

Carter Ledyard Wins Dismissal of Petition to Claw Back Bequests

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Beneficiaries Acting In A Fiduciary Capacity Do Not Lose Their Personal Bequests By Challenging Instruments With An In Terrorem Clause

(New York, New York, October 10, 2024) In a case of first impression in New York, Carter Ledyard obtained dismissal of a trustee's *in terrorem* petition seeking to claw back two beneficiaries' personal bequests based on their approval – in their separate roles as directors and officers of a nonprofit organization – of a lawsuit brought by the nonprofit against the executor of the estate and trustee dispensing of assets on behalf of the decedent. The nonprofit, Radio Drama Network, filed a proceeding challenging Pryor Cashman lawyer Richard L. Kay's drafting of trust amendments that disinherited the nonprofit and diverted a \$100 million estate to an entity that Kay solely controls. No New York court had previously decided this issue. On October 3, 2024 Surrogate's Court, New York County (J. Mella) rejected the clawback attempt, holding that "Although no New York court has expressly held that will or trust contests by representatives – acting in their fiduciary capacities – who are also beneficiaries do not constitute indirect attacks resulting in forfeiture of their own gifts under challenged instruments, other jurisdictions have reached this conclusion. ... There is no basis, in law or logic, to impose a forfeiture on those who challenge an instrument in a representative capacity and do not benefit personally from their actions." This decision is a significant application of the New York rule that *in terrorem* clauses are "not favored" and "strictly construed," especially in estate litigation over gifts to nonprofits in which family members play some role.

At the same time, the court also denied Kay's motion to disqualify CLM from representing the directors in their individual capacity in the *in terrorem* proceeding and the nonprofit in the underlying challenge to the trust, finding that Kay lacked standing. The court also rejected as "wholly inadequate," "without merit," and "rife with speculation" the expert opinion presented by Kay in support of disqualification. The Surrogate found there was no conflict of interest between directors who fulfilled their fiduciary duty to the nonprofit despite the personal risk to themselves. The court also noted the "problematic" timing and that New York courts "carefully scrutinize" efforts to disqualify opposing counsel which can be "tactical 'derailment' weapons in litigation."

The decisions can be found here ([in terrorem](#)) and here ([disqualification](#))

Carter Ledyard's team was led by Judith Wallace, Alexander Malyshev, Pamela Mann, Gary Sesser, Sarah Ganley, and Kevin Simpson.

More information about the cases can be found at [In Significant Appellate Victory, Carter Ledyard Client Radio Drama Network Allowed Broad Discovery in Its Challenge to The Diversion of the \\$100 Million Legacy of Radio Pioneer Himan Brown | Carter Ledyard & Milburn LLP \(clm.com\)](#)

About Carter Ledyard & Milburn LLP

Carter Ledyard & Milburn LLP is an elite New York law firm offering clients full service legal counsel. Our 170-year history speaks to our legacy of quality client service and our location in downtown Manhattan is a hub for financial institutions and global business.

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Contact

For media inquiries, please contact:

Jennifer Topper, Director of Marketing

topper@clm.com

(212) 238-8753

related professionals

Judith Wallace / Partner

D 212-238-8743

wallace@clm.com

Pamela A. Mann / Partner

D 212-238-8758

mann@clm.com

Alexander G. Malyshev / Partner

D 212-238-8618

malyshev@clm.com

Sarah H. Ganley / Associate

D 212-238-8834

ganley@clm.com

Gary D. Sesser / Partner

D 212-238-8820

sesser@clm.com

Kevin M. Simpson / Associate

D 212-238-8643

simpson@clm.com