



DUNCAN V. RAWLS

📅 March 1, 2020

🏛️ [Case Summary, Estate Planning, In Terrorem Clause, Trusts, Wills](#)

📍 [Georgia](#)

🎓 [Steven J. Reading](#)

🔌 off



The Georgia Court of Appeals is the intermediate appellate court in Georgia. It was established in 1906 and has fifteen judges who serve in five divisions. The Court of Appeals has statewide appellate jurisdiction of all cases except those involving constitutional questions, murder, and habeas corpus cases where original appellate jurisdiction lies with the Supreme Court. The Court of Appeals may certify legal questions to the Supreme Court ([Source](#)).

ABSTRACT

Case Name: Duncan v. Rawls 812 S.E.2d 647 (Ga. Ct. App. 2018).

Jurisdiction: Court of Appeals of Georgia.

Plaintiff(s): Jenifer Duncan, et al.¹

Defendant(s): Olga Rawls, et al.²

Concepts: Wills; Trusts; In Terrorem Clause.

Nature of Case: Whether and under what circumstances Georgia public policy prohibits enforcement of an in terrorem, or no contest, provision of a trust.

Lower Ct. Decision: (1) The no contest provision contained in Mrs. Goizueta's August 2013 Trust is valid and enforceable under the Georgia Trust Code. (2) The no contest provision in the August 2013 Trust is not illegal, impossible, or against public policy in Georgia. (3) Enforcing the no contest clause in the August 2013 Trust does not deprive Respondents of the constitutional right to due process. (4) Petitioners are entitled to summary judgment on Respondents' Counterclaim as a matter of law.

Appellate Decision: Judgment affirmed in part, vacated in part, and case remanded with direction.

INTRODUCTION

In February 2013, Ms. Olga Goizueta executed the 31st amendment and restatement of her revocable trust, naming two of her children as trustees. The trust included Schedule B, providing for monetary gifts for 15 of Ms. Goizueta's employees. The trust included an in terrorem clause.³ Schedule B was amended in March 2013, reducing some of the gifts. On August 1, 2013, the 32nd amendment and restatement of the revocable trust occurred. This trust also had the in terrorem clause, but it omitted the Schedule B in its entirety.

Ms. Goizueta died in 2015. The children, as trustees, made distributions, but in an amounts less than specified in the original Schedule B, to some of the 15 employees. The fourteen appellants retained counsel, sending a letter asking that the full amounts under Schedule B be paid. The trustees therein filed for a declaratory judgment that the August 2013 trust was valid, and that the beneficiaries had forfeited their rights by contesting the trust. The beneficiaries counterclaimed undue influence by the children, breach of fiduciary duty, and tortious interference with their expectations of gifts.

BACKGROUND

The Court recognized that [OCGA § 53-12-22 \(b\)](#),⁴ as written, does not embody all possible law regarding the enforceability of in terrorem clauses in trusts,⁵ but that “a condition in terrorem shall be void unless there is a direction in the trust instrument as to the disposition of the property if the condition in terrorem is violated, in which event the direction in the trust instrument shall be carried out.”⁶

The appellants argued that even if the clause satisfies [OCGA § 53-12-22 \(b\)](#), the Court should adopt a good faith/probable cause exception to the enforceability of such a clause.⁷ Under Georgia law, a trust may be attacked where the trust results from undue influence,⁸ but as noted, in terrorem clauses protecting against such a challenge are allowed under Georgia law with only codified limitation.

Appellate courts have relied on authorities addressing no contest clauses in wills when analyzing no contest clauses in trusts⁹ but there are clear differences in the codified law regarding trusts.¹⁰ There are many forms of good faith/probable cause exceptions that have been a part of the law in other states for many years¹¹ and included in the Uniform Probate Code¹² and the Restatement (Second) of Property.¹³

There is an exception to the enforcement of in terrorem clauses when litigation is brought seeking to require a trustee to comply with his fiduciary duties.¹⁴ Indeed in terrorem clauses are enforceable against challenges to a will itself, such as a caveat that seeks to “destroy the Will altogether,” but not enforceable against “a petition for accounting and for the removal of an executor ... because it first affirms the validity of the will.”¹⁵

CASE DESCRIPTION

The General Assembly revised the Georgia Trust Code in 2010, it did not codify a good faith/probable cause exception at that time. Therefore there is no statutory good faith/probable cause exception to enforcement of in terrorem clauses in the Trust Code and no provision for a public policy exception in [OCGA § 53-12-22](#). It was further stated that “[T]he

legislature, and not the courts, are empowered by the Constitution to decide public policy, and to implement that policy by enacting laws.”¹⁶

The appellants’ claim of tortious interference with the expectation of a bequest or gift and whether such a claim also falls into the above-exception to enforcement of in terrorem clauses¹⁷ was unaddressed by the trial court and remanded back to the trial Court for decision.

CONCLUSION

The appellants first argued that Georgia should recognize a probable cause exception to enforcement of in terrorem provisions, and that by holding otherwise, the lower court misinterpreted [OCGA § 53-12-22 \(b\)](#). The appellants further argued that they should be able to bring their claims in good faith without forfeiting what they were given under the trust.

The trial court however enforced the no-contest clause, and the appellate court affirms. There is no exception in state law for challenges made in good faith or with probable cause. However, the Court held that the no contest clause does not extend to claims of breach of fiduciary duty, and it may not apply to the claim of tortious interference.

The case was remanded for further proceedings. In October 2018, the Georgia Supreme Court denied the Certiorari Petition¹⁸ and will not review the lower court’s ruling and that Georgia Court of Appeals’ decision stands.

-
1. The fourteen appellants are Jenifer Duncan, Jennifer Curry, Amanda Smith, Shelia McCloud, Rosalba Arellano Jones, Judy Cunningham, Gloria Espinosa, H.L. Bowen, Clyde Thomas Padgett, W.F. Timms, E.G. Brown, C.W. Payne, Stephen W. Norman, and Joseph Cochran. ↩
 2. Olga Rawls and Javier Goizueta, Individually, and in Their Capacities as Co-Executors of the Estate of Olga Casteleiro de Goizueta, Deceased; in Their Capacities as Co-Trustees of the Goizueta Family 2013 Trust dated August 1, 2013; and in Their Capacities as Co-Trustees of the Olga Casteleiro de Goizueta Pourover Trust dated as of August 1, 2013. ↩
 3. “Should any beneficiary, singly or in conjunction with any other person or persons, directly or indirectly (whether or not in good faith and with probable cause) ... contest or

initiate proceedings to contest in any court the validity of all or any part of my Will or this Agreement or any other trust created by me or, in any manner, attack or seek to impair or invalidate any of the provisions of my Will or this Agreement or any other trust created by me or to prevent any provision of my Will or this Agreement or any other trust created by me from being carried out in accordance with its terms ... that beneficiary shall be subject to forfeiture under this Article whether or not such action is taken in good faith or with probable cause, it being my intention that any such action shall result in forfeiture no matter what the facts and circumstances surrounding such action.” ↵

4. Ga. Code § 53-12-22 (a) A trust may be created for any lawful purpose. (b) A condition in terrorem shall be void unless there is a direction in the trust instrument as to the disposition of the property if the condition in terrorem is violated, in which event the direction in the trust instrument shall be carried out. ↵
5. The Probate Code has a similar provision regarding wills. See OCGA § [OCGA § 53-4-68 \(b\)](#). ↵
6. See *also* Mary F. Radford, Wills, Trusts, Guardianships, and Fiduciary Administration, 65 Mercer L. Rev. 295, 297 (2013) (“Both the Georgia Probate Code and the Georgia Trust Code recognize the validity of [no contest] clauses provided that the will or trust contains a direction as to the disposition of the forfeited property in the event the clause is violated.”). ↵
7. So argued that such an exception might provide that in terrorem clauses are enforceable “unless probable cause exist[s] for instituting the proceeding,” Restatement (Second) of Property: Donative Transfers § 9.1, and that such a proceeding be brought in good faith. See 1 Ga. Wills & Administration § 8:7 (“Many states refuse to enforce no-contest clauses if there is probable cause for the contest or the contest is brought in good faith.”). ↵
8. See, e.g., *Davison v. Hines*, [291 Ga. 434, 437](#) (1), [729 S.E.2d 330](#) (2012) (some evidence showed that persons with a confidential relationship took such an active role creating a trust that their will was substituted for that of the principal such that the documents were the product of undue influence). ↵
9. See, e.g., *Snook v. Sessoms*, [256 Ga. 482, 482](#), [350 S.E.2d 237](#) (1986), citing *Cohen v. Reisman*, [203 Ga. 684, 685](#), [48 S.E.2d 113](#) (1948). ↵
10. Specifically, [OCGA § 53-4-68 \(a\)](#), pertaining to wills, provides that “[c]onditions in a will[, such as a condition in terrorem,] that are impossible, illegal, or against public policy shall be void.” Subsection (a) to the trust statute, which parallels [OCGA § 53-4-68 \(a\)](#), provides only that “[a] trust may be created for any lawful purpose.” [OCGA § 53-12-22 \(a\)](#). Thus, cases that quote the statute pertaining to wills to the effect that “conditions which are impossible, illegal, or against public policy shall be void” are distinguishable. See,

- e.g., *Sinclair v. Sinclair*, 284 Ga. 500, 502 (2), 670 S.E.2d 59 (2008) (involving an in terrorem clause in a will); *Taylor v. Rapp*, 217 Ga. 654, 656, 124 S.E.2d 271 (1962) (citing former version of OCGA § 53-4-68); *Cohen v. Reisman*, 203 Ga. 684, 684 (2), 48 S.E.2d 113 (1948) (involving an in terrorem clause in a will). ↩
11. 1 Ga. Wills & Administration § 8:7 (“Many states refuse to enforce no-contest clauses if there is probable cause for the contest or the contest is brought in good faith.”). ↩
 12. See Uniform Probate Code § 3-905 (1969) (“A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.”). ↩
 13. See Restatement (Second) of Property, Don. Trans. § 9.1 (1983) An otherwise effective provision in a will or other donative transfer, which is designed to prevent the acquisition or retention of an interest in property in the event there is a contest of the validity of the document transferring the interest or an attack on a particular provision of the document, is valid, unless there was probable cause for making the contest or attack. ↩
 14. See *Callaway v. Willard*, 321 Ga. App. 349, 358 (3) (a), 739 S.E.2d 533 (2013). Such a clause cannot be enforced against a litigant when “the purpose of such litigation is to enforce the will and to compel the executor to carry out its terms.” *Cohen*, 203 Ga. at 685 (4), 48 S.E.2d 113. Similarly, and in a case following *Reisman* but involving a trust, it was held that “[a] beneficiary [of a trust] assuredly is empowered to enforce the provisions of a trust, no matter the terms of any in terrorem clause.” *Snook v. Sessoms*, 256 Ga. 482, 482, 350 S.E.2d 237 (1986) ↩
 15. *Norman v. Gober*, 292 Ga. 351, 354 (1), 737 S.E.2d 309 (2013). ↩
 16. *Commonwealth Inv. Co. v. Frye*, 219 Ga. 498, 499, 134 S.E.2d 39 (1963); see also *Perdue v. Baker*, 277 Ga. 1, 14 (6), 586 S.E.2d 606 (2003) (“The core legislative function is the establishment of public policy through the enactment of laws.”). ↩
 17. See, generally, 1 Ga. Wills & Administration § 4:10, and cases cited therein. ↩
 18. S18C1055. DUNCAN et al. v. RAWLS et al. (A17A2052) ↩

Posted by Steven J. Reading

Steven Reading holds an LL.B from the University of London and is an GGU Law LL.M Candidate for 2020. He is a startup founder with expertise in funding, scaling, and selling companies. He has spent the past fifteen years building online communities and developing global startup ecosystems. He currently works as the principal consultant in a firm connecting constituents from

international markets to global Innovation Hubs. He practices an open innovation approach to digital transformation based upon connecting Corporations, Startups, VC's, Government Agencies and Universities, through technology, to the Modern Consumer. Steven has lived and worked in the Bay Area for 25 years and now resides in Berkeley, California.



RECENT POSTS

[Interview: Robert Patterson](#)

[Interview: Nathan Pastor on Barefoot v. Jennings](#)

[Write-On Competition](#)

[Video Interview: Richard Rothstein](#)

[In re Estate of Easterday](#)

RECENT COMMENTS

ARCHIVES

[November 2020](#)

[October 2020](#)

[July 2020](#)

[June 2020](#)

[May 2020](#)

[April 2020](#)

[March 2020](#)

February 2020

CATEGORIES

BEAT

Case Summary

Charitable Contribution

Charitable Deduction

Civil Procedure

Constitutional Law

Contracts

Criminal Law

DC Circuit

Divorce

Eight Circuit

ERISA

Estate Planning

Evidence

GGU Presents

GILTI

In Terrorem Clause

Insurance

Interview

Life Insurance

Ninth Circuit

Opportunity Zones

Preemption

Probate

[SCOTUS](#)

[Second Circuit](#)

[Stock](#)

[Tax](#)

[TCJA](#)

[Trusts](#)

[Uncategorized](#)

[US Tax Court](#)

[Whistleblower](#)

[Wills](#)

META

[Log in](#)

[Entries feed](#)

[Comments feed](#)

[WordPress.org](#)



CONTACT US!

Via our contact form or
through the avenues below.

GGU Tax & Estate
Planning Review
Golden Gate University
School of Law
536 Mission Street
San Francisco, CA 94105
[ContactTaxReview@ggu.edu](mailto>ContactTaxReview@ggu.edu)



TAGS

[Connecticut](#) [Georgia](#) [Minnesota](#) [North Carolina](#) [Oklahoma](#) [Oregon](#) [Pennsylvania](#) [Texas](#)

[Privacy Policy](#)

