 3-3.5(b)(3)(D) to allow a beneficiary to make an application to the court, upon a showing of special circumstances, for the deposition of "any person whose examination the court determines may provide information with respect to the validity of the will that is of substantial importance or relevance to a decision to file objections to the will."[5]

Courts have continued to limit the application of no contest clauses where its application would be violative of public policy. Two such limitations have become widely adopted and accepted by courts and practitioners. First,

courts have routinely held that a petition to compel a fiduciary to account does not trigger a no contest clause.[6] Second, and which follows from the former, is that objections to a fiduciary's accounting and seeking removal for breaches of fiduciary duty do not trigger such a clause.[7] The policy for such limitations is that a testator/grantor cannot render a fiduciary immune from liability for his/her failure to exercise reasonable care, diligence, and prudence.[8] As the First Department explains *In re Aoki*, where a testator elects to provide that a bequest be held in trust as opposed to distributing it outright, he/she "must have been aware that the trustee's conduct was subject to oversight based on public policy considerations."[9]

Strict Construction

When considering the enforcement of a no contest clause, New York law considers, first and foremost, whether the effect of such clause will negatively impact the intent of the testator/grantor. As a result, New York law disfavors no contest clauses and strictly construes their application.

As practitioners continue to use no contest clauses in wills and trusts, courts continue to be asked to weigh in on their application under various factual scenarios. Enter: strict construction. Although courts hold such clauses to be valid and enforceable, they also strictly construe the circumstances under which they can be applied in order to protect against public policy considerations and other competing interests but always with an eye on what the testator/grantor intended. Two of the more recent leading cases in this regard are *In re Adams* and *In re Brown*.

In *Matter of Adams*,[10] the Nassau County Surrogate's Court was asked to apply the protections of EPTL 3-3.5 to an *in terrorem* clause contained in a revocable inter vivos trust, which was funded during the decedent's life (notably, the decedent's will did not contain an *in terrorem* clause). The *in terrorem* clause in the trust contained a provision that purported to be triggered if a beneficiary "delay[ed] the probate of the Grantor's Last Will and Testament."[11] The decedent's daughter, who wanted to conduct SCPA 1404 discovery, sought a construction of the no contest clause in the trust to determine whether such discovery would trigger the clause given that the safe harbor protections of EPTL 3-3.5 only expressly apply to forfeiture clauses contained in wills.[12]

The court agreed with the decedent's daughter, holding that SCPA 1404 discovery in the probate proceeding would not trigger the no contest clause in the decedent's revocable trust.[13] As the court explained, "[s]imply because the in terrorem clause is in the Trust and not in the will should not result in the beneficiary from being foreclosed from exercising any right she has pursuant to EPTL 3-3.5."[14] The court essentially concluded that it was immaterial whether the no contest clause was contained in the trust or a will – neither can be used to preclude discovery afforded to a potential objectant to a will under SCPA 1404.[15] Notably, the court permitted the daughter to conduct the examination of the proponent of the will and the holding was affirmed by the Second Department on appeal.[16]

In *Matter of Brown*,[17] the decedent funded a revocable trust with approximately $100 million during his lifetime and named a charitable foundation as the remainder beneficiary of most of the trust's assets. During his life, the decedent amended the trust several times, ultimately replacing the charitable foundation with a new charitable trust that was to be controlled by the decedent's attorney.[18] The decedent's granddaughters were the officers and directors of the excluded charitable foundation, as well as beneficiaries of the revocable trust in their individual capacities.[19] The granddaughters, on behalf of the excluded charitable foundation, filed a petition to challenge the amendments to the revocable trust on the basis of undue influence and fraud.[20] In turn, the attorney sought a construction of the *in terrorem* clause in the revocable trust to the effect that the petition filed on behalf of the charitable foundation constituted a challenge by the granddaughters and, thus, a forfeiture of their individual bequests.[21]

The New York County Surrogate's Court held that the granddaughters did not trigger the no contest clause "by asserting positions on behalf of [the charitable foundation] – which they were obligated to do as fiduciaries."[22] The court determined that the granddaughters "were not acting as individuals; for legal purposes, they were the corporate entity acting only on its behalf,"[23] and reasoned that "[b]eneficiaries who also act in representative roles should not be forced to choose between fulfilling their fiduciary duties and forfeiting their bequests."[24]

While *Matter of Brown* should provide some level of comfort to beneficiaries who also serve in fiduciary capacities, it should be noted that it is the only known New York case to squarely address the issue.[25] Therefore, it is yet to be determined whether other counties and appellate courts will adopt its holding.

Although courts have ruled on these issues under the right circumstances, practitioners should be careful when and how they seek a construction of a no contest clause. Courts are loathe to provide advisory opinions and will dismiss such construction proceedings if it determines that a litigant is seeking advice from the court about a hypothetical scenario as opposed to seeking the court's adjudication of a justiciable dispute.[26] Surrogate courts have noted that "where no apparent controversy exists, any "'advisory'" opinion is rendered as if the decedent themselves contested

the issue."[27] Nevertheless, "[a]dvisory opinions are not a traditional judicial function."[28]

Conclusion

Even though no contest clauses have been valid and enforceable for decades, their increased use has garnered more attention from both courts and practitioners. In turn, courts have repeatedly held that such provisions designed to condition a bequest on the conduct of a beneficiary (or, more likely, the beneficiary refraining from certain conduct) in wills and trusts are enforceable. However, they have also repeatedly limited their application in favor of public policy considerations and other competing interests, such as fiduciary obligations, which are still measured to ensure that the intent of the testator/grantor is followed. This "strict construction" has led to more exceptions to the general rule that no contest clauses are valid and provides more guidance to practitioners and litigants as to the type of conduct that will – or will not – lead to forfeiture.

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Endnotes

1. *See Matter of Singer*, 13 NY3d 447, 451 [2009]; *Matter of Adams*, Sur Ct, Nassau County, May 12, 2020, Reilly, J., file No. 2019-2489; *Matter of Brown*, 2024 WL 4467779, at *3 [Sur Ct, N.Y. County Oct. 03, 2024]; *Matter of Merenstein*, 2018 WL 11593246, at *1 [Sur Ct, N.Y. County Oct. 5, 2018]; *Matter of Follman*, Sur Ct, Queens County, Sept. 25, 2023, Kelly, J., file No. 2021-5529/B.
2. EPTL 3-3.5.
3. *Id.*
4. *Matter of Singer*, 13 N.Y.3d 447, 453 [2009].
5. EPTL 3-3.5(b)(3)(D).
6. *Matter of Merenstein*, 2018 WL 11593246, at *1 [Sur Ct, N.Y. County Oct. 5, 2018] [*citing Matter of Lang*, 60 Misc2d 232 [Sur Ct, Erie County 1969] and *Matter of Egerer*, 30 Misc3d 1229[A], 2006 N.Y. Slip Op 52713[U] [Sur Ct, Suffolk County 2006]].
7. *Matter of Aoki*, 221 AD3d 479, 480 [1st Dept 2023].
8. *Id.*; *see Matter of Merenstein*, 2018 WL 11593246, at *1 [Sur Ct, N.Y. County Oct. 5, 2018]; *see also* EPTL 11-1.7[a].
9. *Matter of Aoki*, 221 AD3d 479, 480 [1st Dept 2023].
10. *Matter of Adams*, Sur Ct, Nassau County, May 12, 2020, Reilly, J., file No. 2019-2489.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Matter of Adams*, 204 AD3d 993 [2d Dept 2022].
17. *Matter of Brown*, 2024 WL 4467779 [Sur Ct, N.Y. County Oct. 3, 2024].
18. *Id.* at *1.
19. *Id.*
20. *Id.*
21. *Id.* at *2.
22. *Id.* at *3.
23. *Id.*
24. *Id.* at *4.
25. *Id.*
26. *Matter of DeMarino*, 84 Misc 3d 1217[A], 2024 N.Y. Slip Op 51466[U] [Sur Ct, Queens County 2024]; *see Matter of Follman*, Sur Ct, Queens County, Sept. 25, 2023, Kelly, J., file No. 2021-5529/B.
27. *Matter of Hussein*, 2023 Slip.Op. 23412 [Sur Ct, Richmond County 2023].
28. *Id.*