STATE OF MICHIGAN

COURT OF APPEALS

In re MARY E. GRIFFIN Revocable Grantor Trust.

OTTO NACOVSKY,

Petitioner-Appellee,

v

PRISCILLA HALL, Trustee,

Respondent-Appellant.

FOR PUBLICATION
December 2, 2008

No. 277268
Shiawassee Probate Court
LC No. 05-032492-TV

Advance Sheets Version

Before: Hoekstra, P.J., and Cavanagh and Zahra, JJ.

ZAHRA, J. (*dissenting*).

I respectfully dissent. MCL 700.2518 expressly applies to a "provision in a *will* . . . ." (Emphasis added.) I cannot agree with the majority that "while MCL 700.2518 does not apply to trusts, it reflects this state's public policy that [*in terrorem*] clauses in trust agreements are unenforceable if there is probable cause for challenging the trust." Ante at 4.

In reaching its decision that *in terrorem* provisions are unenforceable if there is probable cause for challenging the trust, the majority addresses whether an *in terrorem* clause in a trust agreement is contrary to public policy. In *Royal Property Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 722; 706 NW2d 426 (2005), this Court reiterated that,

> "[i]n defining 'public policy,' it is clear to us that this term must be more than a different nomenclature for describing the personal preferences of individual judges, for the proper exercise of the judicial power is to determine from objective legal sources what public policy *is*, and not simply assert what such policy *ought* to be on the basis of the subjective views of individual judges. This is grounded in Chief Justice Marshall's famous injunction to the bench in *Marbury v Madison*, 5 US (1 Cranch) 137, 177; 2 L Ed 60 (1803), that the duty of the judiciary is to assert what the law 'is,' not what it 'ought' to be. [Emphasis in original.]"

For this reason,

> "'[c]ourts must proceed with caution in determining what exactly constitutes Michigan's "public policy," and not merely impose its [sic] belief of what public policy should be. In other words, Michigan's "public policy" must be clearly apparent in "our state and federal constitutions, our statutes, and the common law," as well as our "administrative rules and regulations, and public rules of professional conduct[.]"'"
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> In other words, "[t]he public policy of Michigan is not merely the equivalent of the personal preferences of a majority of this Court; rather, such a policy must ultimately be clearly rooted in the law. There is no other proper means of ascertaining what constitutes our public policy." [Citations omitted.]

In my opinion, Michigan public policy does not dictate that an *in terrorem* provision in a trust agreement is unenforceable if there is probable cause for challenging the trust. MCL 700.2518 is persuasive evidence that only an *in terrorem* provision in a *will* is unenforceable if there is probable cause for challenging the will. The majority's conclusion effectively reads into MCL 700.2518 a category of legal instruments in which an *in terrorem* provision may be unenforceable. This is an unwarranted judicial expansion of MCL 700.2518. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002). (Stating that nothing will be read into a clear statute that is not within the manifest intention of the Legislature as derived from the language of the statute itself). The best evidence that the Legislature did not intend to allow challenges when the trust agreement contains an *in terrorem* provision is that MCL 700.2518 plainly expresses an intent to allow challenges to a will that contains an *in terrorem* provision. Had the Legislature intended to allow challenges in the face of an *in terrorem* provision within a trust agreement, there is no dispute that it could have done so.

I agree with the majority that the common law of this state, as reflected in *Schiffer v Brenton*, 247 Mich 512, 520; 226 NW 253 (1929), and *Farr v Whitefield*, 322 Mich 275, 280-281; 33 NW2d 791 (1948), is that *in terrorem* clauses in wills are enforceable, irrespective of whether the will contest was in good faith or bad faith. I also agree with the majority that the Legislature, through MCL 700.2518, partially abrogated the common law in regard to *in terrorem* clauses within wills. However, I cannot agree that MCL 700.2518 reflects an intent to partially abrogate the common law in regard to *in terrorem* clauses within trust agreements. And while legal commentators may be correct in speculating that there is no apparent reason to treat *in terrorem* clauses within trust agreements differently from those within wills, I cannot "'assert what such policy *ought* to be on the basis of'" my subjective view. *Royal Property Group, supra* at 722 (citation omitted; emphasis in original).

I would reverse and remand for further proceedings.

/s/ Brian K. Zahra