

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D19549  
Y/kmg

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Argued - May 13, 2008

STEVEN W. FISHER, J.P.  
FRED T. SANTUCCI  
DANIEL D. ANGIOLILLO  
WILLIAM E. McCARTHY, JJ.

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2007-07851  
2007-10675

DECISION & ORDER

In the Matter of Joseph Singer, deceased.  
Vivian Singer, respondent; Alexander  
Singer, appellant.

(File No. 1179/04)

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Seth Rubenstein, P.C., Brooklyn, N.Y. (Nora S. Anderson of counsel), for appellant.

Olshan Grundman Frome Rosenzweig & Wolosky, LLP, New York, N.Y. (Lori Marks-Esterman of counsel), for respondent.

In a probate proceeding in which the executor, Vivian Singer, petitioned pursuant to SCPA 1420 to construe the in terrorem provisions set forth in “article sixth” of the will of Joseph Singer, which was admitted to probate by a decree dated May 19, 2005, the appeal is from (1) an order of the Surrogate’s Court, Kings County (Lopez-Torres, S.), dated August 3, 2007, and (2) an amended order of the same court dated September 6, 2007, which granted the petition, determined that Alexander Singer violated the in terrorem provisions of “article sixth” of the will, and revoked his bequest under the will.

ORDERED that the appeal from the order dated August 3, 2007, is dismissed, as that order was superseded by the amended order dated September 6, 2007; and it is further,

ORDERED that the amended order dated September 6, 2007, is affirmed; and it is further,

ORDERED that one bill of costs is awarded to the petitioner.

June 10, 2008

MATTER OF SINGER, DECEASED

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The Surrogate's Court properly determined that the appellant's conduct in deposing the testator's former attorney regarding drafts of prior wills violated the in terrorem clause set forth in "article sixth" paragraph 6(A) and 6(B) of the will. The in terrorem clause prohibited an "attempt to contest" the will "in any manner" (*see Matter of Ellis*, 252 AD2d 118, 128). Furthermore, the act of deposing the testator's prior attorney was not protected under the safe harbor provisions set forth in EPTL 3-3.5 and SCPA 1404, which, inter alia, allow only the deposition of attesting witnesses, the attorney who prepared the will, and where, as here, the will contains an in terrorem clause, "the nominated executors in the will and the proponents" (SCPA 1404[4]; *see* EPTL 3-3.5[b][3][D]). The testator's former attorney did not fall within any of those categories. Accordingly, under the particular facts of this case, the Surrogate's Court properly granted the petition and revoked the appellant's bequest.

The appellant's remaining contention is not properly before this Court.

FISHER, J.P., SANTUCCI, ANGIOLILLO and McCARTHY, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court