

**STEVE LEIMBERG'S ESTATE PLANNING EMAIL NEWSLETTER - ARCHIVE**  
**MESSAGE #3204**

**Date: 09-May-25**

**From: Steve Leimberg's Estate Planning Newsletter**

**Subject: Marc Soss on Carlson v Colangelo: What Triggers an In Terrorem Clause Under New York Law**

“Under New York law, an “In Terrorem Clause” is an enforceable provision that may be included within a testamentary document to provide a deterrent to any challenge to the verbiage contained within the document. Many states, excluding Florida, permit these provisions to be included within a testamentary document as a deterrent against challenges to dispositive provisions. In *Carlson v Colangelo*, the New York Court of Appeals, in overruling both lower courts, found that a Plaintiff seeking to enforce a trust's provisions as intended by the grantor did not constitute a challenge to the trust itself and therefore did not violate the In Terrorem Clause contained within the document. The moral is that sometimes you need to appeal lower court rulings to get a ruling consistent with the law.”

Marc Soss provides members with his analysis of *Carlson v Colangelo*.

Marc Soss’ practice focuses on estate planning, probate and trust administration, and corporate law in Southwest Florida. Marc is a frequent contributor to LISI and has published articles in the Florida Bar, Rhode Island Bar, North Carolina Bar, Association of the United States Navy and Military.Com. Marc is a retired United States Navy Supply Corps Officer.

Here is his commentary:

**EXECUTIVE SUMMARY:**

Sometimes three (3) times is a charm when it comes to the interpretation of legal issues. In *Carlson*, the New York Court of Appeals found that a Plaintiff’s lawsuit, which the lower courts deemed to be a violation of an in terrorem clause, was not in fact an attempt to nullify the Trust or challenge its terms but a proceeding to enforce its provisions as written. Further, Plaintiff's declaratory action, that she was a member of Dempsaco LLC, cause of action for breach of fiduciary duty, and an accounting did not amount to a challenge to the Trust or to the grantor's intent.

**COMMENT:**

Beginning in 2004, the Plaintiff, Kristine M. Carlson (“Plaintiff”), engaged in a romantic relationship with Donald P. Dempsey (the “Decedent”). In 2005, Plaintiff invested \$100,000 in Dempsaco LLC, an entity that Decedent had formed to purchase commercial real estate. Subsequently, in 2005, the Decedent was diagnosed with a serious medical condition, and the Plaintiff, a registered nurse, dedicated herself to his care until his death in 2015.

The Decedent’s estate plan included a Pour-Over Will and Revocable Trust which named Crissy Colangelo (“Defendant”) as both the executor and trustee. Both instruments included similar in

terrorem clauses. The estate plan provided for both the Plaintiff and Defendant. The Pour-Over Will provided that “[i]n the event that Dempsey's trust was deemed invalid or otherwise not in existence, the will bequeathed to plaintiff the following:

I give, devise and bequeath all of my interest and to the real property and personal residence located at 122 Eton Downs, Cortlandt Manor, New York 10567, together with all rights I may have under any policies of insurance thereon, but subject to any obligations secured thereby [collectively, 'the Premises'], to KRISTINE M. CARLSON . . . if she survives me, or if she does not survive me, to her then living issue, per stirpes . . .

I give and bequeath all of my interest in and to Dempsaco LLC, a limited liability company operating at 122 Waterbury Manor, Cortlandt Manor, New York 10567, to CHRISSY [sic] COLANGELO, . . . if she survives me, and I direct that when the real property owned by the company is sold, the company shall distribute the sum of Three Hundred Fifty Thousand (\$350,000.00) dollars to KRISTINE M. CARLSON, if she is then living, or if she is not then living, to her then living issue, per stirpes.

The Donald P. Dempsey Revocable Trust (the “Trust”) provided the Plaintiff with real property and an income stream as follows:

After application of paragraph A of this Article, the Trustee shall distribute all of the Grantor's interest or this Trust's interest in and to Dempsaco LLC, . . . to CHRISSY COLANGELO . . . It is the Grantor's sincere wish and desire that CHRISSY COLANGELO, provide a stream of income, not to exceed the sum of Three Hundred Fifty Thousand (\$350,000.00) in total, to KRISTINE M. CARLSON, . . . if she is then living, or if she is not then living, to her then living issue, per stirpes . . .

The Trust further provided that the Trustee shall distribute all of the Grantor's interest or this Trust's interest in and to 122 Eton Downs, Cortlandt Manor, New York 10567, to KRISTINE M. CARLSON, presently residing at 122 Eton Downs, Cortlandt Manor, New York 10567. The balance of the Trust estate was to be distributed to the Defendant, per stirpes.

#### In Terrorem Clause.

The clause provided:

In the event that any heir, distributee, beneficiary, agency, organization or other individual ("challenger") shall contest any aspect of this Trust, or the distribution of the Grantor's assets pursuant to his Last Will, inter vivos Trust Agreement, beneficiary designations or non-probate beneficiary designations, or shall attempt to set aside, nullify, contest, or void the distribution thereof in any way, then the Grantor directs that such rights of such challenger shall be ascertained as they would have been determined had that challenger predeceased the execution of this instrument and the Grantor, without living issue.

### Distribution Plan and Claim:

Approximately two-and-a-half (2.5) years after the Decedent's death, counsel for the Trustee informed the Plaintiff of the real property and stream-of-income bequests. The correspondence stated that the Trustee was of the position that the Decedent had utilized "precatory language" regarding distribution of the stream of income; the Decedent had overestimated the size of his estate; and the Trust, including Dempsaco, lacked funds or assets "to pay anything to [plaintiff]." The correspondence further included a demand that Plaintiff release the Trustee from all liability and waive all of Plaintiff's rights to the income stream of income before the real property would be distributed to her.

### Lawsuit and Arguments:

After failed attempts by the Plaintiff to resolve this impasse, the Plaintiff commenced a lawsuit in the Supreme Court against the Defendant, as Trustee and in her individual capacity, and against Dempsaco. Plaintiff claimed that: (i) her transfer of \$100,000 in 2005 to Dempsaco was an investment and she was a 50% member of the company; and (ii) that Defendant, as Trustee, had "breached her fiduciary duty to Plaintiff by commingling, self-dealing and misusing funds belonging to Dempsaco" and had "been unjustly enriched at the expense of, and to the detriment of Plaintiff and Dempsaco." Plaintiff sought the following relief: (i) an injunction directing the Trust to distribute the Trust's interest in the real property to the Plaintiff; (ii) declaration that Plaintiff is a 50% member of Dempsaco; (iii) declaration that Plaintiff is entitled to the income stream; (iv) compensatory damages; (v) punitive damages; (vi) an accounting of Dempsaco's income and expenses since Dempsey's death; and (vii) imposition of a constructive trust on Dempsaco's proceeds.

In defense, the Defendant argued that the Plaintiff's assertion that the payment of the income stream was mandatory, rather than discretionary, triggered the in terrorem clause, and Plaintiff was not a member of Dempsaco. The Supreme Court found that Plaintiff failed to establish any ownership interest in Dempsaco and granted Defendant's motion for summary judgment. Plaintiff did not appeal this decision.

The Defendants again moved for summary judgment and argued that Plaintiff's unsuccessful claim of a 50% interest in Dempsaco triggered the in terrorem clause. The Supreme Court again granted Defendants' motion and held that "[t]he clear intent of the grantor, as gleaned from the Trust, was to prevent . . . conduct that would delay or dilute the dispositions under the Trust, place the Grantor's game plan in jeopardy, and threaten Colangelo's clear right to Dempsaco LLC. . . . It cannot be disputed that Plaintiff contested the distribution of the Grantor's 100% interest in Dempsaco to Colangelo under the Trust." The Supreme Court also awarded Defendants attorney fees. On appeal, the Appellate Division modified Supreme Court's order as to attorney fees and otherwise affirmed. The Appellate Division concluded that "plaintiff contested the distribution of Dempsey's interest in Dempsaco in violation of the in terrorem clause."

### **CONCLUSION:**

The New York Court of Appeals reviewed the case and concluded that Plaintiff cause of action did not violate the in terrorem clause. The lawsuit did not attempt to nullify the Trust or challenge its

terms, but sought to enforce the trust's provisions as written, which was the distribution of her bequests in full accord with the Trust and in satisfaction with the grantor's intent. Further, Plaintiff's claim that she was a member of Dempsaco was a declaration of her interest in the entity and did not amount to a challenge to the Trust or to the grantor's intent. In addition, the court found that triable issues of fact remained regarding the income stream and unjust enrichment claims” and remanded the proceedings.

HOPE THIS HELPS YOU HELP OTHERS MAKE A POSITIVE DIFFERENCE!

*Marc Sass*