

**NOTICE**

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2015 IL App (4th) 141096-U

NO. 4-14-1096

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

September 3, 2015  
Carla Bender  
4<sup>th</sup> District Appellate  
Court, IL

In re: the Matter of the Estate of LUCILLE	)	Appeal from
ALEXANDER, Deceased,	)	Circuit Court of
ROBERT ALEXANDER, SUE ALEXANDER, and	)	Morgan County
DONNA GREGORY,	)	No. 13P115
Petitioners-Appellants,	)	
v.	)	Honorable
CONNIE NORDSIEK,	)	David R. Cherry,
Respondent-Appellee.	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.  
Justices Turner and Steigmann concurred in the judgment.

**ORDER**

¶ 1 *Held:* The appellate court affirmed the trial court's judgment denying the petition to declare beneficiary's rights forfeited where the beneficiary's actions did not violate the *in terrorem* clause in the will.

¶ 2 In November 2013, decedent, Lucille Alexander passed away, leaving a will and first codicil naming petitioners, Robert Alexander, Sue Alexander, and Donna Gregory, and respondent, Connie Nordsiek, co-executors. In December 2013, Connie filed a petition for probate and letters testamentary, alleging the named co-executors could not effectively administer the estate and stating she was ready, willing, and able to act as sole executor.

Thereafter, petitioners filed a petition to probate the will and appoint the four siblings nominated in the will as co-executors. Prior to the trial court entering an order admitting the will to probate, Connie withdrew her petition to probate the will. In April 2013, petitioners filed a petition to declare Connie's interest in the estate forfeited, alleging her original petition contested the

executor clause in violation of the *in terrorem* clause. The court found Connie's petition did not trigger the *in terrorem* clause and denied petitioners' petition.

¶ 3 On appeal, petitioners assert the trial court erred by finding Connie's petition did not violate the *in terrorem* clause. We affirm.

¶ 4 I. BACKGROUND

¶ 5 A. Lucille's Estate Plan

¶ 6 In April 1992, Lucille executed a will establishing a testamentary trust. The first codicil to the will was executed in April 1997. The will named four of Lucille's children, petitioners and Connie, as co-trustees and co-executors. Under the terms of the will and first codicil, Lucille named her five living children as lifetime income beneficiaries of the trust. Further, the will allows Sue to live in Lucille's residence for life, so long as she maintains the residence as her principal home. The will allows Bob to farm Lucille's land for life, so long as he practices good husbandry with respect to the crops. These provisions were designed to maintain the status quo at the time the will was executed. Finally, the will contained an *in terrorem* clause which provided as follows:

"If any beneficiary shall commence, or, except as required by law, participate in any proceedings to contest the validity of this [w]ill or any part thereof, or to assert any claim based on an alleged agreement to make a [w]ill or otherwise dispose of my estate, such beneficiary shall forfeit whatever interest he or she would have taken under this [w]ill and my estate shall be administered and distributed as though he or she had predeceased me."

¶ 7 Lucille's estate plan also included powers of attorney. In July 1990, Lucille executed a document granting Connie general power of attorney. In September 1997, Lucille granted Connie power of attorney for healthcare.

¶ 8 B. Guardianship Proceedings

¶ 9 In 2012, Connie first exercised her powers of attorney to hire in-home caregivers for Lucille and make other arrangements for Lucille's needs. Sue objected to the presence of these caregivers in the home she shared with Lucille, allegedly firing one caregiver and engaging in a physical altercation with another. As a result, in February 2013, Connie moved Lucille into Connie's home and hired around-the-clock caregivers. That same month, Bob, Sue, and Donna initiated guardianship proceedings. These protracted and contentious proceedings never reached final resolution, as Lucille passed away shortly before the guardianship hearing.

¶ 10 C. Probate Proceedings

¶ 11 On December 5, 2013, Lucille's will and first codicil were filed in the circuit court. On December 17, 2013, Connie filed her petition to probate Lucille's will and for letters testamentary. In pertinent part, her petition read as follows.

"5. Based on the litigation which has occurred in the case styled *In Re the Matter of Lucille Alexander, a Disabled Adult*, Morgan County Case No. 2013-P-13, your petitioner believes that it would be impossible for the named executors to act as co-executors and not in the best interests of the estate. Your petitioner is ready, willing[,] and able to act as the executor.

6. Petitioner asks that the will and first codicil be admitted to probate and the letters testamentary issue to the petitioner as executor. Petitioner requests supervised administration."

On January 8, 2014, Bob, Sue, and Donna filed a motion to strike and dismiss Connie's petition for probate, arguing Lucille's will expressly appointed the four siblings as co-executors. On the same day, Bob, Sue, and Donna filed a petition to probate Lucille's will and requested petitioners and Connie be appointed executors in accordance with article VI of the will.

¶ 12 In March 2014, the matter proceeded to a hearing, where counsel for petitioners suggested the first step procedurally was to address the motion to strike Connie's petition for probate. Counsel for Connie expressed his confusion, stating, "I am a little confused because \*\*\* [petitioners' counsel] and myself spoke before we came into the courtroom and I thought we had an understanding that we would withdraw Connie's [p]etition, that we would proceed on their [p]etition that the, had [sic] four of them would be appointed" co-executors. Connie thereafter withdrew her petition to probate the will. The trial court then entered agreed orders admitting the will to probate, naming the four siblings co-executors, and declaring heirship.

¶ 13 In April 2014, petitioners filed a petition, alleging, in relevant part, Connie's actions in filing her original petition for probate wherein she sought to be named the sole executor violated the *in terrorem* clause of Lucille's will because it commenced a proceeding contesting the clause naming the four siblings co-executors. Connie argued her original petition for probate merely stated her belief the named co-executors could not work together to administer the estate and did not amount to a will contest triggering the *in terrorem* clause.

¶ 14 The trial court heard argument and considered briefs submitted by the parties. In December 2013, the court entered a docket order that read, in pertinent part, as follows:

"The [c]ourt finds that the [petitioners'] arguments are not persuasive and the authorities do not establish a clear and convincing course of action for the [c]ourt to follow. The requested relief sought by the [petitioners] is an extreme remedy to the dispute in this matter. Nothing before the [c]ourt at this juncture convinces the [c]ourt that the said Connie Nordsiek has committed an action which would trigger the "in terrorem" clause of the [l]ast [w]ill and [t]estament of Lucille Alexander and [c]odicil thereto, such as to result in a forfeiture of an heir's rights or benefits thereunder. Petition denied."

¶ 15 This appeal followed.

¶ 16 II. ANALYSIS

¶ 17 On appeal, petitioners argue Connie has forfeited her beneficiary interest in Lucille's will by violating the *in terrorem* clause. Specifically, petitioners contend Connie's petition to probate the will contested the validity of the clause appointing the four siblings co-executors by stating her belief the co-executors would be unable to fulfill their duties and asserting she was ready, willing, and able to act as executor. Connie contends the language of the *in terrorem* clause, strictly construed to avoid forfeiture and in favor of the beneficiary, does not apply to her petition because the petition did not challenge the validity of the executor clause.

¶ 18 As a general matter, *in terrorem* clauses containing conditions against contesting or attempting to set aside a will are valid. *In re Estate of Mank*, 298 Ill. App. 3d 821, 825, 699 N.E.2d 1103, 1107 (1998). Although these clauses may be valid, they are disfavored and we construe them strictly to avoid forfeiture. *Id.* at 826, 699 N.E.2d at 1107. It is a well-established

rule "equity does not favor forfeitures, and in construing conditions, both precedent and subsequent, a reasonable construction must be given in favor of the beneficiary." *Clark v. Bentley*, 398 Ill. 535, 540, 76 N.E.2d 438, 441 (1947).

¶ 19 "[T]he duty of the court in any will construction case is to ascertain from the words of the will the intention of the testator and give effect thereto unless the same is in violation of public policy or some rule of law." *In re Estate of Wojtalewicz*, 93 Ill. App. 3d 1061, 1063, 418 N.E.2d 418, 420 (1981). A court must construe the entirety of a clause, rather than isolated parts, to determine the testator's true intention. *Clark*, 398 Ill. at 539, 76 N.E.2d at 440. Thus, the "analysis does not begin and end with the language of the clause and the conduct at issue." *Mank*, 298 Ill. App. 3d at 826, 699 N.E.2d at 1107. The particular facts and circumstances of the case inform the inquiry into whether application of the *in terrorem* clause to the conduct at issue would be contrary to public policy or the law. *Id.*; see also *Oglesby v. Springfield Marine Bank*, 25 Ill. 2d 280, 288, 184 N.E.2d 874, 878 (1962).

¶ 20 Petitioners characterize Connie's petition to probate Lucille's will as a contest to the executor provision sufficient to invoke the *in terrorem* clause where the requested relief would require the trial court to declare the provision naming four co-executors invalid. Connie takes issue with this characterization and claims her petition for probate merely suggested the court appoint her executor in light of the contentious guardianship proceedings and did not call into question the validity of the executor provision.

¶ 21 Both parties rely on the first district decision, *Wojtalewicz*, 93 Ill. App. 3d 1061, 418 N.E.2d 418. In *Wojtalewicz*, a legatee filed a petition to deny appointment of the named executor, who had delayed admitting the will to probate for two years and failed to file the

necessary tax returns. *Id.* at 1062, 418 N.E.2d at 419. The *in terrorem* clause in the will provided, in pertinent part, as follows:

"In the event that any devisee, beneficiary[,] or legatee named herein, or any one of my next of kin, \*\*\* shall commence or maintain, directly or indirectly, any proceeding to challenge or deny any of the provisions of this my [w]ill, the devise, bequest[,] or legacy herein made to him, her, or it, shall lapse and fall, and my [e]xecutor \*\*\* [is] required to refrain from making any distribution of any sum whatever to any such person, persons[,] or organization who shall seek to contest this my [l]ast [w]ill and [t]estament or any of its provisions." *Id.*, 418 N.E.2d at 419-20.

The trial court found the petition to deny appointment of the named executor did not violate the *in terrorem* clause. *Id.*, 418 N.E.2d at 420. The appellate court disagreed, finding the petition plainly requested the executor clause be denied in violation of the language of the *in terrorem* clause. *Id.* at 1062-63, 418 N.E.2d at 420. However, the appellate court found enforcement of the *in terrorem* clause would violate the law and public policy of Illinois and, thus, declined to enforce the clause. *Id.* at 1063-64, 418 N.E.2d at 420-21.

¶ 22 We find the language in the instant *in terrorem* clause substantially narrower than the language at issue in *Wojtalewicz*. Lucille's will forbids a beneficiary from commencing or participating in "proceedings to contest the validity of [the] [w]ill or any part thereof, or to assert any claim based on an alleged agreement to make a [w]ill or otherwise dispose of my estate." This language shows Lucille's intention to prevent her beneficiaries from coming forward with purported wills made or agreements entered into after the execution of her April 1992 will or

contesting the *validity* of the will in some other way. Connie's original petition did not suggest Lucille later changed her mind about the executor nomination and wished for Connie alone to act as executor. Nor did Connie's petition challenge the *validity* of the executor provision. Connie expressed her concern the named executors could not work together to fulfill their duties in administering the estate—a concern supported by the limited evidence of the contentious guardianship proceedings contained in the record before us.

¶ 23 Petitioners argue Illinois law is well settled; courts must appoint a testator's designated executor. *Relf v. Shatayeva*, 2013 IL 114925, ¶ 52, 998 N.E.2d 18. Petitioners contend Connie, represented by counsel, is charged with this knowledge and, therefore, her petition necessarily calls the validity of the executor clause into question by requesting her appointment as the sole executor. Petitioners further contend the trial court could not appoint Connie alone as executor "without a concomitant declaration by the court that the will provision calling for four co-executors is invalid." We disagree.

¶ 24 "While the right of a testator to name an executor is not an unrestricted right to have that person so act, the selection should not be set aside lightly. \*\*\* This selection should be altered only for the specific reasons enumerated" in the Probate Act. *In re Estate of Kuhn*, 87 Ill. App. 2d 411, 423, 231 N.E.2d 97, 103 (1967) (The *Kuhn* court relied on section 276 of the Probate Act of 1965 (Ill. Rev. Stat. 1965, ch. 3, ¶ 276). The language in section 276 is materially identical to the language in section 23-2 of the Probate Act of 1975, which applies in this case. Compare Ill. Rev. Stat. 1965, ch. 3, ¶ 276 and 755 ILCS 5/23-2 (West 2012)). Section 23-2 of the Probate Act of 1975 provides a court may, on petition by any interested party or on its own motion, remove an executor for specific reasons set forth in subparagraphs (a)(1) through (a)(9) and for "other good cause," as set forth in subparagraph (a)(10). 755 ILCS 5/23-2(a)(1) to



(a)(10) (West 2012). As a matter of procedure, a court may well have to appoint the executor designated in a will and then remove said executor in accordance with section 23-2. In any event, the appointment of an executor is not nearly so set in stone as petitioners would have this court believe. We make no finding of law in this regard. We merely reference section 23-2 to illustrate circumstances where a court might decline to allow a designated executor to so act without having to declare the executor provision invalid.

¶ 25 There is a difference between asking the trial court to declare a provision of a will wholly invalid and informing the court of a potentially unworkable situation. As discussed above, Connie did not call the validity of any provision in Lucille's will into question. Rather, her petition advised the court of the intractable relationship between herself and her siblings and raised her concerns as to their collective ability to act as executors.

¶ 26 In keeping with Illinois law, which disfavors forfeiture, we construe the *in terrorem* clause strictly and with a reasonable construction in favor of the beneficiary. *Clark*, 398 Ill. at 540, 76 N.E.2d at 441; *Mank*, 298 Ill. App. 3d at 826, 699 N.E.2d at 1107. We find Connie's petition, withdrawn before the trial court entered the order admitting Lucille's will to probate, did not contest the validity of the will, triggering forfeiture. Because we find the clause inapplicable to this situation, we need not reach the question whether enforcement would violate Illinois law or public policy. *Clark*, 398 Ill. at 540, 76 N.E.2d at 441 (where *in terrorem* clause is inapplicable, we need not determine its validity); *Ruby v. Ruby*, 2012 IL App (1st) 103210, ¶ 30, 973 N.E.2d 361. Therefore, we affirm the court's judgment denying petitioners' petition to declare Connie's rights and benefits under Lucille's will forfeit.

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, we affirm the trial court's judgment.

¶ 29

Affirmed.