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## FORFEITURE CLAUSES IN TRUSTS

The Supreme Court of Virginia recently addressed the issue of the construction and effect of a forfeiture (no-contest) clause contained in an inter vivos trust. In *Keener v. Keener* (Record No. 082280, Sep. 18, 2009), the testator, father of seven children, executed a “pour-over” will that left all of his property to his revocable living trust. The will named the testator’s eldest son as executor. The testator was the sole trustee of the trust during his lifetime, and his son was successor trustee. The will and trust were executed in 2003.

In March of 2007, one of the testator’s daughters, Debra, argued with one of her sisters in the presence of their father. She left the house with the testator’s will and trust documents, made copies of them, and returned the original papers. At the time of the testator’s death five months later, Debra was on speaking terms with only one of her siblings. A few weeks after the argument, the testator executed an addendum to his trust that provided, “At my death: 1. Any person that objects to or contests any provision of this Trust, in whole or in part, shall forfeit his or her entire distribution otherwise payable under this Trust and receive only \$1.00 under this trust and will receive no other distribution from my Trust nor from my estate.” The testator’s will did not contain a no-contest or forfeiture provision.

At the time of the testator’s death, the original will was in the possession of the son named as executor of the will. He did not offer the will for probate because he thought probate was not necessary since “the Will was referring everything to the trust.” Debra went to the Office of the Clerk of the Circuit Court of Prince William County, and learned that her father’s will had not been offered for probate. She tried to offer a copy of the will for probate, but was told that the original will was necessary. Debra later testified that two of her siblings told her that “there is no will.” On October 15, 2007, Debra applied to the Clerk of the Circuit Court of Prince William County for administration of her father’s estate, stating under oath that he died intestate. The Clerk entered an order appointing Debra the administratrix of her father’s estate and issued letters of administration to her.

Three days later, the son serving as successor trustee of the trust complied with the distribution provisions of the trust and made partial distributions to the beneficiaries. When he learned that Debra had qualified as administratrix of their father's estate, the son stopped payment on Debra's check on the ground that she had violated the no-contest provision in the last addendum to the trust. He and two of his siblings brought suit in the circuit court asking for admission of the original will to probate, removal of Debra as administratrix, and appointment of the son as executor as provided in the will. The petitioners alleged that Debra's action to qualify as administratrix amounted to a contest of the trust. Debra's answer stated that she would have no objection to the admission of a properly executed original will to probate, and that she would "cooperate in correcting the probate records" and change the fiduciary. She also filed a counterclaim and later filed an amended counterclaim. The circuit court ruled that the original will would be admitted to probate, thus terminating Debra's authority to act as administratrix. Regarding Debra's counterclaim and affirmative defenses, the court held "that her action in qualifying as administratrix was, in effect, a contest of all of the provisions of the trust because, if it had been successful, it would have resulted in the distribution of all assets remaining in the testator's ownership at the time of his death directly to his heirs at law, and not to the trust as provided for in his will." The court said that Debra's conduct triggered the forfeiture clause in the final addendum to the trust, and that she forfeited her interest in the trust, and had no standing to assert any claims against the trustees.

The Supreme Court of Virginia said that whether a no-contest clause in a will has been triggered presents a mixed question of law and fact. The Court had previously adopted the rule that "a no-contest provision in a will should be strictly enforced according to its terms." The Court then addressed a question of first impression in Virginia, "whether the same principles we apply to a no-contest clause in a will should apply with equal force to such language appearing in a trust that constitutes a part of a decedent's testamentary estate plan." The Court stated that "[b]ecause the testator relied on the trust for the disposition of his property, we consider it appropriate to give full effect to no-contest provisions in such trusts for the same reasons that support the enforcement of such provisions when they appear in wills."

The Court then considered whether Debra's actions in opening intestate administration of her father's estate triggered the no-contest provision of the trust. The Court said that no-contest provisions are strictly construed because the testator has the opportunity to select the language that expresses the testator's intent, and because "provisions that work a forfeiture are not favored in the law generally and will not be enforced except according to their clear terms." The Court applied those principles and said that Debra's acts did not bring her within the language in the trust. The trust did not include a provision stating that the testator's intent was to fund the trust through the will, and the will did not contain a forfeiture provision. The Court said that the testator could have included language in the will or trust that would have been broad enough to include acts such as Debra's, but did not choose to do so. The Court reversed the judgment of the circuit court and remanded the case for further proceedings.

The attorneys at Oast & Hook can assist clients with their insurance, investment, estate, long-term care, veterans' benefits and special needs planning issues.

### Ask Allie

O&H: Allie, we hear that your veterinarian has advised you to have an exercise program. Please tell us about it.

Allie: Sure! It all started with my trip to meet my new vet. A nice fellow, or so I thought, until he told my mom that I am a bit "pudgy" in the middle. Must have happened while I ran on vacation. Well no thanks to him, I now have a workout incorporated in my "laser" play. That's right. I said it: "MY WORKOUT!" You won't believe what mom has me doing. Each morning, while she "sits," she moves that laser light so quickly that she has me running in circles and zig-zag patterns. With these maneuvers, you would think I was at soccer practice. I'm also crawling under the s-curve scratcher and jumping quickly over it, and I liked that scratcher, too. If I hear another word about "sets" and "reps," I will scream or rather "MEOW" to high heaven. I let mom know when I have had enough by first sitting down and then falling over on my side. It may not present a flattering picture, but it gets my point across. The important thing is that dogs and outdoor cats may get a lot of exercise, while indoor cats may not. It's important that indoor cats (and people) get exercise to help control their weight and keep them in good health. Although I'm not crazy about the idea, I must admit the exercise has already made a difference. Don't forget to jog today, or at least jump over a scratcher!

### Announcements

Oast & Hook will hold its quarterly Social Workers and Administrators Breakfast on November 19th at the Russell Memorial Library, 2808 Taylor Road Chesapeake, Virginia. Registration begins at 9:15 a.m. and the presentation begins at 9:30 a.m. Questions will be answered from 10:30 a.m. to 11:00 a.m. The breakfast is designed to be both a networking opportunity and also an educational opportunity for area professionals who work with seniors, the disabled, and their families. Seats are limited, so please register early. To register for this breakfast, please phone Linda Gerber at 757-967-9704.

Oast & Hook is sponsoring a "Shred Day" from 9:00 a.m. to noon, Saturday, November 14th. Stealth Shredding will park one of its trucks at Oast & Hook's Virginia Beach office, and you will be able to bring your personal records to be shredded at no cost. If you have any questions or comments about Oast & Hook's November 14th Shred Day, then please phone Linda Gerber at 757-967-9704.

### Distribution of This Newsletter

Oast & Hook encourages you to share this newsletter with anyone who is interested in issues pertaining to the elderly, the disabled and their advocates. The information in this newsletter may be copied and distributed, without charge and without permission, but with appropriate citation to Oast & Hook, P.C. If you are interested in a free subscription to the *Oast & Hook News*, then please e-mail us at [mail@oasthook.com](mailto:mail@oasthook.com), telephone us at 757-399-7506, or fax us at 757-397-1267.