Trigger Warning: the "Safe Harbor" at Section 420

In 2014, the Missouri legislature enacted a statute[1] enabling a trust beneficiary to test the water before committing to a petition or motion that might trigger an *in terrorem* clause, forfeiting her interest in the trust.

Section 456.4-420.1, RSMo. says an "interested person" may petition the court for an "interlocutory determination" whether the proposed or alternative pleading would trigger a forfeiture "that is enforceable under applicable law and public policy."[2] Further subsections provide

> (a) that the petition is to be verified, and that the court is to consider no evidence apart from the verified allegations, the text of the trust instrument, and such extrinsic evidence as might be necessary to clarify any ambiguity in the clause itself,
>
> (b) that the petitioner could bring this as a separate action, but if she joins with it her substantive claims, the court is to take up this question first, separately,
>
> (c) that the order determining whether the clause would be triggered -- and whether the forfeiture would be enforceable -- may then be separately appealed, subject to the usual rules as to interlocutory appeals, and
>
> (d) that proceedings on the substantive claims may or may not be stayed, but if the order determining the "applicability" of the *in terrorem* clause is vacated or reversed on appeal, "no interested person shall be prejudiced" by having relied on it in the interim.

Subsection 7 gives a nonexclusive list of situations in which an *in terrorem* clause is "not enforceable." These do not expressly include a petition to remove or surcharge the trustee for breach of trust.

Subsection 8 confirms the court's authority under section 456.10-1004, RSMo., to award costs, expenses, and lawyers' fees as equity might require.

why is this necessary

Absent this statute, a beneficiary might have sought to plead her case in the alternative, asking the court first to rule on the question whether counts two and three, etc., or a proposed amended petition, would trigger the

clause, and if so whether the clause was enforceable, and then take up the substantive counts only if she got favorable rulings on these questions, from the trial court or on an interlocutory appeal.[3]

But the strategy was not without risk, and the statute was drafted to alleviate that risk.

In particular, the drafting committee was concerned[4] that an *in terrorem* clause might purport to trigger a forfeiture if a beneficiary sought to enforce mandatory provisions of the trust code, notably the trustee's duty "to act in good faith and in accordance with the purposes of the trust,"[5] and the duty to keep "qualified" beneficiaries "reasonably informed about the administration of the trust and of the material facts necessary for them to protect their interests."[6]

It has been eight years, and the statute has been before appellate courts five times. The following discussion is somewhat out of chronological sequence, reserving the March 2020 opinion of the Missouri Supreme Court in *Knopik v. Shelby Investments, LLC*[7] for last.

Finkle-Rowlett Trust

The petitioner in *Finkle-Rowlett Trust v. Steins*[8] sought an interlocutory judgment that the second and third counts of his petition would not trigger the *in terrorem* clause at issue. The Nodaway County probate court ruled adversely on the question, but did not certify that ruling for an interlocutory appeal.

The petitioner nonetheless moved for summary judgment on the remaining counts, for a declaratory judgment that the deceased settlor had lacked capacity to execute the second amendment to her revocable trust, and for a temporary restraining order to prevent distribution of the trust until that matter had been resolved.

But the court ruled that the fact that the settlor had been adjudicated incapacitated shortly after executing the trust amendment did not foreclose the possibility that she had capacity to execute the instrument at the time, and denied the summary judgment motion.

The court then granted the trustee's motion to dismiss the second and third counts of the petition on the ground that these violated the *in terrorem* clause, causing the petitioner to forfeit his interest in the trust and leaving him without standing to pursue those claims.

The Western District appeals court reversed, saying this result assumed without actually finding that the clause was enforceable, and remanded for a determination on that question.

The trustee had filed a motion to dismiss the appeal as untimely, arguing that the time for taking an appeal was when the lower court ruled adversely on the threshold question. But the appeals court said that order was not final and appealable until the trial court certified it as such, which it did only on the petitioner's later motion.

On remand, the case was assigned a different judge, who confirmed that the case could not be determined on a motion for summary judgment and there would have to be a trial on the question of the settlor's capacity at the time she executed the second amendment.

The petitioner was unable to persuade the court to release him from a $30k bond the first judge had ordered him to post against the possibility all this expensive lawyering might not deliver his anticipated result.

His counsel withdrew, with the court's leave. Two months later, after some skirmishing over discovery, the parties announced a settlement, which the court approved. At least some portion of the petitioner's bond was released to him.

Thomas v. H'Doubler

The Southern District appeals court ruled twice in the case of *Thomas v. H'Doubler*, first in December 2020[9] and again in June 2021.[10]

The first appeal was from an interlocutory order that mistakenly referred to a second amended petition, rather than to the third, which had been filed with leave in the face of a motion for summary judgment on the second, omitting the offending paragraphs.

Ultimately the appeals court dismissed this appeal as premature, but in the meantime the lower court had entered summary judgment against the petitioner on the substantive claims, again as pled in the second amended petition, not the third, and in a separate order directed him to pay almost $50k toward the trustee's lawyers' fees. The petitioner appealed both these orders as well.

The appeals court, after rejecting the trustee's motion to dismiss on grounds of *res judicata*, since nothing was actually decided on the first appeal, determined

(a) that the probate court had erred by granting summary judgment on the second amended petition, which had been abandoned by the filing of the third, and the petitioner's inaction for several months in the interim could not be construed as "proceeding further," with the second amended complaint within the meaning of section 456.4-420.2, RSMo. Also,

(b) that the fee award, which was premised on the summary judgment, could not stand.

On remand, the probate court was to issue an interlocutory judgment on the first count of the third amended petition, determining whether the subsequent counts, as repleaded, would still violate the *in terrorem* clause. At this writing that had not yet occurred.

Wooldridge v. Hull

In *Wooldridge v. Hull*,[11] the Southern District appeals court ruled that the trustee, in his capacity as such, did not have standing to appeal an interlocutory order that the petitioner would not be violating the *in terrorem* clause by pursuing her substantive claims.

The trustee had also appealed in his individual capacity as a beneficiary of the trust, but he had allowed that appeal to be dismissed for failure to prosecute. The appeals court said the trustee was not, in that capacity, aggrieved by the order, and he could not assert standing as a fiduciary on behalf of other beneficiaries, as he had a conflicting interest, being himself a beneficiary.

On remand, the case was settled on the third day of a bench trial.

Goldstein Trust

On cross appeals in *Matter of Goldstein Trust*,[12] the Eastern District appeals court affirmed the trial court's rulings (a) that the proposed amended petition would violate the *in terrorem* clause at issue, but (b) that the mere filing of the exploratory petition did not.

Unfortunately we learn nothing from the one paragraph *per curiam* order as to the scope of the subject clause or the allegations of the proposed amended petition.

The judgment from which the appeal was taken[13] says the proposed amended petition "seeks to impose liability on the Defendants for actions [already]

taken in their roles as Trustees," and thereby "to invalidate or annul provisions of the Trust which set forth the duties of the Trustees" -- evidently some kind of exculpatory language --, but "fails to allege any gross neglect or fraudulent misconduct by the Defendants," nor to allege that the defendants "were dishonest, engaged in self-dealing[,] or misappropriated trust assets."[14]

While the appeal was pending, the trial court entered an order chastising the individual parties on both sides and requiring them to pay substantial portions of each other's lawyers' fees.[15]

On remand, apparently the petitioner decided not to press the matter further. But two of his lawyers turned up on opposite sides of a case filed a year later in Jackson County, which ended up in front of the Missouri Supreme Court and was decided incorrectly there.

Knopik v. Shelby Investments, LLC

The trust instrument at issue in *Knopik* required distribution to the petitioner of $100 per month for a term of four years, after which the corpus was to revert to the settlor, a single-member LLC created just before the trust was funded.

The trustee, itself an LLC created about a week before the trust was funded, had made exactly one payment and then told the petitioner it would make no further distributions. An obvious breach of trust, which the trustee readily admitted in its answer to the beneficiary's petition to remove it.

Apparently none of this struck the trial court as contrived.

The trustee counterclaimed that by filing this petition the beneficiary had triggered an *in terrorem* clause, thereby forfeiting his interest in the trust and stripping him of standing to pursue the claim.

> The clause at issue specifically forbade the beneficiary
> [to] make a claim against a trustee for maladministration or breach of trust[, or to] attempt to remove a trustee for any reason, with or without cause[,]

as though maybe the settlor had anticipated this very scenario.

The petitioner chose not to seek the protection of the statute, nor to plead in the alternative, but to proceed directly on the substantive claims.

Possibly the idea was to force the question whether a clause that purports to relieve the trustee entirely of its fiduciary responsibilities is

unenforceable as against public policy.[16] But neither the the trial court,[17] nor the appeals court,[18] nor the Supreme Court[19] took up that question on its merits.

The trial court ignored the question altogether, and both the appeals court and the Supreme Court said the petitioner "should have"[20]availed himself of the statutory "safe harbor," and that because he did not they need not consider whether the *in terrorem* clause might be unenforceable as a matter of public policy.

In effect the court held the clause operated as a condition subsequent to the beneficiary's interest in the trust, regardless of the merits of the claim. The result is that no one would have standing to question the trustee's actions.

In a concurring opinion, Judge Paul C. Wilson said the court might dismiss an appeal on the ground that the case was "fictitious or collusive," but "only if the record before the court demonstrates this is so," which he said it did not here, adding that the court "decline[d] to inquire of the parties and their counsel further on this issue."[21]

legislative maneuvering

While *Knopik* was still pending in the trial court, someone brought a legislative proposal to the chair of the Missouri House Judiciary Committee to add exceptions to the "laundry list" in subsection 7 of section 456.4-420 for any petition, motion, or other pleading for relief from a breach of trust, apparently regardless of merit.

The draft language was added on the House floor[22] to a bill that had already cleared committee, but it did not survive review by the Senate Judiciary Committee.

The organized bar had intervened with a counterproposal[23] that would have carved out situations in which the alleged conduct could be permitted by the trust instrument consistently with section 456.10-1008, RSMo.,[24] or had been ratified by the beneficiary per section 456.10-1009, RSMo. Apparently the parties were unable to agree on a compromise, and the language was simply stripped from the Senate substitute for the House bill.

concluding commentary

In the author's view, *Knopik* was decided incorrectly.

Analytically, the *in terrorem* clause is an affirmative defense to the petition to remove. Here it was also raised as a counterclaim for declaratory judgment. In either of these procedural contexts the question whether the clause is unenforceable should be fair game. The question does not simply disappear because the legislature has created an alternative mechanism for resolving it.

1 The provisions under discussion here were included in H.B. 1231, merged with S.B. 500, merged with S.B. 621, enacted in the second regular session of the 97th General Assembly.

2 The bill also included a parallel provision, codified at section 474.395 RSMo., but largely cross-referencing section 456.4-420, allowing an "interested person" to seek similar relief with respect to an *in terrorem* clause under a decedent's will.

3 See for example *Hunter v. Hunter*, 838 S.E.2d 721 (Va. 2020).

4 Per e-mail dated April 22, 2013 to members of the state bar probate and trust law committee from David English, then chair of the committee, forwarding a copy of the drafting committee's report authored by Robert Selsor, copy in author's possession.

5 Section 456.1-105.2(2), RSMo.

6 Section 456.8-813.1, RSMo.

7 597 S.W.3d 189 (Mo. banc 2020).

8 558 S.W.3d 95 (Mo.App.W.D. 2018), no motions.

9 613 S.W.3d 905 (Mo.App.W.D. 2020), no motions.

10 627 S.W.3d 449 (Mo.App.W.D. 2021), transfer denied.

11 604 S.W.3d 364 (Mo.App.S.D. 2020), no motions.

12 495 S.W.3d 199 (Mo.App.E.D. 2016), transfer denied.

13 Order entered May 14, 2015 in cause no. 1322-PR00895, 22nd Circuit.

14 It is unclear whether these criteria are meant to track section 456.10-1008, RSMo., which says language in a trust instrument purporting to relieve the trustee of liability for a breach of trust "committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries" is unenforceable.

15 Order entered October 16, 2016 in cause no. 1322-PR00895, 22nd Circuit.

16 See text accompanying footnote 14 above.

17 Order entered July 09, 2018 in cause no. 17P8-PR01016, 16th Circuit.

18 Docket no. WD81931 (Mo.App.W.D. 05/14/19).

19 597 S.W.3d 189 (Mo. banc 2020)

20 In a footnote on the last page of its slip opinion, the appeals court made a point of saying it did not reach the question whether a challenge to the applicability and enforceability of the *in terrorem* clause, if properly made under section 456.4-420, would have been successful.

That footnote, and similar text at page 6 of the Supreme Court's slip opinion, 597 S.W.3d 189, 192-3 (Mo. banc 2020), treats the the statutory "safe harbor" mechanism as mandatory rather than discretionary with the petitioner.

21 597 S.W.3d 189, 195 (Mo. banc 2020), Wilson, J., concurring.

22 House Amendment 1, offered by Rep. Canejo on February 28, 2018, House Journal pages 928 ff., second regular session, 99th General Assembly.

23 Copies of relevant e-mail correspondence are in the author's possession.

24 See text accompanying footnote 14 above.