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COURT OF APPEALS  
STATE OF NEW YORK

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CARLSON,  
  
Appellant,  
  
-against-  
  
COLANGELO,  
  
Respondent.  
-----

NO. 38  
  
92 Court Street  
Binghamton, New York  
March 13, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Christian C. Amis  
Official Court Transcriber

1 CHIEF JUDGE WILSON: Next case on the calendar is  
2 Carlson v. Colangelo.

3 MS. NIMTEZ: May it please the court. Irma  
4 Nimetz on behalf of plaintiff-appellant, Kristine Carlson.  
5 I respectfully request three minutes for rebuttal, Your  
6 Honor.

7 CHIEF JUDGE WILSON: Yes, of course.

8 MS. NIMTEZ: Thank you.

9 Under the public policy of this state, in  
10 terrorem clauses are disfavored and must be strictly  
11 construed. Here, we respectfully request that this court  
12 reverse the Second Department decision granting summary  
13 judgment to defendants-respondents.

14 In this case, Crissy Colangelo, who was a  
15 trustee, and also a beneficiary of the Donald P. Dempsey  
16 Revocable Trust, used an in terrorem clause as a sword to  
17 bully the only other beneficiary of the trust, Kristine  
18 Carlson, into accepting only one of the pre-residuary  
19 bequests that the decedent wished for her to have. And as  
20 a precon - - -

21 JUDGE RIVERA: Why - - - why is it Ms. Carlson's  
22 action doesn't challenge the trust or the will? What - - -  
23 why is it it's not in violation of the in terrorem clause?  
24 Put aside whatever you may be arguing is potentially  
25 misconduct by the trustee.

1 MS. NIMTEZ: Let me address it this way. In  
2 Matter of Singer, this honorable court said that in  
3 terrorem clauses are to be construed narrowly - - -

4 JUDGE RIVERA: Uh-huh.

5 MS. NIMTEZ: - - - and surrogates should then - -  
6 - or judges of the Supreme Court - - - should look at, on a  
7 case-by-case basis, the conduct of the beneficiary. Here,  
8 Kristine Carlson - - - and Your Honor, I - - - I submit  
9 that you have to look at her conduct, not in a vacuum, but  
10 as a result of the trustee's conduct. But what did  
11 Kristine Carlson do? What she did was try to effectuate  
12 the intent of the decedent - - -

13 JUDGE GARCIA: Was she entitled - - - I'm sorry.  
14 Was she - - -

15 MS. NIMTEZ: - - - in giving her two pre-  
16 residuary bequests.

17 JUDGE GARCIA: Sorry. Counsel, was she entitled  
18 to \$350,000?

19 MS. NIMTEZ: Yes, she was.

20 JUDGE GARCIA: I thought the terms of the trust  
21 were, if it's possible or it's my sincere wish or something  
22 like that.

23 MS. NIMTEZ: So - - - Your Honor, I'm glad you  
24 pointed that out. Defendants-respondents at the outset  
25 said that the trust provided that that language was

1 precatory, that it was decedent's wish and desire for  
2 Kristine Carlson - - -

3 JUDGE GARCIA: And so she asked for \$350,000  
4 minimum, right?

5 MS. NIMTEZ: Well, the trust actually provided it  
6 was up to \$350,000 - - -

7 JUDGE GARCIA: Right. But your client, in  
8 bringing this suit, asked for \$350,000.

9 MS. NIMTEZ: Yes. Which is what the decedent - -  
10 -

11 JUDGE GARCIA: So how is that not contradictory -  
12 - -

13 MS. NIMTEZ: Well, Your Honor, you have to look  
14 in addition to the trust, to the will of the decedent.  
15 This was a pour-over will into the trust. Typically, a  
16 pour-over will mirrors the language of the trust. This was  
17 sloppy drafting and - - - but if you look at the tru - - -  
18 at the will - - - excuse me - - - it says that the decedent  
19 directed the trustee to give Kristine Carlson \$350,000 when  
20 the property known as Dempsaco was sold. So there was a  
21 clear direction to distribute \$350,000 to - - - to - - -

22 CHIEF JUDGE WILSON: Wel, when you - - - when you  
23 say sloppy drafting, does that at least create an issue  
24 about what the decedent's intent was?

25 MS. NIMTEZ: I don't believe so, Your Honor.



1 When I actually meant sloppy drafting, I meant that the  
2 attorney drafter spelled her own client's name wrong. It's  
3 Crissy without an H. I - - - I meant that the - - - the  
4 provisions in the will do not mirror the trust, but the  
5 trust controls. There was no question - - -

6 CHIEF JUDGE WILSON: Well, but that sounds a  
7 little - - - a little sloppy, no? That the provisions in  
8 the trust and will say diff - - - something slightly  
9 different about that \$350,000.

10 MS. NIMTEZ: Yes, but the trust controls. That's  
11 - - - that's every - - -

12 JUDGE GARCIA: So if the trust controls, the  
13 trust language is clear, and you're not entitled to  
14 \$350,000.

15 MS. NIMTEZ: Your Honor, I respectfully disagree.  
16 I don't know how we're not entitled to three - - - \$350,000  
17 when it - - - it specific - - -

18 JUDGE GARCIA: But how can the trust control, and  
19 you're saying we should look at the will.

20 MS. NIMTEZ: To - - - to - - - to determine  
21 perhaps the decedent's intent, that it was a clear  
22 direction. And indeed, the dec - - - the defendants, after  
23 their motion to dismiss, the complaint was denied. They  
24 gave up on that language, that it was precatory. There was  
25 never a suggestion that Kristine Carlson was not entitled

1 to the \$350,000.

2 But let me address Judge Rivera's initial point,  
3 which was by bringing this lawsuit, was Kristine Carlson -  
4 - - did she violate an in terrorem clause? And our  
5 position is no. She brought this lawsuit to enforce the  
6 decedent's intentions, which was that she to - - - was to  
7 receive two pre-residuary bequests, the house where she and  
8 the decedent were living and \$350,000.

9 CHIEF JUDGE WILSON: Well, if it were - - - if it  
10 were simple enough to avoid an in terrorem clause by  
11 saying, all I'm trying to do is effectuate the decedent's  
12 intent. And for example, the decedent actually didn't mean  
13 to put this provision in the will or didn't mean that it  
14 should be interpreted this way, I'm not sure what in  
15 terrorem clause would ever be effective. The decedent  
16 didn't actually mean to sign this will, that that wasn't  
17 his intent.

18 MS. NIMTEZ: But Your Honor, the decedent did  
19 sign this trust agreement.

20 CHIEF JUDGE WILSON: Well, in this particular  
21 case. I'm - - - I'm - - - I'm talking about the rule that  
22 you're asking for, which sounds as if you were saying if  
23 what someone is complaining about is that some provision in  
24 a will or in a trust instrument doesn't actually effectuate  
25 the decedent's intent, I don't know why you couldn't always

1 say that when you were challenging some provision of a will  
2 or a trust.

3 MS. NIMTEZ: Your Honor, I - - - I - - - we did  
4 not challenge any provision of this trust. We simply  
5 sought to enforce it. And the - - -

6 JUDGE HALLIGAN: But then you're - - -

7 JUDGE TROUTMAN: What about the interest in  
8 Dempsaco, the fifty percent she asked for?

9 MS. NIMTEZ: Yes, Your Honor. We believe that  
10 that also did not seek to set a - - - keep in mind, in  
11 terrorem clauses are for distributees of the decedent  
12 seeking to set aside a trust. Kristine Carlson was not a  
13 distributee of the decedent. Indeed, the distri - - - the  
14 decedent was never married, had no children - - -

15 JUDGE CANNATARO: Sorry. Can you finish your  
16 first thought in response to Judge Troutman's question?  
17 Because I - - - I did understand that the trust required  
18 that the ownership interest be transferred in toto to  
19 Colangelo. And - - - and Carlson - - -

20 MS. NIMTEZ: I agree with you.

21 JUDGE CANNATARO: - - - attempted to stop that  
22 from happening.

23 MS. NIMTEZ: Your Honor, I disagree. Kristine  
24 Carlson, from the outset, never contested that - - - what  
25 does the trust specifically say? It says this grantor's

1 interest in Dempsaco - - -

2 JUDGE GARCIA: But isn't that - - -

3 MS. NIMTEZ: - - - or the trust's interest. It  
4 doesn't say that this grantor or - - - has a one hundred  
5 percent ownership interest - - -

6 JUDGE GARCIA: But going to the Chief Judge's  
7 question he just asked you.

8 MS. NIMTEZ: Yes.

9 JUDGE GARCIA: Couldn't you always say that? I  
10 leave you my car, but you don't really own that car. I'm  
11 not challenging that you left this person the car. I'm  
12 just challenging you don't have an interest in the car.  
13 But it's just one way of challenging it that you hope won't  
14 trigger an in terrorem clause, right?

15 MS. NIMTEZ: I don't think so, Your Honor. Here,  
16 there was no - - - there was no evidence that Donald  
17 Dempsey owned Dempsaco one hundred percent. And - - -

18 JUDGE HALLIGAN: But that goes to the merits, I  
19 think, of - - - of the argument you're making. I - - - I  
20 think some of the questions you're getting - - - and I - -  
21 - I would pose - - - try posing it to you again - - - is,  
22 you know, is it - - - is it your argument that if you  
23 characterize it, which it sounds to me like you're doing,  
24 as enforcing the decedent's intentions, it can't trigger an  
25 in terrorem clause. And if that's your view, then what's

1 left of the teeth in an in terrorem clause? That - - -  
2 that's - - - that's what I'm trying to understand.

3 MS. NIMTEZ: So an in terrorem clause is meant to  
4 discourage distributees of the decedent, of which Crissy -  
5 - - Kristine Carlson is not. A distributee is an intestate  
6 distributee. So - - -

7 JUDGE HALLIGAN: So - - - so is your view that  
8 she's not bound by the - - - the in terrorem clause has no  
9 effect as to her at all because she's not a - - - a  
10 distributee?

11 MS. NIMTEZ: Well, I think in this case, she - -  
12 - it - - - it's a leg - - - she was not able to set aside  
13 this trust. But what - - - what would she have gained if  
14 she set aside the trust? How do people set aside a trust  
15 or object to a will? They - - -

16 JUDGE RIVERA: Well, it - - - it's not  
17 necessarily setting aside the trust. It's - - - it's what  
18 you think the trust means. And you may - - - and then be  
19 challenging exactly what the decedent wanted. I know  
20 you're characterizing it as simply trying to effectuate the  
21 decedent's desires.

22 But let me ask you a different question. What -  
23 - - let's say we disagree with you. What - - - what would  
24 have been her recourse? If - - - if - - - if her  
25 understanding is, no, the decedent is - - - forget the

1 350,000 right now - - - definitely wanted me to have this  
2 house. That's clear from the will. That's clear from the  
3 trust. The trustee is not turning it over to me or demands  
4 that I sign some document, and I think that's unlawful.  
5 What would have been her recourse?

6 MS. NIMTEZ: That's a - - -

7 JUDGE RIVERA: Other than the action that she  
8 took. Is there any recourse - - -

9 MS. NIMTEZ: See, that's an excellent question.

10 JUDGE RIVERA: Thank you.

11 MS. NIMTEZ: What does a beneficiary in this  
12 situation do when she - - -

13 JUDGE GARCIA: She couldn't go Surrogate's Court?

14 MS. NIMTEZ: We could have gone to Surrogate's  
15 Court. However, Dempsaco - - - you cannot bring an action  
16 with Dempsaco. It's not a - - - a decedent or - - - that  
17 would have had to been in Supreme Court - - -

18 JUDGE GARCIA: Couldn't you go to Surrogate's  
19 Court to enforce the trust - - - the terms of the trust, or  
20 no?

21 MS. NIMTEZ: With the exception of Dempsaco,  
22 because it was just with respect to decedents.

23 But may I answer Judge Rivera's question first?  
24 And that is, what was she to do when a trustee violates her  
25 duty of loyalty? When a trustee conditions a bequest on

1 giving up fifty percent of your bequest. So the trustee,  
2 in her own - - - violated her duty of loyalty by giving - -  
3 -

4 JUDGE HALLIGAN: Can't - - - can't she make that  
5 argument - - - couldn't one make that argument in a wide  
6 range of circumstances? I think what you're hearing us  
7 grappling with is what remains of an in terrorem clause if  
8 one could make allegations along these lines in a wide  
9 range of cases and therefore subvert the purpose of an in  
10 terrorem clause.

11 MS. NIMTEZ: What remains is if a - - - a  
12 distributee contests the - - - what's in the - - - in - - -  
13 in the trust or will, then perhaps they violate an in  
14 terrorem clause. But in terrorem clauses in and of  
15 themselves are meant for distributees, next of kin, of the  
16 decedent who seek to set aside - - -

17 JUDGE GARCIA: But this says beneficiary.

18 MS. NIMTEZ: Excuse me?

19 JUDGE GARCIA: Doesn't this say beneficiary, this  
20 - - -

21 MS. NIMTEZ: Yes. But in the case of a  
22 beneficiary, it would only be a beneficiary who gained more  
23 from a prior instrument. That did not occur in this case.

24 CHIEF JUDGE WILSON: So could you have gone to  
25 Surrogate's Court and said, what the trustee is doing here

1 is inappropriate, conditioning my getting the house on  
2 anything else, period?

3 MS. NIMTEZ: Your Honor, we tr - - - we - - -

4 CHIEF JUDGE WILSON: And gotten an order - - -  
5 and gotten an order from Surrogate's Court saying she's got  
6 to distribute the house. And the other - - - and Dempsaco  
7 stuff is not my business, but she's got to distribute the  
8 house.

9 MS. NIMTEZ: Well, in this case, we vehemently  
10 argued to the - - - the Supreme Court and to the Appellate  
11 Division that - - -

12 CHIEF JUDGE WILSON: And my - - - my question is  
13 different. Could you have gone to Surrogate's Court for  
14 that relief?

15 MS. NIMTEZ: We believe that in that case as well  
16 - - - the trustee sought to frustrate our - - - Kristine  
17 Carlson's bequest at every turn, in terms of - - - of  
18 discovery and in terms of - - - I'm - - - I'm sure she  
19 would have also brought a proceeding in Surrogate's Court  
20 saying that Kristine Carlson violated the in terrorem  
21 clause. But in the - - - the one minute I have left, I  
22 must bring to your attention that a trustee has the duty -  
23 - -

24 JUDGE RIVERA: No. Just to clarify this point,  
25 you're saying - - - I don't know that you would agree - - -

1 but you're saying that the same argument that trustee is  
2 making here, they would have made if you had gone to  
3 Surrogate's Court - - -

4 MS. NIMTEZ: Correct.

5 JUDGE RIVERA: - - - because it's the same - - -  
6 the challenge - - - it - - - the nature of the challenge is  
7 the same. Is this your argument?

8 MS. NIMTEZ: Yes. And I'll just say, I know the  
9 red light is on.

10 CHIEF JUDGE WILSON: That's right. Take your  
11 minute.

12 MS. NIMTEZ: I would - - -

13 CHIEF JUDGE WILSON: Yeah.

14 MS. NIMTEZ: - - - just say that courts have to  
15 look at a trustee's violation of a fiduciary duty. It  
16 wasn't just Kristine Carlson, give up fifty percent of your  
17 bequest and sign a receipt and release agreement. It was  
18 an indemnity agreement re - - - indemnifying the trustee  
19 from any and all claims brought by anyone. So if the  
20 decedent's estranged brother in Florida sued Crissy  
21 Colangelo, she would have asked Crissy - - - Kristine  
22 Carlson to indemnify her and release her from any  
23 liability.

24 And I will say that the public policy in cases so  
25 - - - clearly state that any action or a precondition by a

1 trustee upon a beneficiary is against public policy and  
2 EPTL 11-1.7.

3 Thank you, Your Honor.

4 CHIEF JUDGE WILSON: Thank you.

5 MR. KONICOFF: May it please the court. Michael  
6 Konicoff for the respondents.

7 JUDGE GARCIA: Counsel, could you pick up with  
8 this last point on Surrogate's Court? Was there a remedy  
9 in Surrogate's Court here?

10 MR. KONICOFF: Your Honor, I believe that she  
11 could have brought a proceeding to enforce the proceedings  
12 of - - - of the trust, if that's what she was looking to  
13 do. But this - - - this action - - -

14 CHIEF JUDGE WILSON: To - - - to - - - I'm sorry  
15 - - - to enforce the what?

16 MR. KONICOFF: To enforce the provisions under  
17 the - - - under the trust. I apologize.

18 JUDGE HALLIGAN: Including - - - including with  
19 respect to Dempsaco? I - - - I think she thought not.

20 MR. KONICOFF: No - - - with respect to Dempsaco,  
21 it was clear that Kristine Carlson had zero interest in  
22 Dempsaco - - -

23 JUDGE HALLIGAN: I'm - - - right. The - - - I  
24 believe that's the merits, though. Could - - - could she  
25 have - - - whatever - - - whatever the merits are of the



1 claim, could she have gone to Surrogate's Court to press  
2 her argument about the ownership interest in Surrogate's  
3 Court?

4 MR. KONICOFF: I believe had she done that, we'd  
5 be in the same situation that we are today. I believe that  
6 would have triggered in terrorem clause because - - -

7 JUDGE HALLIGAN: Well, I'm asking a different  
8 question. Is that something that Surrogate's Court could  
9 entertain? Not how would it turn out, or what would the  
10 impact be on the in terrorem clause.

11 MR. KONICOFF: Perhaps, Your Honor. I - - - I'm  
12 honestly not - - - not quite sure if they would entertain  
13 that.

14 CHIEF JUDGE WILSON: So suppose - - -

15 MR. KONICOFF: Dempsaco - - -

16 CHIEF JUDGE WILSON: - - - suppose she actually  
17 owned fifty percent of Dempsaco, just hypothetically.  
18 Suppose she did that. What then would be her remedy?  
19 Where could she go?

20 MR. KONICOFF: Well, she wouldn't need to go  
21 anywhere. The - - - the - - - the terms of the - - - of  
22 the trust state that the grantor's interest in Dempsaco - -  
23 -

24 CHIEF JUDGE WILSON: Uh-huh.

25 MR. KONICOFF: - - - go to Crissy Colangelo.

1 CHIEF JUDGE WILSON: Uh-huh.

2 MR. KONICOFF: That's it. So if she owned - - -

3 CHIEF JUDGE WILSON: But what - - - but my  
4 hypothetical is, and what if the trustee isn't recognizing  
5 that; that is, she actually owns fifty percent. Trustee is  
6 saying, no, you don't. What's her remedy? Where does she  
7 go, Surrogate's Court, Supreme Court, nowhere?

8 MR. KONICOFF: Well, I think she could probably  
9 go to Supreme Court as she did here. However, what would -  
10 - - she was doing - - -

11 CHIEF JUDGE WILSON: Then why wouldn't that  
12 trigger the in terrorem clause?

13 MR. KONICOFF: Because she wasn't a fifty percent  
14 owner, and I think we need to - - -

15 CHIEF JUDGE WILSON: So whether it triggers the  
16 in terrorem clause depends on whether she wins or loses?

17 MR. KONICOFF: Well, I think - - - I - - - I do  
18 think it depends on the merit of the claim, because here,  
19 for example - - -

20 JUDGE HALLIGAN: That's a very - - - that's a  
21 tough - - -

22 JUDGE TROUTMAN: Does it clearly indicate what  
23 the amount was - - - the percentage? Does the trust  
24 clearly indicate he owned a hundred percent?

25 MR. KONICOFF: The trust does not indicate a

1 percentage. No, it does not. However, the claim - - -

2 JUDGE RIVERA: Well, it says it's his interest.

3 He cannot transfer more than his own interest.

4 MR. KONICOFF: It's - - - it's hi - - - his - - -  
5 the grantor's interest in Dempsaco goes to Crissy Colangelo  
6 under the trust - - -

7 JUDGE RIVERA: Whatever that may be.

8 MR. KONICOFF: Correct.

9 JUDGE RIVERA: If fifty percent, it's only fifty  
10 percent.

11 MR. KONICOFF: Correct. But this was not a  
12 situation where Kristine Carlson owned thirty percent and  
13 was trying to determine whether or not her thirty percent  
14 was maybe a fifty percent ownership interest. This was a  
15 situation where she testified in a deposition that she had  
16 no interest - - -

17 JUDGE HALLIGAN: I want to go back, if I can, to  
18 your answer to the - - - to the Chief Judge. If the rule  
19 is that whether or not a challenge to an ownership interest  
20 violates the in terrorem clause, if that depends on whether  
21 you win or lose, that's a really big gamble to take.  
22 Because no matter how strong, I think - - - in any  
23 litigation, right - - - no matter how strong you think your  
24 position is, you know, going into court, that you could win  
25 or lose. There's no sure thing. And - - - and so if

1 that's the rule, wouldn't that really chill enforcing what  
2 might be a very valid interest?

3 MR. KONICOFF: I - - - I have to go back to the  
4 merits of the claim, because if - - -

5 JUDGE HALLIGAN: No, I'm asking you to set that  
6 aside. Just take - - - take this as a hypothetical if you  
7 would. Okay? As a general matter, if we're thinking  
8 broadly about what the rule is, right, I - - - what I heard  
9 you to say in response to the Chief is that if you bring a  
10 challenge such as the - - - the one here with respect to  
11 who owns what percentage of Dempsaco in Supreme Court, that  
12 whether that triggers the in terrorem clause or not depends  
13 on whether you win or lose.

14 MR. KONICOFF: Well, it - - -

15 JUDGE HALLIGAN: Is that your position?

16 MR. KONICOFF: Well, it depends on the - - - on  
17 the language of the trust. We have to look at - - - at  
18 everything, and as in ma - - -

19 JUDGE HALLIGAN: Okay. If you - - - if you have  
20 language such as what you have here. But - - - but your  
21 view is that it depends on whether you win or lose; is that  
22 right?

23 MR. KONICOFF: I - - - I believe - - - my view is  
24 that it depends on the merit of the claim.

25 JUDGE HALLIGAN: Okay. Okay. So if that's

1 correct, what about the calculus that you have to go  
2 through on the front end? You might think your claim is  
3 strong. And in fact, objectively, that might be the case,  
4 but you could still win or lose. So - - - so I mean, what  
5 - - - what effect does that have on - - - on your practical  
6 ability to enforce a right that you might actually have?

7 MR. KONICOFF: Well, I think if we look under the  
8 provisions of the EPTL and - - - and the SCPA, there are  
9 provisions that specifically provide for certain actions  
10 that can be taken, right, in terms of discovery, for  
11 example, or in a - - - in a potential will contest, there's  
12 certain people that you can depose when you think  
13 potentially maybe there - - - maybe there's an objection  
14 here - - -

15 JUDGE HALLIGAN: And in your view, those don't  
16 trigger the in terrorem clause, or they do?

17 MR. KONICOFF: They wouldn't. No, they wouldn't.  
18 They're un - - - under 3-3.5 and under the SCPA 1404, there  
19 are specific exclusions that would not trigger the in  
20 terrorem clause.

21 Here, however, this was a claim made where  
22 Kristine Carlson had the knowledge that she was not a  
23 member of Dempsaco.

24 CHIEF JUDGE WILSON: Yeah, but we - - -

25 MR. KONICOFF: There was no K-1s produced in

1 discovery - - -

2 CHIEF JUDGE WILSON: Let me - - - let me - - -  
3 let me - - - I still move back to the - - -

4 MR. KONICOFF: I apologize.

5 CHIEF JUDGE WILSON: - - - No. No. No, it's  
6 okay. Let me - - - I just want to make sure I understand  
7 this because a typical situation, what you might have an in  
8 terrorem clause take effect, is when somebody says this is  
9 - - - this will is actually not the valid will. It was,  
10 you know, signed under duress or it was, you know - - - and  
11 there, the - - - at least as I understand it - - - the  
12 effect of the in terrorem clause doesn't turn at all on  
13 whether you're right or wrong. It's there to prevent you  
14 from making any challenge, right or wrong. The merits  
15 don't have anything to do with it in the situation where  
16 you're saying this is an invalid will.

17 Isn't that what an in terrorem clause is supposed  
18 to do - - -

19 MR. KONICOFF: Well, in an in terrorem clause,  
20 for example, if - - - and I'll use the example of a  
21 distributee un - - - under a will. Okay. If you challenge  
22 the will, say, for example - - - hypothetically, saying  
23 that there was undue influence - - -

24 CHIEF JUDGE WILSON: Or this is not the person's  
25 signature, it's a forgery.



1 MR. KONICOFF: Correct. It was - - - it was  
2 improperly executed, undue - - - due execution, duress.  
3 Those are typically the objections. And if you win that  
4 case, the will is then knocked out, but - - -

5 CHIEF JUDGE WILSON: If there's an in terrorem  
6 clause, and you - - - and you brought your challenge in  
7 violation - - -

8 MR. KONICOFF: If you - - - if you challenge a  
9 will - - -

10 CHIEF JUDGE WILSON: Uh-huh.

11 MR. KONICOFF: - - - right. And - - - and you  
12 convince a court that that will should not be admitted to  
13 probate, that document is knocked out. And then - - - and  
14 the next step is it either goes to a prior will or the  
15 estate would be distributed by the rules of intestacy. So  
16 that's why I say the merits of the claim really do matter,  
17 and - - -

18 JUDGE RIVERA: Yeah, but the merits you're  
19 describing are that the will itself is invalid and  
20 therefore the in terrorem clause cannot apply. Right.  
21 That - - - that's what you're describing there.

22 MR. KONICOFF: Yeah, in this situation, yes.

23 JUDGE RIVERA: A different - - - a different  
24 claim is, I'm not challenging this will. I'm not saying  
25 they should have given me the house. I'm saying it says I

1 should get the house. It says I should get some part of  
2 this company. And all I want is the court to recognize  
3 that when - - - when the trustee in this example, for the  
4 trust is - - - is not doing so. The whole point of the in  
5 terrorem clause is so that you never figure out whether or  
6 not that challenge is correct, right - - -

7 MR. KONICOFF: My position - - - my position is -  
8 - - and our position on the - - - which the lower court and  
9 the Appellate Division agreed with was she was seeking  
10 more.

11 JUDGE RIVERA: I know. But - - - over here - - -  
12 so - - -

13 MR. KONICOFF: Under - - - under the - - -

14 JUDGE RIVERA: Okay. So your position is that  
15 she is doing more - - - just to be clear - - - she is doing  
16 more than simply going to a court and saying please give  
17 effect to this trust?

18 MR. KONICOFF: Absolutely.

19 JUDGE RIVERA: Word for word?

20 MR. KONICOFF: Absolutely. She is seeking a  
21 claim, and she is seek - - -

22 JUDGE RIVERA: Is that true for the house?

23 MR. KONICOFF: No. It's not - - -

24 JUDGE RIVERA: Okay. So why didn't - - - why - -  
25 - why didn't the trustee turn over the house?

1 MR. KONICOFF: Because we don't get to the house.

2 If - - - if you look at the - - - if you look at the

3 language of the trust, it's - - - it's article 6 - - -

4 JUDGE RIVERA: Yeah.

5 MR. KONICOFF: - - - paragraph A.

6 JUDGE RIVERA: Yeah.

7 MR. KONICOFF: Starts with the intangible

8 personal property going to Crissy Colangelo.

9 JUDGE RIVERA: Yeah. Yeah.

10 MR. KONICOFF: Paragraph B, right, after

11 application of article A - - -

12 JUDGE RIVERA: Yeah.

13 MR. KONICOFF: - - - Dempsaco goes to Crissy.

14 That's - - -

15 JUDGE RIVERA: Whatever interest he has. Yes.

16 Okay.

17 MR. KONICOFF: Correct. The - - - the - - - the

18 grantor or the trustee - - -

19 JUDGE RIVERA: You still haven't gotten to the

20 house. I'm waiting for the house.

21 MR. KONICOFF: The house doesn't come until

22 paragraph C after application of A and B.

23 JUDGE RIVERA: Okay. But she wants the house.

24 She doesn't care about that other stuff.

25 MR. KONICOFF: She wants the house. She

1 triggered the in terrorem clause.

2 JUDGE GARCIA: Well - - - well, once she could  
3 have moved to have the - - - get the house. But I just  
4 have a little trouble understanding how this trust works.  
5 Right. And you were describing it. It seems to me - - -  
6 and I just don't know this - - - that under those - - - the  
7 flow of those paragraphs, this isn't an ongoing trust.  
8 It's just a distribution mechanism. Like, does this trust  
9 continue, or does, at some point, Dempsaco go to one party,  
10 personal tangible property goes to that party, and then the  
11 house goes, and the trust is done.

12 MR. KONICOFF: I - - - I - - - I believe you've -  
13 - - you've described it correctly that there is an order of  
14 operations, if you will, in article 6 and upon distribution  
15 of - - - of those - - -

16 JUDGE GARCIA: So let's say that happens, A, B,  
17 C, all the distributions are made. Let's just - - - this  
18 hypothetical - - - assume she gets the house, tangible  
19 personal property goes to the other party, Dempsaco entire  
20 goes to the other party. Now there's a distribution.  
21 There's no trust left, is my reading of this thing. Why  
22 couldn't she challenge at that point, I have an interest in  
23 Dempsaco?

24 MR. KONICOFF: Meaning - - - meaning after - - -

25 JUDGE GARCIA: The distribution.



1 MR. KONICOFF: - - - hypothetically, after the  
2 distributions were made?

3 JUDGE GARCIA: Yes.

4 MR. KONICOFF: Had - - - hypothetically, if - - -  
5 if she had challenged it after the bequests were made to -  
6 - -

7 JUDGE GARCIA: There's no trust. I'm challenging  
8 a trust. You have Dempsaco. I own part of Dempsaco.

9 MR. KONICOFF: Yeah, but then - - - but then  
10 you're looking to still challenge a document - - -

11 JUDGE GARCIA: What document?

12 MR. KONICOFF: - - - you had previously - - -  
13 that was previously enforced?

14 JUDGE CANNATARO: But the trust is over.

15 JUDGE GARCIA: Trust done.

16 MR. KONICOFF: Your Honor, my - - - my only  
17 response to that is - - - is that's not what happened here.  
18 And - - - and I understand it's a hype - - - I understand  
19 it's a hypothetical. And I - - - absolutely - - -

20 JUDGE GARCIA: One - - - one other question.  
21 There was some discussion about will versus trust and  
22 language on the 350. Could you address that?

23 MR. KONICOFF: Yeah. So - - - and - - - and  
24 counsel is correct that the language regarding the \$350,000  
25 is different in the trust and the will. And for the

1 record, I didn't draft those documents. So - - - but with  
2 regard to Dempsaco, it's the same. Dempsaco goes to Crissy  
3 Colangelo under the will - - -

4 JUDGE GARCIA: Regarding the 350?

5 MR. KONICOFF: 350 is different, Your Honor.  
6 Three - - - the 350 - - - the \$350,000 under the trust is  
7 different. Under the will - - - under the will, I believe  
8 it was when the property that Dempsaco owned - - - gas  
9 station - - - was sold, the \$350,000 would go to Kristine  
10 Carlson. However, it's a pour-over will. The trust was in  
11 existence. We don't get to the will. And as we argue to  
12 the lower court, you know, we - - - we - - - we believe  
13 that the will was really irrelevant here. You have a trust  
14 that's in existence. They're not challenging the existence  
15 of the trust. In effect, they're seeking to enfor - - - we  
16 believe, doing more than enforce it, but they're seeking to  
17 enforce the trust, so the - - - the trust is good. It  
18 stands.

19 JUDGE RIVERA: What - - - what was - - - what was  
20 the argument for the trustee not to turn over the house  
21 before this action? Years have passed. Why didn't she  
22 transfer the house?

23 MR. KONICOFF: And I think that goes to the - - -  
24 the letter from counsel, including the release. And just  
25 for the record, Kristine Carlson had been living in that

1 house. She had been - - - she moved into the house - - -

2 JUDGE RIVERA: Yeah. So I see that in the  
3 record, which makes it - - - one - - - one would wonder  
4 even more why not turn over that house in terms of the  
5 title?

6 MR. KONICOFF: Well, she was willing to.

7 JUDGE RIVERA: There's no argument that that is  
8 the decedent's wish, correct - - - and the grantor's wish?

9 MR. KONICOFF: The grantor's wish was that  
10 Kristine Carlson would receive the house.

11 JUDGE RIVERA: Right.

12 MR. KONICOFF: That - - - that's clear. However,  
13 in that letter from Alli Fischer, the attorney that was  
14 representing - - -

15 JUDGE RIVERA: Right.

16 MR. KONICOFF: - - - my client at the time, she  
17 explains that we're willing to give you the house, however  
18 - - -

19 JUDGE RIVERA: Does the trust allow for that?

20 MR. KONICOFF: The trust does - - -

21 JUDGE RIVERA: To put a contingency protecting  
22 and insulating the trustee from any litigation.

23 MR. KONICOFF: I - - - I believe - - - I believe  
24 the case law is clear that would be against public policy.  
25 That's not what - - - but that's not what we have here.

1 That language is - - - is not in - - -

2 JUDGE RIVERA: So if that violated public policy,  
3 she's still not getting the house.

4 MR. KONICOFF: Well, no, and then - - -

5 JUDGE RIVERA: Your position is she's not even  
6 getting the house.

7 MR. KONICOFF: But - - - but - - - but the lower  
8 court determined correctly - - -

9 JUDGE RIVERA: Yeah.

10 MR. KONICOFF: - - - that the action of not  
11 giving her the house was trumped by her triggering the in  
12 terrorem clause, and I maintained that that was correct in  
13 the - - -

14 JUDGE CANNATARO: Well, would she have triggered  
15 the in terrorem clause simply by claiming a breach of  
16 fiduciary duty on the part of the trustee?

17 MR. KONICOFF: A - - - a breach of fiduciary duty  
18 with - - - with regard to - - -

19 JUDGE CANNATARO: Sign this release, indemnify  
20 me, whatever - - - you know, not relating specifically to  
21 any of the dispositions called for in article 6 of the  
22 trust.

23 MR. KONICOFF: I - - - I don't - - - I don't  
24 believe that that would have been - - - had - - - would  
25 have triggered the in terrorem, because it probably goes

1 more along the line of a - - - of a proceeding specifically  
2 to enforce the provisions of the trust. Hypothetically, it  
3 would be, you're not giving me these. I want to move to  
4 enforce the trust.

5 JUDGE RIVERA: Oh, I'm sorry. So then, to be  
6 clear, what could - - - what could she have done to assert  
7 her rights to the house, which you're not disputing she had  
8 rights to the house, and whatever claim she wanted to make  
9 regarding these 350,000 and Dempsaco, what could she have  
10 done, and without violating the clause?

11 MR. KONICOFF: I - - - I believe she could have  
12 brought a proceeding - - -

13 JUDGE RIVERA: Yes.

14 MR. KONICOFF: - - - to enforce the terms of the  
15 trust. But once she went after Dempsaco - - -

16 CHIEF JUDGE WILSON: In - - - in - - - in - - -  
17 sorry - - - in - - - where?

18 JUDGE RIVERA: Where?

19 CHIEF JUDGE WILSON: In what court?

20 JUDGE RIVERA: Where?

21 MR. KONICOFF: I - - - I - - - most likely would  
22 have been in Surrogate's Court.

23 JUDGE RIVERA: And if she's not in Surrogate's  
24 Court and she goes to another court to do exactly that, has  
25 she violated the in terrorem clause?

1 MR. KONICOFF: I - - - I don't believe that the -  
2 - - that jurisdictionally that - - - that would be a  
3 violation of the in terrorem clause - - -

4 JUDGE RIVERA: So how is this not exactly what  
5 you've described?

6 MR. KONICOFF: Because she's going after  
7 Dempsaco, and that's what triggered the in terrorem clause.  
8 She gets A and B under the - - -

9 JUDGE HALLIGAN: But what's the distinction  
10 between the two? I must be missing it. But can you - - -

11 JUDGE RIVERA: Yeah, I don't get that.

12 JUDGE HALLIGAN: Can you explain that?

13 MR. KONICOFF: She had no claim to Dempsaco.  
14 Kristine Carlson was aware that she had no claim to  
15 Dempsaco. In fact, she made an argument in her complaint  
16 that she had she had been receiving distributions from  
17 Dempsaco, in fact, a \$50,000 distribution at one point. So  
18 one would think, in discovery, she'd be able to produce a  
19 K-1 or some sort of document demonstrating that she had an  
20 interest.

21 JUDGE HALLIGAN: But - - - but that - - -

22 MR. KONICOFF: She had no interest in this  
23 company and claimed it - - -

24 JUDGE HALLIGAN: - - - that - - - that - - -  
25 that, to me, I think, is about the merits of her claim to

1 have an interest in Dempsaco. Right. What I was asking  
2 is, in response to Judge Rivera's question, which is how is  
3 - - - she - - - you were asked, how could she enforce a  
4 right that she had, and you laid out an option. And the  
5 question is, how is that different from what she did here?  
6 Not on - - - not with respect to the merits.

7 MR. KONICOFF: The difference here is she went  
8 after something that she knew that she had no right in. I  
9 think - - - I believe - - - I believe, Judge Garcia had - -  
10 -

11 JUDGE HALLIGAN: Well, you're saying that - - -  
12 that it's - - - it's a losing claim, but I don't think that  
13 you're disagreeing about the procedural path that she took;  
14 is that right?

15 MR. KONICOFF: Well, procedurally - - -

16 JUDGE HALLIGAN: Okay. Let's assume someone has  
17 a valid claim.

18 MR. KONICOFF: Yes.

19 JUDGE HALLIGAN: I - - - okay. What can they do  
20 to enforce it without triggering an in terrorem clause?

21 MR. KONICOFF: Then - - - then they would - - -  
22 but - - - but again, we have to look at the claim. And I'm  
23 not trying to dance around the question, but - - -

24 JUDGE HALLIGAN: Yeah, I'm - - - I'm - - - I'm  
25 asking you, though - - - just indulge me, okay?

1 MR. KONICOFF: Okay.

2 JUDGE HALLIGAN: I - - - I appreciate that you  
3 are saying that you think that this claim has no merit, but  
4 let's assume a case where there is a claim that has merit.  
5 Perhaps you have a K-1, whatever might indicate some  
6 ownership interest. Okay. What can that person do to  
7 enforce that ownership interest without triggering an in  
8 terrorem clause?

9 MR. KONICOFF: I believe that they could bring a  
10 petition to enforce the trust - - -

11 JUDGE HALLIGAN: Uh-huh.

12 MR. KONICOFF: - - - in Surrogate's Court.

13 JUDGE HALLIGAN: And that would not trigger the  
14 in terrorem clause, provided that they were successful?

15 MR. KONICOFF: Pro - - - provided that they were  
16 not seeking something that they weren't entitled to under  
17 the trust.

18 JUDGE HALLIGAN: How - - - I - - - I'm - - - I'm  
19 - - - I'm not sure if that's a semantical distinction or -  
20 - - or a substantive one. How is that different than  
21 saying they were successful or unsuccessful?

22 MR. KONICOFF: It - - - it - - - it's different  
23 because here, if she sought to enforce the trust by saying,  
24 I want the house, I want the money, and stop there, she  
25 receives those bequests. And - - - and granted, there's

1       precatory language with - - - with regard to the \$350,000,  
2       as we had taken that position in a pre-answer motion to  
3       dismiss. However, if she had asked for those two things  
4       which she receives under the trust, entirely different than  
5       going after a company that goes to my client under the  
6       trust.

7                 JUDGE HALLIGAN: But in a case where - - - I know  
8       your red light is on - - -

9                 MR. KONICOFF: Yeah.

10                JUDGE HALLIGAN: - - - but - - - but in a case  
11       where - - - again, indulge my hypothetical - - - where  
12       someone in fact has a valid claim to an ownership interest  
13       in a company, your view is that that would not trigger the  
14       in terrorem clause.

15                MR. KONICOFF: Well, we - - - was - - -

16                JUDGE HALLIGAN: - - - because like the 350,  
17       there would be a viable claim.

18                MR. KONICOFF: We - - - we would look to the  
19       language of the trust. And if - - - if she had a - - - if  
20       that claim - - - or - - - or that bequest, if you will, was  
21       given to her under the trust and she sought to enforce it -  
22       - - and I - - - I don't think it would - - -

23                JUDGE RIVERA: And - - - and you agree - - - I  
24       know your red light is on - - - you - - - you agree, if she  
25       had not received anything else under the trust, nothing



1 else, okay. She's not named at all in any shape or form,  
2 but she believes that she's got a fifty percent interest,  
3 that she could have sought to gain that interest in an  
4 action because she's not violating the in terrorem. She's  
5 not otherwise have any claim under that trust.

6 MR. KONICOFF: Well, it - - -

7 JUDGE RIVERA: Saying - - - when it says his  
8 interest, his interest is only fifty percent. And she's  
9 saying, I'm a fifty percent owner; I want my fifty percent.

10 MR. KONICOFF: Well, if she - - - if she had no -  
11 - - if she wasn't receiving anything under - - - else under  
12 the trust - - -

13 JUDGE RIVERA: Under the trust.

14 MR. KONICOFF: - - - then she wouldn't be - - -

15 JUDGE RIVERA: Because she's not named.

16 MR. KONICOFF: - - - she wouldn't be subject to  
17 the in terrorem clause.

18 JUDGE RIVERA: Correct - - - that's my point.

19 MR. KONICOFF: Yeah.

20 JUDGE RIVERA: Yes. I just want to make sure - -  
21 -

22 MR. KONICOFF: Yeah. Yeah. Yes.

23 JUDGE RIVERA: - - - we're all on the same - - -

24 MR. KONICOFF: Yes.

25 JUDGE RIVERA: - - - same page. That but for the

1 listing of the other things that you're not disputing she  
2 was entitled to, that she - - - she would have been able to  
3 challenge the - - -

4 MR. KONICOFF: Okay. And - - - and if - - - and  
5 if I may - - - and I know the red light is on - - - but  
6 just - - - just to make clear for the record, the - - - the  
7 house, absolutely, she was entitled to, but I do want to  
8 make clear that the \$350,000 we did maintain and did not  
9 abandon that argument that that was precatory language.  
10 The lang - - - the words in the trust were wish and desire.  
11 In our opinion, those were clear words of precatory import.  
12 So I'd rest.

13 CHIEF JUDGE WILSON: Thank you.

14 MR. KONICOFF: Thank you.

15 JUDGE CANNATARO: Counsel, can I ask you a  
16 question? Over here. Sorry.

17 MS. NIMTEZ: Yes.

18 JUDGE CANNATARO: I - - - I - - - I just want to  
19 make sure I understand the - - - the sequence of the  
20 litigation. After - - - after your client commences this  
21 action, there is a - - - I think, a rather immediate  
22 dispute over ownership interests in Dempsaco, whereby she's  
23 claiming that she's a fifty percent owner of Dempsaco. And  
24 in 2021, I think Supreme Court issues an order stating that  
25 she, in fact, does not have a fifty percent interest in

1 Dempsaco. And what I read the record as saying is that she  
2 continues to press that claim into subsequent years, into  
3 2022, and that's the point at which it's determined that  
4 she's violated the in terrorem clause by challenging the  
5 transfer of what is now not only all of the testator's  
6 ownership interest in Dempsaco, but what has now been  
7 determined to be a one hundred percent ownership interest  
8 in Dempsaco.

9 MS. NIMTEZ: With - - -

10 JUDGE CANNATARO: What's wrong about that?

11 MS. NIMTEZ: With all due respect - - -

12 JUDGE CANNATARO: Yeah.

13 MS. NIMTEZ: - - - the - - - the procedural  
14 posture of that question is incorrect.

15 JUDGE CANNATARO: Okay.

16 MS. NIMTEZ: And so she did bring an action with  
17 respect to Dempsaco. Once the Supreme Court said that she  
18 was not a member of Dempsaco, which I believe was May of  
19 2021 - - -

20 JUDGE CANNATARO: I agree.

21 MS. NIMTEZ: - - - we filed a notice of appeal,  
22 and we did not perfect that appeal. Why? Because the  
23 defendants-respondents, within a matter of three weeks,  
24 made another motion for summary judgment dismissing the  
25 complaint in its entirety. We filed a cross motion for

1 summary judgment. And so yes, we - - - we actually  
2 abandoned that and did not perfect our appeal on the  
3 grounds that the court decided it, we believed incorrectly,  
4 because all Kristine Carlson did was she had a personal  
5 interest in Dempsaco based upon her \$100,000 investment.  
6 But we moved on. And so - - -

7 JUDGE SINGAS: So wouldn't that have been a  
8 better vehicle to do that at that juncture, to either ask  
9 for reargument or appeal that portion of the Supreme Court  
10 order?

11 MS. NIMTEZ: Your Honor, no, because the other  
12 summary judgment motion was already fully submitted. And  
13 we believed, given the cost of litigation and so forth, if  
14 we won our cross motion on the second summary judgment  
15 motion, the first summary - - - the - - - the first issue  
16 with respect to Dempsaco would have been moot. So - - -

17 JUDGE GARCIA: Counsel, it does seem like this is  
18 a case about litigation strategy and litigation risk. So  
19 there were possibilities of doing some things in  
20 Surrogate's Court. I do read the trust as being,  
21 essentially, a - - - just a pass through where these things  
22 are supposed to happen. One, two, three. You could have  
23 sought to enforce one, two, three, including three being  
24 the house. Once those - - - that was done, the trust is  
25 done, as I read it. And you could have said, okay, great.

1           Whoever is the owner of Dempsaco now, I own half. But you  
2           didn't do that.

3                   MS. NIMTEZ: Your - - - well, Your Honor, let's -  
4           - - let's look at what we did do at the outset.

5                   JUDGE GARCIA: We are.

6                   MS. NIMTEZ: We attempted for two and a half  
7           years to get a copy of the trust - - -

8                   JUDGE GARCIA: I - - - I'm not saying that - - -

9                   MS. NIMTEZ: - - - and when we get the trustee's  
10          letter - - -

11                  JUDGE GARCIA: - - - behavior here was good or  
12          bad - - -

13                  MS. NIMTEZ: Well, wait - - -

14                  JUDGE GARCIA: - - - I'm saying you had choices -  
15          - -

16                  MS. NIMTEZ: We - - -

17                  JUDGE GARCIA: - - - litigation choices in  
18          response to that. Different areas of litigation carry  
19          different types of risks.

20                  MS. NIMTEZ: Let - - - let - - - let me answer  
21          that two ways. Number one, what we first did was reached  
22          out to the attorney drafter, Allison Fischer, before  
23          litigation was commenced to say, let's sit down. Let's  
24          talk. What did she do? She ignored Mr. Streng's emails,  
25          and she returned - - - did not return calls and said, sign

1 this receipt, release, and indemnity, and - - -

2 JUDGE GARCIA: And at that point, why don't you  
3 go to court and say, I want the trust enforced? I want the  
4 distributions made. Not saying what they should be. Make  
5 them under the terms of the trust.

6 MS. NIMTEZ: There too - - - in that respect - -  
7 - and keep in mind, all of this talking about SCPA 1404,  
8 EPTL 3-5.5, regarding construction, these relate to wills.  
9 And the courts say, well, they also relate to trusts, but  
10 there is a difference, as Judge Rivera pointed out. The  
11 trust was effective upon signature, and on day one, that  
12 house should have been transferred - - -

13 JUDGE GARCIA: Can we go back to my - - - can we  
14 go back to my question, though? Why, at that point,  
15 couldn't you just bring an action to force the  
16 distributions under the terms of the trust?

17 MS. NIMTEZ: The answer to that is Singer tells  
18 us to look at the conduct. The conduct - - - Kristine  
19 Carlson believed, based upon her \$100,000 investment in  
20 Dempsaco, that she had a good-faith interest in Dempsaco  
21 that - - -

22 JUDGE TROUTMAN: When did you ever get a copy of  
23 the full trust agreement?

24 MS. NIMTEZ: Your Honor, not until we commenced  
25 litigation.

1 JUDGE TROUTMAN: So before you commenced  
2 litigation, you didn't have the instrument to assess - - -

3 MS. NIMTEZ: Well, they wouldn't give it to us.  
4 We had pages of the trust. So we had the in terrorem  
5 clause, and we had article 6.

6 I just would point out also - - - so we didn't  
7 actually have the residuary of the trust. Another breach  
8 of the fiduciary's duty was what happened during those two  
9 and a half years while Kristine Carlson was patiently  
10 waiting? The trustee sold property and assets of the  
11 trust, distributed them to herself. These - - - there are  
12 so many violations of fiduciary duty that I'm sure Judge  
13 Cardozo, the author of Meinhard v. Salmon, would recognize  
14 and hope that fiduciary duties mean something and that  
15 trustees cannot violate their fiduciary duties from day one  
16 and force beneficiaries to make - - -

17 JUDGE RIVERA: Well, do you - - - do you know - -  
18 - do you know of any case where a trustee violates public  
19 policy, in this case with the letter requesting - - -

20 MS. NIMTEZ: An indemnity?

21 JUDGE RIVERA: - - - the sign, right - - - yes -  
22 - - and then uses the in terrorem clause as a shield?

23 MS. NIMTEZ: Well, keep in mind, in terrorem  
24 clauses, every - - - every case that you'll read and that's  
25 in these briefs is brought by a distributee, of which

1 Kristine Carlson and Crissy Colangelo are not.

2 But no, we have not found cases where - - - let  
3 me put it to you this way, that the cases that discuss this  
4 issue with respect to public policy, Matter of Rimland, but  
5 various cases say that when a trustee inserts a  
6 precondition to getting a bequest or seeks to exonerate  
7 their - - - their breaches of fiduciary duty as a  
8 precondition to - - - for a beneficiary to receive a - - -  
9 a bequest, those are, without question, void with - - - as  
10 against public policy - - -

11 JUDGE GARCIA: Does that mean the - - - does that  
12 mean, then, all bets are off once the trustee does that, I  
13 could challenge anything under the trust, because they  
14 acted in violation of public policy in that way? So now I  
15 could say, you know what, I get all of Dempsaco because you  
16 violated public policy. Is there a limit on what you can  
17 challenge after that, once there's some violation of public  
18 policy?

19 MS. NIMTEZ: Well, that would perhaps be in the  
20 discretion of - - - of the courts. However, what I would  
21 say is, since there are no statutes governing trusts in  
22 this regard, only wills, that a fiduciary has to abide by  
23 their fiduciary duties. Trustees cannot do this.

24 JUDGE GARCIA: And there are remedies for  
25 violating fiduciary duty, but is one of those remedy - - -

1 MS. NIMTEZ: Yes. And that is to replace them -  
2 - -

3 JUDGE GARCIA: Excuse me. Excuse me.

4 MS. NIMTEZ: Oh, sorry.

5 JUDGE GARCIA: Is one of those remedies, I can  
6 now challenge the trust on any basis?

7 MS. NIMTEZ: I believe, Your Honor, that the  
8 first remedy would be to remove the trustee if she is  
9 violating, or he is violating his fiduciary duties.  
10 However, some - - - that - - - and - - - and by the way, an  
11 action - - - and if you look at the Akoi case, the First  
12 Department case, affirming Judge Mella's decision in the  
13 Surrogate's Court, New York County. Actions whereby you  
14 seek to hold trustees accountable do not violate in  
15 terrorem clauses. So the first step would be to remove a  
16 trustee who, as Crissy Colangelo did - - -

17 JUDGE RIVERA: If - - - if the court holds  
18 against you on - - - on the appeal before us, does your  
19 client have any recourse to get the house, anything?

20 MS. NIMTEZ: No. The house was sold. No. And -  
21 - - and so poor Kristine Carlson - - -

22 JUDGE RIVERA: The trustee sold the house?

23 MS. NIMTEZ: Yes.

24 JUDGE RIVERA: Are there proceeds from the house  
25 that you might be able to - - -

1 MS. NIMTEZ: I believe so, but - - -

2 JUDGE RIVERA: - - - any action - - -

3 MS. NIMTEZ: Yes, I believe so. I - - - I - - -  
4 it's - - -

5 JUDGE RIVERA: - - - you got any action to get  
6 that?

7 MS. NIMTEZ: Yes. In fact, we're before the  
8 Supreme Court Justice Lubell on May 13th - - -

9 JUDGE RIVERA: Okay. So you have some recourse -  
10 - -

11 MS. NIMTEZ: - - - after this honorable court  
12 decides.

13 JUDGE RIVERA: - - - not the house, but you have  
14 some recourse - - -

15 MS. NIMTEZ: Money dam - - - money, yes.

16 JUDGE RIVERA: Money. Yes. Okay.

17 MS. NIMTEZ: Because otherwise, she's out of  
18 luck, and the decedent's intentions have not been honored.

19 Thank you, Your Honor.

20 CHIEF JUDGE WILSON: Thank you.

21 (Court is adjourned)

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C E R T I F I C A T I O N

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of Carlson v. Colangelo, No. 38 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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