

To Contest or to Not Contest, That is the Question!

Exploring Delaware Law Relating to No-Contest Clauses

By
J. Zachary Haupt
and
Reece G. Barker

Morris, Nichols, Arsht & Tunnell LLP



It is not unusual for clients to be concerned about estate-related disputes arising after their death. After all, clients have a variety of personal circumstances and objectives and many clients choose to benefit one or more of their family members, friends and preferred organizations to the detriment of others. Clients who harbor such concerns generally understand that any estate-related litigation arising after their death could deplete the value of their estate, cause private information to become public, and create rifts among loved ones. To help obviate these concerns, planners sometimes recommend the use of so-called “no-contest” clauses, which can reduce the risk of litigation by penalizing any beneficiary who asserts a baseless claim. Delaware’s statutory and case law supports the use of such clauses, and recent cases provide guidance regarding what types of matters may be pursued notwithstanding the existence of such clauses.

General Overview

No-contest clauses, also known as “in terrorem” or “forfeiture” clauses, are provisions in wills and trusts that establish penalties applicable to persons who challenge the validity of the document or its terms. The primary purpose of a no-contest clause is to uphold the donor’s intent by deterring challenges that could deplete the estate or harm the donor’s reputation when the donor is no longer alive to provide a defense. Although the law surrounding no-contest clauses varies substantially by jurisdiction, as a general matter, in many jurisdictions a challenger will suffer the penalty imposed by the no-contest clause unless (i) there was probable cause for initiating the suit, or (ii) as in Delaware, the challenger is determined by a court to have prevailed substantially in his or her claims.

Delaware’s No-Contest Clause Statute

Consistent with Delaware’s strong policy in favor of enforcing the terms of a governing instrument as written, Delaware codified the recognition of no contest clauses in 2003 by enacting Section 3329 of Title 12 of the Delaware Code (“Section 3329”). Section 3329(a) provides that a provision of a will or trust that, if given effect, would reduce or eliminate the interest of any beneficiary of such will or trust who initiates or participates in an action to contest the validity of such will or trust or to set aside or vary the terms of such will or trust shall be enforceable. Section 3329(b) provides that the general rule under Section 3329(a) shall not apply in the following five circumstances, often referred to as “safe harbors”: (i) any action brought by a trustee of a trust or personal representative under a will; (ii) any action brought by a beneficiary in which the beneficiary prevails substantially; (iii) any agreement among beneficiaries of a will or trust for the purpose of settling a dispute relating to such will or trust; (iv) any action to determine whether a proposed or pending motion, petition or other proceeding would constitute a contest within the meaning of a no-contest provision described in Section 3329(a); or (v) any action brought by a beneficiary of a will or trust instrument for construction or interpretation of such will or trust instrument.

Key Considerations

A. Delaware’s Statute is Stricter Than the Law of Other Jurisdictions

As stated above, many jurisdictions provide that a no-contest clause is enforceable unless probable cause existed for instituting the proceeding. Such a standard is generally satisfied where a reasonable person, usually through reliance on the advice of independent legal counsel, could conclude that there was a substantial likelihood that the challenge would be successful.¹ Consequently, in other jurisdictions, it is not always necessary for the litigant to actually succeed in his or her claim to avoid application of the no-contest clause.

In Delaware, however, there is a more rigorous standard to avoid application of a no-contest clause. Rather than applying a “probable cause” standard, a no-contest clause is not enforceable as to any action in which the beneficiary is determined by the court to have “prevailed substantially.”

Thus, Delaware applies a more onerous standard to litigants than other jurisdictions, requiring more than just a likelihood of success to evade the no-contest clause’s application. This should act as a stronger deterrent than the probable cause standard and is consistent with Delaware’s strong policy of honoring a settlor’s intent.²

B. No-Contest Clauses May Apply to Claims Asserted Against Other Instruments

Section 3329 is written in terms of a no-contest clause in a will or trust that reduces or eliminates the interests of a beneficiary *of such will or trust* when the beneficiary pursues a claim to contest the validity *of such will or trust* or to set aside or vary the terms *of such will or trust*. A recent Delaware case appears to validate the use of a no-contest clause to reduce or eliminate the interest of a beneficiary when such beneficiary pursues a claim with respect to a different will or trust as well.

Eicoff Barrington Living Trust involves litigation related to a settlor’s estate plan that was initiated by one of the settlor’s granddaughters.³ The settlor’s estate plan included a will, various life insurance policies, and several trusts, including: (1) The Helene Eicoff Revocable Trust (the “Living Trust”); (2) The Alvin Eicoff and Helene Eicoff Joint Irrevocable Trust (the “Irrevocable Trust”); and (3) The Helene Eicoff Barrington Living Trust (the “Barrington Trust”).

Importantly here, the governing instrument for the Barrington Trust (the “Barrington Trust Agreement”) provides, *inter alia*, that after the settlor’s death the trustee shall set aside for settlor’s granddaughter, Leanne, assets with a fair market value on the date of distribution of \$2,000,000 to be administered for the benefit of Leanne and any descendant of hers living from time to time. The Barrington Trust Agreement also contains a no-contest clause, which provides in pertinent part:

If any person who is a devisee, legatee or beneficiary referred to in the Will of the Grantor, or in this [Barrington] Trust Agreement, or in the Living Trust Agreement, or any heir of the Grantor or third person claiming rights derived from such person previously mentioned (including but not limited to a spouse or surviving spouse of any such person), does directly or indirectly engage in any of the following conduct, then in that event the Grantor specifically disinherits each such person, and such person, and all descendants of such person, shall thereby be deemed to have predeceased the Grantor, so that all legacies, bequests, devises[,] distributions, gifts, powers, and interests given under this [Barrington] Trust Agreement to that person shall be null and void; and therefore the Trustee shall administer this [Barrington] Trust Agreement as if such person, and all descendants of such person, have predeceased the Grantor:

(a) Contests the Will of the Grantor, the Living Trust Agreement, or this [Barrington] Trust Agreement or, in any manner, attacks or seeks to impair or invalidate any of the provisions thereof . . .

(continued on p. 18)

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(i) Attacks or seeks to impair or invalidate any of the following, whether or not any such attack or attempt is successful:

- (i) any designation made or to be made by the Grantor during her lifetime, of beneficiaries for any insurance policy on the Grantor's life;
- (ii) any designation made or to be made by the Grantor during her lifetime, of beneficiaries for any pension, profit sharing, or retirement plan benefits or IRA account;
- (iii) any trust that the Grantor created or may create during the Grantor's lifetime or any provision thereof.

Following the settlor's death, Leanne filed a number of suits in Florida and Delaware, including: (1) an action involving a challenge to the validity of the settlor's Will due to fraud, duress, mistake, or undue influence by settlor's attorney (the "Estate Action"); (2) an action challenging a determination made by the trustee of the Irrevocable Trust concerning the named beneficiaries of the Irrevocable Trust (the "Irrevocable Trust Action"); (3) an action challenging the validity of the Living Trust (the "Florida Living Trust Action"); and (4) an action challenging the instruments governing the Barrington Trust (the "Florida Barrington Trust Action").

At one point during the flurry of filings, the trustees of the Barrington Trust (the "Trustees") filed a Verified Petition for Instruction in the Delaware Court of Chancery (the "Instruction Action") seeking an instruction pursuant to 10 *Del. C.* § 6504 that Leanne's conduct violated the no-contest clause, that Leanne is no longer a beneficiary of the Barrington Trust, and that the Trustees should treat Leanne as having predeceased the settlor under the terms of the no-contest clause. The Delaware Court of Chancery stayed the Instruction Action in favor of the actions in Florida.

Leanne eventually voluntarily dismissed the Florida Barrington Trust Action without prejudice. In response, the Trustees filed a motion to lift the stay in the Instruction Action. The court considered the Trustee's summary judgment motion to determine whether Leanne's conduct violated the no-contest clause, that Leanne is no longer a beneficiary of the Barrington Trust, and that the Trustees should treat Leanne as having predeceased the settlor under the terms of the no-contest clause.

The court found that Leanne's challenges to the validity of the Barrington Trust, the Living Trust, and the Will triggered the no-contest clause that appeared in the Barrington Trust Agreement. According to the court, the plain language of the no-contest clause provided that any beneficiary who challenges the validity of the Barrington Trust, the Living Trust, or the Will forfeits his or her rights as a beneficiary of the Barrington Trust. The court concluded "Leanne's challenges to the validity of the Barrington Trust, the *Living Trust*, and the *Will* triggered the No-Contest Clause. The plain language of the No-Contest Clause provides that any beneficiary who challenges the validity of the Barrington Trust, the *Living Trust*, or the *Will* forfeits his or her rights as a beneficiary of the Barrington Trust."⁴

Although the court did not have to expressly reach the issue, it

appears that a claim against the Living Trust or Will alone may have also been sufficient to trigger the no-contest clause of the Barrington Trust even if Leanne had not raised a claim directly related to the Barrington Trust. This application of the statute could raise interesting issues under other fact patterns, such as in the context of a silent trust where a beneficiary is not aware of the existence of the no-contest clause, or perhaps even aware of the existence of the trust that gives rise to the no-contest clause. Additionally, this potential application of the statute highlights the importance of understanding the terms of all potentially relevant documents so the interrelatedness of the documents can be fully analyzed.

C. What Does it Mean to Have "Prevailed Substantially"?

As explained above, Section 3329(b) creates a statutory safe harbor for any action pursued by a beneficiary in which the beneficiary prevails substantially in his or her claim. Existing Delaware case law does not fully address exactly what it means to prevail substantially in this context. In other contexts, "substantially prevailed" refers to prevailing on the object of the action, succeeding on a significant issue in litigation that achieves some of the benefit sought in bringing the suit, or succeeding on the central claim of the lawsuit, whether it comes through judgment after trial, summary judgment, or through a settlement agreement, which may provide guidance here.⁵

The "prevailed substantially" safe harbor was also at issue in the *Eicoff Barrington Living Trust* matter. There, settlor's granddaughter, Leanne, argued that she had "prevailed substantially" within the meaning of Section 3329(b)(2) in her challenge to the Barrington Trust in Florida because she dismissed her claims in the Florida Barrington Trust Action without prejudice. The court did not agree. Rather, the court found that Leanne's voluntary dismissal of her claims concluded the Florida Barrington Trust Action without Leanne obtaining any of the relief she sought and without the Florida court making findings regarding the validity of the Barrington Trust. As such, the statutory exception for prevailing substantially in the claim was inapplicable and the no-contest clause was enforceable under Section 3329.

Leanne also argued that, because the Florida Barrington Trust Action was dismissed without prejudice, she could reassert her claims and could therefore still prevail substantially on her claims. The court explained, however, that Section 3329(b)(2) only excepts actions where the beneficiary has in fact prevailed substantially, not other hypothetical actions that have not been initiated.

While it seems reasonable to anticipate that, at the very least, the "prevailed substantially" standard in the no-contest context would be satisfied when the challenger actually prevails on their claim, there is some uncertainty with respect to any other result.

D. Not Every Challenge Triggers a No-Contest Clause

Not all claims related to a trust or will that includes a no-contest clause will violate the clause, and if there is uncertainty in that regard the statutory safe harbors provide a potential path forward. A beneficiary may be able to pursue certain claims related to a trust with a no-contest clause, at least for purposes

of the pleading stage, without triggering the no-contest clause. For example, in another recent case, a beneficiary requested a declaratory judgment under Section 3329(b)(4) that his proposed counterclaim and third-party complaint would not trigger no-contest clauses.⁶ The court carefully parsed the beneficiary's claims, finding they largely did not offend the no-contest provisions, with one exception. If filed, the no-contest clauses would not be triggered by certain breach of fiduciary duty and breach of trust claims or a claim for breach of the implied covenant of good faith and fair dealing. However, the beneficiary's request for a court-ordered consent was at odds with the plain terms of the trust agreements and, if filed, would implicate the no-contest clauses. Notwithstanding the court's determination that part of the beneficiary's request, if filed, would implicate the no-contest provisions, the beneficiary was permitted to file an amended form of the counterclaim and third-party complaint excising the claim that would have violated the no-contest clauses.

This recent ruling serves as a reminder that, prior to filing a complaint, potential litigants would be wise to review the trust agreement carefully to determine which claims may violate a no-contest clause. If there is any question as to the application of the no-contest clause, the potential litigant may file a motion for safe harbor as to whether such claims trigger the no-contest clause.

E. Be Mindful of Beneficiary Incentives

A no-contest clause is very unlikely to dissuade someone from pursuing a claim if he or she has nothing to lose if the no-contest clause applies. For example, if a child is completely disinherited, a no-contest clause will not deter such child from pursuing a claim because the child will receive nothing whether the no-contest clause applies to the claim or not. However, if such child is instead bequeathed a meaningful sum, albeit less than he or she may stand to receive if successful in litigation, the risk of losing that meaningful sum as the result of unsuccessful litigation may be sufficient to prevent the aggrieved child from pursuing a claim.

Conclusion

Delaware law clearly provides a basis for the use of no-contest clauses in wills and trusts governed by Delaware law. Delaware's courts will generally respect such clauses and honor a settlor's intent, although not all claims will violate such clauses. If a prospective litigant has concerns, it may be advisable to file a motion under the safe harbor to determine if the no-contest clause would apply to the questionable claim. Prospective litigants should also be mindful that there remains some uncertainty regarding what exactly may constitute prevailing substantially within the meaning of Section 3329, and must weigh the risks versus the potential rewards of pursuing claims when a no-contest clause may apply. In that regard, clients and planners should also always be mindful of whether a potential claimant will be adequately incentivized to refrain from pursuing a claim in order to ensure that a no-contest clause has its desired effect.

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J. Zachary Haupt is special counsel in Morris Nichols' trusts and estates/private client group in Wilmington, Del. Zach's practice focuses on advising individuals, institutional fiduciaries, private wealth managers, and their counsel on matters involving Delaware trusts and estates. He regularly works with clients to settle new trusts and to modify existing irrevocable trusts through decantings, mergers, consent modifications, non-judicial settlement agreements, administrative amendments, and judicial reformations. Additionally, Zach assists clients with the creation and modification of estate plans and the administration of Delaware estates.



Reece G. Barker is an associate with the Trusts & Estates/Private Client group. His practice focuses on advising individuals, institutional fiduciaries, private wealth managers, and their counsel on matters involving Delaware trusts and estates. He also works on fiduciary litigation cases, representing trustees, executors, and beneficiaries in disputes related to trusts and estates.

Notes:

- 1- *In the Matter of Helene Eicoff Barrington Living Tr.* U/A/D June 29, 2015, as amended, 2024 WL 5103824 (Del. Ch. Dec. 13, 2024), at *8 n. 54.
- 2- Note, however, that the Court of Chancery, as a court of equity, discourages forfeiture and therefore may interpret no-contest provisions narrowly. See, e.g., *In the Matter of the Niki and Darren Irrevocable Tr.*, C.A. No. 2019-0302-SG, at 31 (Del. Ch. Dec. 19, 2019) (Transcript); see also *Jefferson Chem. Co. v. Mobay Chem. Co.*, 267 A.2d 635, 637 (Del. Ch. 1970) ("Equity ... abhors a forfeiture."); *Garrett v. Brown*, 1986 WL 6708, at *8 (Del. Ch. June 13, 1986) ("Forfeitures are not favored and contracts will be construed to avoid such a result."), *aff'd*, 511 A.2d 1044 (Del. 1986); *Clements v. Castle Mortg. Serv. Co.*, 382 A.2d 1367, 1370 (Del. Ch. 1977) ("Forfeiture as such is highly disfavored by the courts, including those of Delaware.").
- 3- *Eicoff Barrington Living Tr.*, 2024 WL 5103824.
- 4- *Id.* at *6 (emphasis added).
- 5- 37A Am. Jur. 2d *Freedom of Information Acts* § 565 (2025); 2 Civ. Actions Against the U.S. § 7:89 (2d ed. 2024).
- 6- *In the Matter of the JCM 2001 Trust for Grandchildren FBO Robert C. Beyer, Laurel Court Trust FBO Robert Beyer, and Robert C. Beyer Living Trust*, C.A. No. 2023-1097-SEM (Del. Ch. Nov. 12, 2024) (Transcript). This still-ongoing litigation is overseen by a Magistrate in Chancery and this ruling has not yet been adopted as an order of the Court of Chancery.