THE CARROT AND STICK APPROACH: IN TERROREM CLAUSES IN TEXAS JURISPRUDENCE

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I. INTRODUCTION

Everyone is familiar with the oft-cited "carrot-and-stick" idiom, which may conjure up the image of a donkey or other beast of burden being enticed along by the potential reward of a carrot dangling in front of the animal's face. The other half of the expression—the stick—serves as a threatened punishment, which will be used if the carrot is not sufficient inducement to persuade the animal to move. The phrase "carrot-and-stick" is, in fact, defined as "characterized by the use of both reward and

punishment to induce cooperation."[1] Inducing behavior is exactly what testators and trust settlors hope to accomplish by including in terrorem clauses in their wills and trusts. The purpose of such clauses is to effectuate the intent of the testator or settlor to avoid will or trust contests by offering potential contestants a "carrot" in the form of a gift or bequest under the terms of the instrument, but threatening a "stick" in the form of forfeiture of such gift or bequest if they contest the instrument.

Under a standard in terrorem clause,[2] a beneficiary has two options: (1) accept the gift under the testamentary instrument, or (2) contest the instrument and, if successful, alter the testator's dispositive scheme (making the in terrorem clause and the entire will invalid and causing the estate to be divided in accordance with a prior valid will or the state's intestacy laws) and receive a larger gift.[3] The catch? If the contest fails, the beneficiary would forfeit all benefits under the instrument.[4]

The Latin meaning of the term *in terrorem* is "in order to frighten," and these clauses were historically used to strike terror in the hearts of anyone who might wish to contest a testamentary instrument.[5] Black's Law Dictionary defines an in terrorem clause (or "no-contest clause") as "a provision designed to threaten one into action or inaction; esp[ecially], a testamentary provision that threatens to dispossess any beneficiary who challenges the terms of the will."[6] In fact, in keeping with the threatening idea, most instruments provide that the person who contests the will directs the court to consider them as having predeceased the testator without descendants.

In Texas, our jurisprudence has recognized the validity of in terrorem clauses in wills and trusts, but the enforceability of such clauses has been nothing short of guesswork. Texas case law has generally recognized the validity of in terrorem clauses, but it construes such clauses strictly.[7] Texas case law favorably discusses (and even suggests) that Texas should apply the exception to the enforceability of in terrorem clauses recognized in many jurisdictions with respect to contests brought in good faith and with probable cause; however, no Texas court has ruled directly on whether such

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1. MERRIAM-WEBSTERS COLLEGIATE DICTIONARY 175 (10th ed. 2000).

2. For purposes of this Article, the terms "in terrorem clause," "anti-contest clause," "no-contest clause," and "forfeiture clause" are used interchangeably. In addition, because Texas recognizes no-contest clauses in wills and inter vivos trusts (e.g., revocable living trusts), testators as well as settlors may use these provisions in their instruments. For purposes of this Article, however, we have primarily used the term "testator."

3. *See* Gerry W. Beyer, Rob G. Dickinson & Kenneth L. Wake, *The Fine Art of Intimidating Disgruntled Beneficiaries With In Terrorem Clauses*, 51 SMU L. REV. 225, 227 (1998).

4. *See id.*

5. BLACK'S LAW DICTIONARY 896 (9th ed. 2009); *see infra* Part II.

6. BLACK'S LAW DICTIONARY 1073 (9th ed. 2009).

7. *See, e.g.*, Lesikar v. Moon, 237 S.W.3d 361, 368, 370 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (stating that the court "narrowly construe[s] in terrorem clauses to avoid forfeiture while also fulfilling the settlor's intent").

exception is applicable in Texas.[8] The Texas Legislature recently attempted to eliminate much of this speculation with the enactment of Texas House Bill 1969, which added § 64 to the Texas Probate Code and § 112.038 to the Texas Trust Code; the new statutes provide that forfeiture provisions in wills and trusts that are triggered by court actions are not enforceable if probable cause exists for bringing the action and if the action is brought and maintained in good faith.[9]

This Article traces the history and development of in terrorem clauses, explores the development and effectiveness of such provisions in Texas, and analyzes potential improvements to and drafting approaches in light of Texas Probate Code § 64 and Trust Code § 112.038. Part II discusses the historical background of in terrorem clauses, including certain public policy arguments that support and oppose the enforcement of such clauses. Part III focuses on the evolvement of in terrorem provisions in Texas, including recognized exceptions and the recent enactment of Texas Probate Code § 64 and Trust Code § 112.038. Part IV compares current Texas jurisprudence regarding in terrorem clauses to jurisprudence in certain other states. Finally, Part V considers recommendations for improving the Texas statutes regarding in terrorem clauses and suggests approaches for drafting such provisions given the current Texas jurisprudence.

II. HISTORICAL DEVELOPMENT OF IN TERROREM PROVISIONS

This Part provides several historical accounts of the use of in terrorem clauses, highlighting examples of such provisions and principles of law from the Bible, Babylonian and Mesopotamian civilizations, the Roman empire, and Britain (before the Norman conquest and the early common law). Then, this Part traces the development of early American jurisprudence related to anti-contest clauses. Finally, this Part concludes with public policy arguments for and against the enforceability of in terrorem clauses.

A. Biblical Account

The earliest account of using an in terrorem clause is found in the Book of Genesis.[10] After God created the heavens, earth, and all living things, including the first man, Adam, God commanded Adam as follows:

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8. *See, e.g.*, Calvery v. Calvery, 55 S.W.2d 527, 530 (stating that "[t]he great weight of authority sustains the rule that forfeiture of rights under the terms of a will will not be enforced where the contest of the will was made in good faith and upon probable cause").

9. Act of June 19, 2009, 81st Leg., R.S. ch. 414, §§ 1-5, 2009 Tex. Gen. Laws 995-96 (to be codified at Tex. Prob. Code Ann. § 64; Tex. Prop. Code §§ 111.0035, 112.038). House Bill 1969 also added Texas Trust Code § 111.0035(b)(6) to provide that Texas Trust Code § 112.038 cannot be waived by the terms of a trust instrument. *Id.* § 2.

10. Beyer, Dickinson, & Wake, *supra* note 3, at 230.

"From any tree of the garden you may eat freely; but from the tree of the knowledge of good and evil you shall not eat, for in the day that you eat from it you will surely die."[11] In analyzing this Scripture, it is interesting to note that God first provided Adam with a special allowance or gift: he could eat from *any* tree of the garden.[12] Then, God imposed a condition on this gift, providing that Adam may not eat from the tree of the knowledge of good and evil; if this condition was disobeyed, the penalty was death and Adam would forfeit his perfect life in the Garden of Eden.[13] We all know what happened—Adam and Eve listened to the serpent and disobeyed God's commands by eating the forbidden fruit.[14] Initially, God altered the promised penalty by punishing Eve with the pains of childbirth and Adam with toil and work for the rest of his life, and shortly thereafter, God physically banished them from the Garden of Eden.[15] And, although Adam and Eve did not die immediately in physical terms, they were "dead" at the moment they disobeyed because they were spiritually separated from God; ultimately, God's penalty was enforced as promised.

B. Babylonian Civilization

The Babylonians have also been identified as using in terrorem provisions in marriage contracts to frighten the betrothed couple to obey the marital agreement and institute punishment if a party repudiated the agreement.[16] In basic terms, an example of such a contract follows: if Husband forsakes Wife, Husband must pay one mana of silver.[17] If Wife denies Husband, Husband may throw her from the tower.[18] So long as the Wife's mother is living, Husband must support her.[19] Historically, the parties would invoke the spirit of their gods and the king and if a party breached the contract, punishment would follow.[20]

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11. *Genesis* 2:16-17 (New American Standard).

12. *Id.* This allowance could be analogized to a testator or settlor providing a gift or bequest to a beneficiary.

13. *Id.* at 2:17. Although the Bible does not specifically reference it, some commentators have implied that this command caused Adam fear.

14. *Id.* at 3:1-6.

15. *Id.* at 3:16-19, 24.

16. Beyer, Dickinson, & Wake, *supra* note 3, at 230-31.

17. *Id.* at 231 (referring to such a contract described in THEOPHILUS G. PINCHES, THE OLD TESTAMENT IN LIGHT OF THE HISTORICAL RECORDS AND LEGENDS OF ASSYRIA AND BABYLONIA 174 (2d ed. 1903)).

18. *Id.*

19. *Id.*

20. *Id.*

C. Mesopotamian Civilization

A 13th century B.C. will of a Mesopotamian provides an early record (if not the earliest) of a testamentary in terrorem clause:

> And now therefore, my two sons—Yatlinu, the elder, and Yanhamu, the younger—whichever of them shall bring a lawsuit against Bidawe, or shall abuse Bidawe, their mother, shall pay 500 shekels of silver to the king; he shall set his cloak upon the doorbolt, and shall depart into the street. But whichever of them shall have paid respect to Bidawe, his mother—to that one will she bequeath.[21]

The carrot and stick are easily identifiable in this clause: the carrot is the family inheritance, and the stick is a hefty fine and banishment from the family home.

D. Roman Empire

Many civilian legal systems have adopted legal principles dating back to Roman law, including certain guidelines relating to in terrorem clauses.[22] Commentators have noted that the Romans feared dying intestate, and although in terrorem conditions might have been imposed in testamentary instruments, the Romans resorted to various methods to ensure that a person would not die intestate, despite the violation of a condition.[23] For example, the praetor—the Roman authority for the administration of justice—could declare a condition as "inadvertent," indicating that a testator would not have intentionally inserted an impossible condition that could bring about his or her intestacy.[24] If a beneficiary promised by oath to abide by a certain condition imposed by the testator, the praetor could also grant the beneficiary a formal release from the oath if the condition was unlawful or immoral.[25]

In the early Roman empire, two contrasting movements within the Roman jurists may have affected the interpretations of in terrorem conditions: one such view favored more rationalism in the law, with a clearly defined set of rules and remedies, coupled with the application of logic to those rules; the other view promoted flexibility and the avoidance

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21. *Id.* (internal quotation marks omitted) (quoting II THE ANCIENT NEAR EAST: A NEW ANTHOLOGY OF TEXAS AND PICTURES 80 (James B. Pritchard ed., 1975)).

22. *See* Irina Fox, Comment, *Penalty Clauses in Testaments: What Louisiana Can Learn from the Common Law*, 70 LA. L. REV. 1265, 1269 (2010) (citing Wood Brown, *Provisions Forbidding Attack in a Will*, 4 TUL. L. REV. 421, 422 (1930)).

23. *Id.* at 1268-69 (referring to Frederick William Swaim, Jr. & Kathryn Venturatos Lorio, *Successions and Donations* § 12.3, *in* 10 LOUISIANA CIVIL LAW TREATISE 297 (1995)).

24. *Id.* at 1269.

25. *Id.*

of rigid rules, focusing on experience and not just logic and the individual case at hand.[26] Two schools of jurists represented these opposing movements: the Proculians and the Sabinians.[27] The Proculians were ancient strict constructionists, advocating "a strict, objective interpretation of the words used, whatever may have been the intention of the author of the text and often without regard to the consequences."[28] In reviewing the objectivity of an instrument, the Proculians would annul a bequest if the condition in the instrument was contrary to the law or public policy.[29] Conversely, Sabinians favored a liberal construction that was "a looser and less rigid approach to the interpretation of texts."[30] Sabinians focused on determining the testator's intent, not dwelling on the objectivity of the four corners of the instrument, and would attempt to maintain the bequest after removing the illicit or immoral condition.[31] Modern American courts have followed each of these views in construing in terrorem clauses in will contest proceedings.[32]

E. England

In terrorem provisions in England date back as early as around 950 A.D.[33] A will thought to be the oldest discovered testament made in England contained the following provision:

> And I pray my dear lord, for the love of God, that he will not allow any man to alter our will. And I pray all God's friends that they will give their support to it. May he who violates it have to account with God, and may God be ever gracious to him who wishes to uphold it.[34]

In early English law, the terms "in terrorem" and "forfeiture" were not used synonymously. An in terrorem clause was considered to be an "empty threat," such that the beneficiary would still receive the gift even if he or she brought a contest and lost. Professor Gerry Beyer notes that "[a] true no-contest or forfeiture clause went beyond a mere threat and actually delivered the punishment; that is, the unsuccessful contesting beneficiary

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26. Peter Stein, *The Development of Law in Classical and Early Medieval Europe: Interpretation and Legal Reasoning in Roman Law*, 70 CHI.-KENT L. REV. 1539, 1544-45 (1995).

27. *Id.* at 1545.

28. *Id.*

29. Fox, *supra* note 22, at 1269 (citing Wood Brown, *Provisions Forbidding Attack in a Will*, 4 TUL. L. REV. 421, 422 n.2 (1930)).

30. Stein, *supra* note 26, at 1545.

31. Fox, *supra* note 22, at 1270.

32. *See, e.g.*, *infra* Part II.F.

33. Beyer, Dickinson, & Wake, *supra* note 3, at 231.

34. *Id.* at 232 (citing DOROTHY WHITELOCK, ANGLO-SAXON WILLS 29 (Harold Dexter Hazeltine ed., 1930)).

sacrificed the gift under the will."[35] It is interesting to note that a relatively simple provision has caused "a confusion of judicial thought altogether out of proportion to the apparent simplicity of the issues involved."[36]

After the Norman Conquest and establishment of the feudal system in England, the power to dispose of land by will disappeared for the most part.[37] To circumvent this restriction, landowners instead conveyed their land to trustees and prayed in their wills that the trustees would give the land to the testators' sons or convey the land to purchasers.[38] The changes in testamentary law under the feudal system did not alter the testamentary disposition of personal property, which was under the jurisdiction of ecclesiastical courts.[39] As a result, there are a few examples of in terrorem clauses in wills during this time period, including clauses resulting in forfeiture if the beneficiaries interfered with the disposition under the terms of the will, as well as forfeiture triggered by other actions, including a beneficiary's refusal to serve as executor.[40]

Landowners regained the ability to devise land through a will when the English Parliament enacted the Statute of Wills in 1540.[41] Initially, the in terrorem rule developed with respect to conditions in restraint of marriage, as discussed above in the Babylonian example.[42] With respect to conditions in restraint of marriage, the ecclesiastical courts held all restraints on marriage to be invalid.[43] The High Court of Chancery, in an effort to promote consistency with the ecclesiastical courts, adopted an in terrorem rule with respect to conditions in restraint of marriage that generally provided that a testator did not really intend to impose an in terrorem condition and that such condition would not be given effect unless the testator demonstrated that he or she was earnest by including a "gift over"[44] to govern the distribution of the property in case of forfeiture under the in terrorem provision.[45] The in terrorem rule with respect to conditions in restraint of marriage applied to no-contest clauses in wills by the late 17th

35. GERRY W. BEYER, WILLS, TRUSTS, AND ESTATES: EXAMPLES & EXPLANATIONS 224 n.4 (4th ed. 2007) [hereinafter "E&E"].

36. Olin L. Browder, Jr., *Testamentary Conditions Against Contest Re-Examined*, 49 COLUM. L. REV. 320, 320 (1949).

37. Beyer, Dickinson, & Wake, *supra* note 3, at 233.

38. *Id.*

39. *Id.*

40. *Id.* at 234-35.

41. *Id.* at 235.

42. *See* Peter G. Lawson, *The Rule Against "In Terrorem" Conditions: What Is It? Where Did It Come From? Do We Really Need It?*, 25 EST. TR. & PENSIONS J. 71, 73 (2005); *supra* Part II.B.

43. *See* Lawson, *supra* note 42, at 74.

44. *See* 5 WILLIAM J. BOWE & DOUGLAS H. PARK, PAGE ON THE LAW OF WILLS § 44.29, at 565-67 (4th ed. 2005) [hereinafter PAGE ON THE LAW OF WILLS]. A "gift over" is a conditional gift to a party other than the initial devisee or legatee, which is effective when a specified condition is breached, such as the breach of an in terrorem clause. *Id.*

45. Lawson, *supra* note 42, at 73-74.

century.[46] The English in terrorem rule requiring a gift over for enforceability applied only to will contests, however, and not to other conditions imposed under a will.[47] For example, in cases in which a testator made a legacy dependent on a legatee not becoming a nun or on a legatee not marrying a particular individual, the courts refused to apply the rule requiring a gift over in order to make such conditions enforceable.[48] Further, the English in terrorem rule applied only to devises of personal property or a mix of real and personal property, not to devises of solely real property.[49] In terrorem clauses were valid and enforceable with respect to devises of real property, even in the absence of a gift over.[50]

F. United States: Early Decisions

Early American jurisprudence borrowed many principles of English common law; however, in 1869, the high court of Ohio became the first American court to review the validity of a no-contest clause, and it rejected the traditional English common-law rule of distinguishing between real and personal property and the mandate of a gift over for the forfeited bequest.[51] As noted above, in England, the courts would uphold anti-contest clauses relating to real property but not for personal property, treating them merely as in terrorem unless the will provided for a gift over in light of forfeiture.[52] In *Bradford v. Bradford*, the Ohio court upheld the in terrorem provision in question, reasoning that rational penalty clauses related to both real and personal property conform with "good policy" and "prevent litigation."[53]

Several years later, in 1898, the United States Supreme Court considered the validity of an anti-contest clause in *Smithsonian Institution v. Meech*.[54] In that case, after the testator's will provided miscellaneous bequests to certain of the testator's own relatives, the will then provided the following in terrorem provision: "These bequests are all made upon the condition that the legatees acquiesce in this will, and I hereby bequeath the share or shares of any disputing this will to the residuary legatee hereinafter

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46. *Id.* (citing two early English cases: Powell v. Morgan, (1688) 23 Eng. Rep. 668 (Ch.); 2 Vern. 90, and Morris v. Borroughs, (1737) 26 Eng. Rep. 253 (Ch.); 1 Atk. 399).

47. *Id.* at 77.

48. *Id.* at 76 (citing *In re* Dickson's Trust, (1850) 61 Eng. Rep., 14; 1 Sim. N.S. 36; and *Re* Hanlon, [1933] Ch. 254 (Ch.).

49. *Id.* at 77-78. This distinction developed because the jurisdiction of the ecclesiastical courts was limited to personal property, so the High Court of Chancery, which developed the in terrorem rule to promote consistency with the ecclesiastical courts, applied the rule only to personal property. *Id.*

50. Beyer, Dickinson, & Wake, *supra* note 3, at 239.

51. Bradford v. Bradford, 19 Ohio St. 546, 547 (Ohio 1869).

52. *See* Beyer, Dickinson, & Wake, *supra* note 3, at 240.

53. *Bradford*, 19 Ohio St. at 548. Upon forfeiture, the bequest passed in accordance with the testator's residual bequest. *Id.*

54. Smithsonian Inst. v. Meech, 169 U.S. 398, 415 (1898).

named."[55] The testator named the Smithsonian Institute as the residuary beneficiary of the majority of his estate.[56] The Supreme Court upheld the in terrorem provision, found that forfeiture clauses were founded on "good law and good morals,"[57] and reasoned:

> Experience has shown that often, after the death of a testator, unexpected difficulties arise; technical rules of law are found to have been trespassed upon; contests are commenced wherein not infrequently are brought to light matters of private life that ought never to be made public, and in respect to which the voice of the testator cannot be heard either in explanation or denial; and, as a result, the manifest intention of the testator is thwarted. It is not strange, in view of this, that testators have desired to secure compliance with their dispositions of property, and have sought to incorporate provisions which should operate most powerfully to accomplish that result. And, when a testator declares in his will that his several bequests are made upon the condition that the legatees acquiesce in the provisions of his will, the courts wisely hold that no legatee shall, without compliance with that condition, receive his bounty, or be put in a position to use it in the effort to thwart his expressed purposes.[58]

Although the modern common-law approach differs from state to state, the rulings in the early cases of *Bradford*, which removed the distinction between real property and personal property gifts and eliminated the gift over requirement for personal property bequests,[59] and *Meech*, which highlighted the positive aspects of forfeiture clauses and protected the testator's wishes, have endured over the years and remain true in the common law today.[60]

G. Scope of In Terrorem Clauses: The Restatement Approach

The *Restatement (Third) of Property: Wills and Other Donative Transfers* offers several model rules regarding the construction, scope, and enforceability of in terrorem clauses in testamentary instruments. With respect to the scope of in terrorem provisions triggered by a "contest," the Restatement provides that a suit to construe, reform, or modify the language of a testamentary instrument should not be deemed a contest or an attack on

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55. *Id.* at 399.

56. *Id.*

57. *Id.* at 415.

58. *Id.*

59. *See* Fox, *supra* note 22, at 1287. Georgia essentially still adheres to the English gift-over requirement: the state recognizes no-contest clauses, but requires that the will include an alternate disposition of the gift if the clause is enforced. *See* GA. CODE ANN. § 53-4-68(b) (West 2003); Linkous v. Nat'l Bank of Ga., 274 S.E.2d 469, 470 (Ga. 1981).

60. Fox, *supra* note 22, at 1287-88.

the document (unless the clause in question expressly so provides).[61] For example, if a beneficiary brings a proceeding to resolve an ambiguity or attempts to modify a document (such as the requirement of a corporate co-trustee when a trust created under the document is too small that it would be uneconomical for such a corporate fiduciary to manage), such actions should not invoke the in terrorem clause.[62] After all, the beneficiary is not seeking to circumvent the testator's intent, but to determine and protect it.[63]

The Restatement provides that certain voluntary conduct of a beneficiary could amount to an indirect contest or challenge to the document.[64] For example, voluntarily aiding another person's attempt to contest the instrument or any of its provisions likely amounts to a contest that violates the in terrorem clause. Such voluntary actions could include sharing expenses of a proceeding or entering into an agreement with another person that assures the beneficiary will receive certain property regardless of the outcome of the proceeding.[65]

A beneficiary may also be acting not only on his or her behalf but as a representative of another individual interest in the estate (e.g., a guardian) or as a fiduciary of the estate or trust (e.g., executor or trustee).[66] In that event, such a proceeding or challenge should have no effect on that individual's own gift unless the representative status is a means of presenting such person's own views.[67] The conduct of another individual should also have no effect on another beneficiary unless the instrument so provides.[68] For example, a testator could rescind a gift to a grandchild if that grandchild's parent brings a contest attacking the will.[69] As discussed later in this Article, however, if the clause is too restrictive or broad, it may be not upheld.[70]

H. Public Policy Considerations Supporting and Opposing the Enforceability of In Terrorem Clauses

The chief dilemma with formulating a proper "rule" applicable to in terrorem clauses is that there is a delicate balance of competing interests and values. On one hand, courts must balance testators' donative intent and right to condition gifts (and the peace of mind that their wishes will be

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61. RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 8.5 cmt. d (Tentative Draft No. 3254, 2001).

62. *See id.*

63. *See id.*

64. *Id.* cmt. e.

65. *See id.*

66. *Id.* cmt. f.

67. *See id.*

68. *Id.* cmt. g.

69. *See id.*

70. *See id.*; *infra* Part IV (discussing overbreadth and other restrictions of in terrorem provisions).

carried out); protect concerns for testators' privacy; avoid waste of an estate in litigious proceedings, and simultaneously, the increased burden on the judicial system's resources; and deter the use of a will contest to coerce a more favorable settlement to a disgruntled beneficiary.[71] On the other hand, courts must weigh the protection of testators and their estates (and rightful beneficiaries) by granting access to the courts to prevent the probate of wills procured by illegal conduct such as undue influence, duress, fraud, and forgery; to determine whether the will was revoked or executed with proper formalities (as it is the duty of the court to determine if a will is valid); and to permit beneficiaries to bring an action founded on good faith and probable cause to confirm the testator's true intent.[72] Many courts have also noted that will contests spur family animosity and air a testator's "dirty laundry" into the public arena.[73] Although the invasion of testators' privacy is perhaps a less important factor for courts to enforce no-contest clauses, privacy concern is likely one of the most important reasons testators incorporate such a clause into their documents,[74] and the United States Supreme Court has long recognized this factor.[75]

To balance the interests, many jurisdictions recognize an anti-contest clause, but limit its application if an action is brought to construe a will or trust[76] or if a beneficiary contests the will in good faith and with probable cause. The Uniform Probate Code (UPC)[77] provides that "[a] provision in a

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71. *See* David Horton, *Unconscionability in the Law of Trusts*, 84 NOTRE DAME L. REV. 1675, 1734 (2009). One commentator has argued that the unconscionability doctrine (often used in contract law) should be the primary method of regulating no-contest clauses. *Id.* BLACK'S LAW DICTIONARY defines "unconscionability" as "[e]xtreme unfairness; [t]he principle that a court may refuse to enforce a contract that is unfair or oppressive because of procedural abuses during contract formation or because of overreaching contractual terms, esp[ecially] terms that are unreasonably favorable to one party while precluding meaningful choice for the other party." BLACK'S LAW DICTIONARY (9th ed. 2009). In the context of a will or trust, not only would the unconscionability doctrine invalidate no-contest clauses that apply to allegations that a fiduciary has breached the terms of the instrument, but also, the doctrine could expand a court's inquiry to encompass a procedural component. *See* Horton, *supra*, at 1732-34. Courts might be more willing to consider specific facts and circumstances (for example, a testator's intent). *See, e.g.*, Estate of Wojtalewicz v. Woitel, 418 N.E.2d 418, 420-21 (Ill. App. Ct. 1981) (refusing to enforce a clause that prevented beneficiaries from objecting to an accounting); *In re* Andrus' Will, 281 N.Y.S. 831, 851-52 (Sur. Ct. Westchester Co. 1935) (abolishing a clause that permitted blanket approval of a fiduciary's actions).

72. RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 9.1 cmt. a. (1983).

73. Martin D. Begleiter, *Anti-Contest Clauses: When You Care Enough to Send the Final Threat*, 26 ARIZ. ST. L.J. 629, 636 (1994).

74. *Id.*

75. *See, e.g.*, Smithsonian Inst. v. Meech, 169 U.S. 398, 415 (1898).

76. *See* Ellsworth v. Ark. Nat'l Bank, 109 S.W.2d 1258, 1262 (Ark. 1937) (ruling that a will construction proceeding was "contemplated by the testatrix"); S. Norwalk Trust Co. v. St. John, 101 A. 961, 963 (Conn. 1917) (ruling that in a beneficiary's action to construe the true meaning of the will, the court could not impose the forfeiture clause because it was not a proceeding to void the will or any of its provisions); Geisinger v. Geisinger, 41 N.W.2d 86, 93 (Iowa 1950) (determining that a beneficiary's action for the construction of a will and codicils thereto did not invoke the in terrorem clause).

77. The UPC, which began in 1963 in attempt to revise the Model Probate Code and standardize wills, intestacy, and probate laws, is one of more than two hundred uniform state laws drafted by the

will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings."[78] In general, many courts follow the good faith and probable cause reasoning for several reasons, including (1) the testator would not have intended to bar a contest under such circumstances, and (2) public policy should not permit enforcing the no-contest clause if the beneficiary had a valid basis for the contest.[79] Even so, there are some courts that enforce a no-contest clause even if a contestant brings an action in good faith and with probable cause.[80] Still, some courts do not even require probable cause to uphold the forfeiture provision.[81]

Some commentators have argued that a good faith and probable cause limitation on no-contest clauses violates the testator's express intent.[82] It is undeniable that a descendant or heir has no vested right in his or her ancestor's property, and that a testator may distribute his or her property as he or she desires. One court has stated:

> The cardinal rule of construction requires that the intention of the testator be ascertained and that if lawful it be given effect even though the disposition of his estate be unequitable, unwise or capricious. He may transmit without regard to moral or natural claims upon his bounty. Neither is he bound to bequeath it in such a manner as to gain the approbation of his contemporaries, the wise or the good.[83]

At the same time, other courts recognize that the probable cause exception is justified in order to protect the validity of the will or trust. The high court in Connecticut famously wrote:

> The exception that a contest for which there is a reasonable ground will not work forfeiture stands upon better ground. It is quite likely true that the authorities to greater number refuse to accept this exception, but we think it has behind it the better reason. It rests upon a sound public policy. The law prescribes who may make a will and how it shall be made; that it must be executed in a named mode, by a person having testamentary capacity and acting freely, and not under undue influence. The law is vitally interested in having property transmitted by will under these conditions, and none others. Courts cannot know whether a will, good on

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National Conference of Commissioners on Uniform State Laws (NCCUSL) since it began in 1892. Andrew Stimmel, *Mediating Will Disputes: A Proposal to Add a Discretionary Mediation Clause to the Uniform Probate Code*, 18 OHIO ST. J. ON DISP. RESOL. 197, 213 (2002).

78. UNIFORM PROBATE CODE §§ 2-517, 3-905 (amended 2006).

79. *See* E&E, *supra* note 35, at 223.

80. *See* discussion *infra* Part IV.

81. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 3-3.5(b) (McKinney 2010).

82. Begleiter, *supra* note 73, at 633.

83. *In re* Estate of Moorehouse, 148 P.2d 385, 388 (Cal. Dist. Ct. App. 1944) (citations omitted).

> its face, was made in conformity to statutory requirements, whether the testator was of sound mind, and whether the will was the product of undue influence, unless these matters are presented in court. And those only who have an interest in the will will have the disposition to lay the facts before the court. If they are forced to remain silent, upon penalty of forfeiture of a legacy or devise given them by the will, the court will be prevented by the command of the testator from ascertaining the truth, and the devolution of property will be had in a manner against both statutory and common law.[84]

As one commentator noted, "an *in terrorem* clause is a powerful weapon in the hands of a wrongdoer who is named a beneficiary in a will through fraud or undue influence."[85] If courts enforce in terrorem clauses in all circumstances, even if a contest is brought in good faith and with probable cause, honorable beneficiaries with the best intentions may be deterred from pursuing legitimate contests against wrongdoer beneficiaries.[86] In some circumstances, unconditional enforcement of in terrorem clauses could even result in a denial of access to the courts.[87]

The scope of proscribed behavior under an anti-contest clause is often ambiguous, which increases the complexity surrounding the decision to enforce the clause. Many no-contest clauses prohibit frontal attacks on the validity of an instrument, as well as challenges that attempt to set aside the will or trust or any of its provisions. Because the language used in the testamentary instrument may be extremely broad, certain courts have enforced no-contest clauses in the following instances: "a surviving spouse's effort to enforce her community property rights under [federal] ERISA [law], a petition to remove a fiduciary, a breach of contract claim, and a frivolous objection to an accounting."[88]

III. IN TERROREM PROVISIONS IN TEXAS

This Part traces the development of in terrorem clauses in Texas, from Texas courts' early recognition of such clauses to the 2009 statutory enactment of the good faith and probable cause exception.

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84. S. Norwalk Trust Co. v. St. John, 101 A. 961, 963 (Conn. 1917). That proposition has been supported by other decisions. *See, e.g.*, Drace v. Klinedinst, 118 A. 907 (Pa. 1922); *In re* Friend's Estate, 58 A. 853 (Pa. 1904); Rouse v. Branch, 74 S.E. 133 (S.C. 1912); Tate v. Camp, 245 S.W. 839 (Tenn. 1922); *In re* Chappell's Estate, 221 P. 336 (Wash. 1923); Dutterer v. Logan, 137 S.E. 1 (W. Va. 1927).

85. Ronald Z. Domsky, *In Terrorem Clauses: More Bark Than Bite?*, 25 LOY. U. CHI. L.J. 493, 495 (1994) (emphasis in original).

86. *Id.* at 495-96.

87. *Id.* at 496 (citing Gunter v. Pogue, 672 S.W.2d 840, 843 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

88. Horton, *supra* note 71, at 1733 (citing Zwirn v. Schweizer, 36 Cal. Rptr. 3d 527, 531-32 (Cal. Ct. App. 2005); Burch v. George, 866 P.2d 92, 100 (Cal. 1994) (en banc); *In re* Estate of Kubick, 513 P.2d 76, 79-80 (Wash. Ct. App. 1973)).

A. Early Recognition of In Terrorem Clauses in Texas Case Law

Early Texas cases recognized the validity and enforceability of in terrorem clauses. In 1908, the Court of Civil Appeals of Texas upheld an in terrorem provision in a testator's will in *Perry v. Rogers*.[89] In *Perry*, the testator's will divided his property among his surviving wife and children from previous marriages.[90] The will contained the following clause:

> If at any time any [beneficiary] should attempt or should proceed in changing or breaking my aforesaid will, then it is my wish and desire that the half interest that I hold and possess in all my estate, both real and personal, be given and I hereby bequeath the same to my present wife for the benefit of my sons Oscar D. and Louis Perry, sons of my present wife by me.[91]

Some of the children of the testator's first marriage filed suit to try title and to partition a portion of the property.[92] The trial court held that, as a result of such action, the property devised to his children of prior marriages was forfeited and instead passed to his surviving wife pursuant to the in terrorem clause in the will.[93] One of the children who was not a party to the action appealed.[94] The court upheld enforcement of the in terrorem clause, reasoning that if the clause did not operate to violate the law, nor contravene good morals or public policy, then the court could not do otherwise but enforce it.[95]

Soon after *Perry*, the Court of Civil Appeals of Texas again upheld an in terrorem provision in *Massie v. Massie*.[96] The testator left a will which provided that if any of his children should contest the will, the contesting child would forfeit any right to the property under the will.[97] The court held that this was a valid provision, and because the testator's son contested the probate of the will, he forfeited all rights thereunder and could not recover any property pursuant to the will.[98]

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89. Perry v. Rogers, 52 Tex. Civ. App. 594, 114 S.W. 897, 899 (Dallas 1908, no writ).
90. *Id.* at 899.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* (noting that "[w]ithin the bounds suggested the law conferred upon the testator full power freely to make any disposition he desired to make of his property").
96. Massie v. Massie, 54 Tex. Civ. App. 617, 118 S.W. 219, 219 (Dallas 1909, no writ).
97. *Id.* at 219-20.
98. *Id.* at 220.

B. The Good Faith and Probable Cause Exception in Texas

For decades, Texas courts have acknowledged and discussed the good faith and probable cause exception in dicta, but no Texas court has directly addressed whether such exception is applicable in Texas. In 1932, the Texas Commission of Appeals, in the case of *Calvery v. Calvery*, alluded to the probable cause exception with respect to the enforcement of in terrorem provisions, in dicta.[99] In *Calvery*, the testator left a will in which she bequeathed a life estate in real property to her foster daughter, with the remainder to the heirs of her foster daughter.[100] The bequest concluded with "any effort to vary the purpose and intention of this item expressed shall revoke and annul any bequest to [the foster daughter]."[101] The foster daughter purported to convey fee-simple title to the property and then filed a suit to construe the will to establish title in fee simple.[102]

The court noted that "[t]he great weight of authority sustains the rule that a forfeiture of rights under the terms of a will will not be enforced where the contest of the will was made in good faith and upon probable cause," and the court acknowledged that the Texas Supreme Court had never ruled on that precise question.[103] The court ultimately found, however, that it was unnecessary to rule on the issue because the beneficiary only sought a construction of the will and did not undertake to contest and destroy the will.[104] As a result, the court held that the beneficiary's action was outside the scope of the forfeiture provision.[105] The court stated:

> In view of the strictness of the rule against declaring forfeitures, we do not think a suit, brought in good faith and upon probable cause, to ascertain the real purpose and intention of the testator and to then enforce such purpose and intention, should be considered as an effort to vary the purpose and intention of the will.[106]

Over fifty years after *Calvery*, the court of appeals in Corpus Christi considered the good faith and probable cause exception, but like the court in *Calvery*, dodged ruling directly on the applicability of the exception in Texas.[107] In *Gunter v. Pogue*, a testator left his property to certain of his stepchildren.[108] The version of his will that was admitted to probate also

99. Calvery v. Calvery, 55 S.W.2d 527, 530-31 (Tex. 1932).
100. *Id.* at 528.
101. *Id.*
102. *Id.*
103. *Id.* at 530.
104. *Id.* at 530-31.
105. *Id.* at 530.
106. *Id.*
107. Gunter v. Pogue, 672 S.W.2d 840, 843-44 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).
108. *Id.* at 842.

contained the following clause: "Any person who shall contest this my Last Will and Testament for any reason either directly or indirectly, overtly or covertly, shall receive, instead of the portion or property given to him or her by this will, the sum of TEN AND 00/100 DOLLARS, each."[109] The executors notified certain of the beneficiaries who had contested the admitted version and other versions of the testator's will that they would receive only ten dollars pursuant to the in terrorem provision.[110] The executors contended that the forfeiture clause should be given effect regardless of whether the contest was brought in good faith and upon probable cause and that in any event, the contesting beneficiaries "had no finding that their contest was brought in good faith and with probable cause."[111]

The court noted that in terrorem provisions are to be strictly construed.[112] The court highlighted public policy concerns favoring and disfavoring the enforcement of such clauses.[113] On one hand, enforcement of these provisions allows the testator's intent to be given full effect and avoids wasteful, contentious litigation.[114] On the other hand, those who are attempting in good faith and with probable cause to determine the testator's intent should not be punished.[115] The court acknowledged that no Texas case had ruled directly on whether the good faith and probable cause exception should be applied in Texas.[116] The court further stated that "given the proper circumstances, Texas would and probably should adopt the good faith and probable cause exception."[117] The court in *Gunter*, however, did not reach such holding, finding instead that even if the good faith and probable cause exception applied, the contesting beneficiaries had the burden to show that the contest was brought in good faith and upon probable cause, and in this case, the beneficiaries had not satisfied that burden.[118]

In *Hammer v. Powers*, the testator's will provided that "if any beneficiary under the will contests or challenges the will or any of its provisions, any share or interest given to the contesting beneficiary is revoked and given instead to Texas Women's University."[119] Citing *Calvery*, the court noted that a forfeiture of rights under a will's terms will not be enforced where the will contest is made in good faith and upon

109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* at 843.
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at 843-44.
119. Hammer v. Powers, 819 S.W.2d 669, 672-73 (Tex. App.—Fort Worth 1991, no writ).

probable cause.[120] In the *Gunter* case, the court did not directly determine the applicability of the good faith and probable cause exception because the beneficiaries had not pled that their contest was made in good faith and upon probable cause.[121] Referring to *Gunter*, the court stated that the contesting beneficiaries had the burden to prove that their contest was made in good faith and upon probable cause.[122] Because the contesting beneficiaries had not pled that their contest was made in good faith and upon probable cause as a defense to the enforcement of the in terrorem clause, the court found the clause enforceable against them.[123]

C. Other Exceptions to and Limitations on the Enforcement of In Terrorem Clauses in Texas

Texas courts have declined to enforce in terrorem provisions for reasons other than the good faith and probable cause exception. In particular, Texas courts have held that the following actions do not cause forfeiture under an in terrorem clause: (1) action to recover a property interest in devised property; (2) action to compel an executor to perform duties; (3) action to ascertain a beneficiary's interest under a will; (4) action to compel a court to probate a will; (5) action to recover damages for the conversion of assets; (6) action to construe a provision of a will; (7) action to request an accounting, partition, or distribution; (8) action to contest a deed that conveyed a beneficiary's interest; (9) action to determine the effect of a settlement agreement; (10) action to challenge an executor appointment; (11) action to seek redress from executors who have breached their fiduciary duties; and (12) testimony in a contest brought by other beneficiaries.[124] In addition, Texas courts have refused to enforce in terrorem provisions against minors and declined to treat the mere filing of an action as a proceeding to contest or attack a will.[125]

Stewart v. Republic Bank, Dallas, N.A. involved an in terrorem provision that was triggered by an event other than a legal contest.[126] The testator's will provided that if either of two individuals were appointed as the guardian of any of the minor children of his deceased daughter, then all property held in a trust for the benefit of such children would be distributed to a different trust for the benefit of his living daughter.[127] The

120. *Id.* at 673.

121. *Id.* (citing Calvery v. Calvery, 55 S.W.2d 527, 530 (Tex. 1932)).

122. *Id.* (citing *Gunter*, 672 S.W.2d at 844).

123. *Id.*

124. *See, e.g.*, Beyer, Dickinson, & Wake, *supra* note 3, at 255-58.

125. *See In re* Estate of Hamill, 866 S.W.2d 339, 342, 345 (Tex. App.—Amarillo 1993, no writ); Stewart v. Republic Bank, Dallas, N.A., 698 S.W.2d 786 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.).

126. *See Stewart*, 698 S.W.2d at 786-87.

127. *Id.* at 787.

representatives of the children argued that such provision was void as against public policy.[128] No Texas case had previously considered such a provision.[129] The Texas court cited a Michigan case in which the Supreme Court of Michigan held that where a contest is made in the name of a minor through a guardian appointed by a probate court, a forfeiture clause is invalid as against public policy because it seeks to deprive the courts of the powers imposed on them by law for the protection of infants (and minors).[130] The Texas court agreed that the provision at issue was void as against public policy because it sought to forfeit the estates of minor children due to an action taken by the probate court in their best interest.[131]

In *Sheffield v. Scott*, the testator's will contained the following in terrorem provision:

> It is my specific request that my devisees and legatees aid my Independent Executor in carrying out my wishes expressed in this Will, and, in order, if possible to assure this, it is my will and I do now expressly provide and make it a condition precedent to the taking, vesting, receiving, or enjoying of any property, benefit, or thing of value whatsoever under and by virtue of this Will, that no such devisee or legatee or beneficiary shall in any manner contest the probate hereof, or question or contest the same, or any part or clause thereof in any judicial proceeding, or seek to delay the administration of my estate or to oppose the appointment of my Independent Executor in any judicial proceeding, and I further will and provide that should any such devisee or legatee or beneficiary so contest or question, or in any manner aid in such contest or questioning, he or she, as the case may be, shall therefore lose and forfeit all right to any benefit and all right or title to any property or thing therein, directly or indirectly devised or bequeathed to him; and such and every forfeited gift, devise and bequest shall pass, instead, as a part of my residuary estate in such manner as though no gift, devise, or bequest had been made to such contesting beneficiary.[132]

Some of the beneficiaries filed a petition to "[a]scertain the [i]ntention" of the testator.[133] The petition was dismissed, and another beneficiary then sought to enforce the in terrorem clause against the beneficiaries who filed the petition.[134] The court, consistent with the strict construction of in terrorem clauses by Texas courts, noted that "only where the acts of the parties come strictly within the express terms of the punitive clause of the

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128. *Id.*
129. *Id.*
130. *Id.* (citing Farr v. Whitefield, 33 N.W.2d 791 (Mich. 1948)).
131. *Id.* at 788.
132. Sheffield v. Scott, 662 S.W.2d 674, 675 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.).
133. *Id.* at 675-76.
134. *Id.* at 676.

will may a breach thereof be declared" and that the particular clause in question did not specifically prohibit the "filing" of a contest.[135] The court held that until such time as further steps are taken in a proceeding in an effort to thwart the testator's intent, the mere filing of a contest motion is not sufficient to trigger forfeiture under the in terrorem clause.[136]

In *In re Estate of Hamill*, the court considered several potential exceptions to the enforceability of an in terrorem clause.[137] The testator's will left her estate to her two daughters, Betty and Gloriadine, and to her grandchildren, Jane, Carol, Sue, and Robert.[138] Her will also included an in terrorem clause that ordered the disinheritance of any beneficiary who initiated an attack on the will.[139] The beneficiaries subsequently filed various actions.[140] The mother of Jane, who was a minor, brought a will contest on her behalf.[141] The trial court did not appoint a guardian ad litem and denied the contest.[142] When Jane reached majority, she pursued an appeal and lost.[143] Sue sued to contest the validity of the will, and her suit was later dismissed.[144] Betty, Gloriadine, and Carol opposed the payment of a debt by the estate's administrator.[145] Robert then filed an action asserting all of testator's daughters and granddaughters had forfeited their rights pursuant to the in terrorem clause.[146] The trial court ultimately ordered a distribution of the estate to all beneficiaries as provided under the will, and Robert appealed.[147]

The court noted that in terrorem clauses should be strictly construed, that forfeiture should be avoided if possible, and that a breach of such a clause will be found only if the parties' actions "clearly fall within the express terms of the clause."[148] Thus, the court considered each of the various actions to determine whether each constituted a will contest, in which case the bequest to the beneficiary bringing such action would be forfeited.[149] The court held that by filing an appeal upon reaching the age of majority, Jane effectively adopted or ratified the will contest brought while she was a minor, and as a result, she forfeited her bequest pursuant to

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135. *Id.*
136. *Id.* at 677.
137. *See In re* Estate of Hamill, 866 S.W.2d 339, 342-43 (Tex. App.—Amarillo 1993, no writ).
138. *Id.* at 341.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.* at 343.
144. *Id.* at 343-45.
145. *Id.* at 345.
146. *Id.*
147. *Id.* at 346.
148. *Id.* at 345 (citing Gunter v. Pogue, 672 S.W.2d 840, 842 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.); Sheffield v. Scott, 662 S.W.2d 674, 676 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.)).
149. *Id.* at 341-45.

the in terrorem clause.[150] With respect to Sue, the court noted that "[t]he mere filing of a will contest is not sufficient to invoke the harsh remedy of forfeiture under a no-contest clause if the contest is later dismissed prior to any legal proceedings being held on the contest and if the action is not dismissed pursuant to an agreement settling the suit."[151] The court held that the filing and dismissal of the suit by Sue was not sufficient to invoke the in terrorem clause, but noted that the in terrorem clause at issue did not expressly provide that the mere filing of a contest was sufficient to invoke such clause.[152] Finally, with respect to Betty, Gloriadine, and Carol, the court held that an action opposing the payment of a debt of the estate would be in the nature of determining whether such debt was properly payable under the will and would not constitute a contest that would invoke the in terrorem clause.[153]

D. Enactment of Texas House Bill 1969

As previously described, prior to the enactment of Texas House Bill 1969, Texas courts recognized the validity of in terrorem clauses, but construed such clauses narrowly.[154] Furthermore, no Texas court had ruled directly on the applicability of the good faith and probable cause exception.[155] The Texas Legislature eliminated questions over the applicability of the good faith and probable cause exception by enacting House Bill 1969 on June 19, 2009.[156] Texas House Bill 1969 added the following § 64 to the Texas Probate Code:

> A provision in a will that would cause a forfeiture of a devise or void a devise or provision in favor of a person for bringing any court action, including contesting a will, is unenforceable if:
>
> (1) probable cause exists for bringing the action; and
>
> (2) the action was brought and maintained in good faith.[157]

Texas House Bill 1969 also added an identical provision to § 112.038 of the Texas Trust Code:

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150. *Id.* at 343.
151. *Id.* at 345 (citing *Sheffield*, 662 S.W.2d at 676-77).
152. *Id.*
153. *Id.*
154. *See supra* Part III.A-C.
155. *See supra* Part III.B.
156. Act of June 19, 2009, 81st Leg., R.S. ch. 414, §§ 1-5, sec. 64, 2009 Tex. Gen. Laws 995-96.
157. TEX. PROB. CODE ANN. § 64 (West 2009). Section 64 applies only to the estate of a decedent who dies on or after the effective date of the new law (June 19, 2009); the estate of a decedent who dies before the effective date of the act is governed by the law in effect on the date of the decedent's death, and the former law continues to be in effect for that purpose. *Id.*

> A provision in a trust that would cause a forfeiture of or void an interest for bringing any court action, including contesting a trust, is unenforceable if:
>
> (1) probable cause exists for bringing the action; and
>
> (2) the action was brought and maintained in good faith.[158]

The addition to the Texas Trust Code also includes an amendment to § 111.0035(b)(6) to provide that the applicability of Texas Trust Code § 112.038 cannot be waived by the terms of a trust instrument.[159]

Texas Probate Code § 64 and Trust Code § 112.038 are intended to clarify, not change, existing Texas law. The statutes, however, are significant in that they clearly apply the good faith and probable cause exception to the enforcement of in terrorem clauses, clarifying any uncertainty with respect to Texas case law on the subject. Texas House Representative Will Hartnett, the author of Texas House Bill 1969, cited as one of the reasons for the enactment of the bill the need to reduce the chilling effect of in terrorem clauses on a beneficiary's willingness to challenge testamentary instruments that were created under suspicious circumstances.[160] Representative Hartnett noted concern for an increased risk of undue influence and questions of mental capacity as a result of the rise in testators' life expectancies, as well as a trend toward more complicated testamentary dispositions as the result of fewer nuclear families and an increase in the number of Texas residents dying without children.[161]

Texas Probate Code § 64 and Trust Code § 112.038 are succinct and notably do not include definitions of "court action," "probable cause," or "good faith."[162] The absence of such definitions will likely create additional uncertainty until case law has developed to sufficiently define these terms or until the Texas Legislature enacts future statutory amendments. In fact, amendments to these sections may come as early as 2011.[163]

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158. TEX. PROP. CODE ANN. § 112.038 (West 2009). Similarly, § 112.038 applies to a trust existing on or created on or after the effective date of the new law (June 19, 2009). *Id.*

159. TEX. PROP. CODE ANN. § 111.0035(b)(6) (West 2009).

160. Gerry W. Beyer & Benjamin Major, *Are In Terrorem Clauses Still Frightening?*, ESTATE PLANNING DEVELOPMENT FOR TEXAS PROFESSIONALS (Frost Bank), July 2010, at 2, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1638724.

161. *Id.*

162. *See* TEX. PROB. CODE. ANN. § 64 (West 2009); TEX. PROP. CODE ANN. § 112.038 (West 2009).

163. William D. Pargaman, *2011 Texas "Probate and Trust" Legislative Update*, http://www.brownmccarroll.com/public/documents/2011_REPTL_Update.pdf (last updated May 20, 2011).

The Real Estate, Probate, and Trust Law Section of the State Bar of Texas (REPTL) has proposed revisions to conform the language of Texas Probate Code § 64 and Trust Code § 112.038 with the language of Probate Code § 243, relating to allowances for defending wills.[164] Probate Code § 243 provides that when a person defends or prosecutes any proceeding "in good faith, and with just cause," for the purpose of having a will or alleged will admitted to probate, the estate shall pay the necessary expenses and disbursements in such proceeding, including reasonable attorney's fees.[165] REPTL's proposal would amend Probate Code § 64 and Trust Code § 112.038 to make no-contest clauses unenforceable with respect to any action if "(1) just cause existed for bringing the action; and (2) the action was brought and maintained in good faith."[166] REPTL's primary motivating factor in proposing the change from "probable cause" to "just cause" to conform with Probate Code § 243 is so that the same jury charge will satisfy both sections.[167] With respect to Probate Code § 243, Texas courts have instructed juries that "good faith" means "an action which is prompted by honesty of intention, or a reasonable belief that the action was probably correct" and that "with just cause" means "that the action [of the person bringing the action] must be based on reasonable grounds and there must have been a fair and honest cause or reason for said actions."[168]

In addition, REPTL proposes amending Probate Code § 64 and Trust Code § 112.038 to clarify that if a no-contest clause is unenforceable with respect to a person who satisfies the probable cause and good faith exception, the same protection extends beyond the person bringing the court action to his or her descendants and to trusts for the benefit of such person or his or her descendants that would otherwise be penalized by the forfeiture provision.[169] Although these proposed changes, if enacted, will provide some additional clarity, Part V of this Article will suggest that the Texas Legislature should consider other amendments to the current statutory framework to afford greater understanding to testators, potential contestants, and their attorneys.

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164. *Id.*

165. TEX. PROB. CODE ANN. § 243 (West 2009).

166. The Real Estate, Probate, and Trust Law Section of the State Bar of Texas, *2011 Decedents' Estate Package Proposal.*

167. E-mail from William D. Pargaman, Co-Chair, REPTL Legislative Committee, to Kara Blanco (Jan. 13, 2011, 09:56 CST) (on file with author).

168. Collins v. Smith, 53 S.W.3d 832, 842 (Tex. App.—Houston [1st Dist.] 2001, no pet.); *see In re* Estate of Longron, 211 S.W.3d 434, 439 (Tex. App.—Beaumont 2006, pet. denied); Garton v. Rockett, 190 S.W.3d 139, 147-48 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

169. E-mail from William D. Pargaman, *supra* note 167.

IV. EVALUATION OF OTHER STATES' JURISPRUDENCE REGARDING IN TERROREM CLAUSES

Modern approaches regarding no-contest clauses vary among U.S. courts, and many states, like Texas, have enacted statutory guidelines regarding the enforceability of no-contest clauses.[170] A number of jurisdictions have enacted the UPC (or a portion thereof), codified their common-law approaches, or adopted a combination of both. Some courts observe a rule of strict construction, in which they consider not only the plain meaning of the instrument, but also the actual language in the no-contest clause to determine the testator's intent and whether an individual's action is prohibited under such clause.[171] Other jurisdictions broadly interpret a no-contest clause to determine the testator's intent—permitting extrinsic evidence of such intent—and whether an individual intended to defeat the provisions of the will.[172] Although the strict and broad interpretations both evaluate the testator's intent, the strict construction view favors the interpretation of the plain meaning within the "four corners of the instrument" rather than the liberal view of considering the testator's circumstances and any specific facts at the time the instrument was made.[173]

Regardless, American jurisdictions generally follow one of the following approaches in evaluating no-contest clauses: (1) characterizing them as void and refusing to enforce them; (2) recognizing them as valid but treating them as unenforceable due to overbreadth; (3) enforcing them without exception; or (4) like Texas, enforcing them subject to certain exceptions, such as in the event an individual contests the instrument in good faith and with probable cause.[174] Most jurisdictions, however, recognize anti-contest clauses and enforce them as not against public policy, although they are historically disfavored in the law (as reflected in the oft-cited phrase, "equity abhors a forfeiture").[175] In addition, all courts recognize certain exceptions to the enforceability of no-contest clauses, including a proceeding to construe a will or trust instrument to ascertain the testator's true intent rather than to seek to nullify an instrument or any of its

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170. *See generally* Annotation, *Validity and Enforceability of Provision of Will or Trust Instrument for Forfeiture or Reduction of Share of Contesting Beneficiary*, 23 A.L.R.4th 369 (1983) (providing a survey of states' decisions and statutes on no-contest clauses).

171. *See* Sharon J. Ormond, *No Contest Clauses in California Wills and Trusts: How Lucky Do You Feel Playing the Wheel of Fortune?*, 18 WHITTIER L. REV. 613, 616-17 (1997). The law provides a great deal of freedom to testators, primarily respecting the integrity of individual choice; this freedom has been called the "cornerstone of the Anglo-American law of succession." J. Andrew Heaton, Comment, *The Intestate Claims of Heirs Excluded by Will: Should "Negative Wills" Be Enforced?*, 52 U. CHI. L. REV. 177, 183 (1985).

172. Ormand, *supra* note 171, at 617.

173. *Id.*

174. *See generally* PAGE ON THE LAW OF WILLS, *supra* note 44, at § 44.29; *see* Begleiter, *supra* note 73, at 630.

175. *See* PAGE ON THE LAW OF WILLS, *supra* note 44, at § 44.29.

provisions.[176] This Part will consider these approaches and highlight several states' case and statutory law.[177]

A. In Terrorem Clauses Are Unenforceable

Two states, Florida and Indiana, have enacted statutory law holding that in terrorem clauses are specifically void and unenforceable. Florida Statute § 732.517 provides that "[a] provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable."[178] Similarly, the Indiana Code states:

> If, in any will admitted to probate in any of the courts of this state, there is a provision or provisions providing that if any beneficiary thereunder shall take any proceeding to contest such will or to prevent the admission thereof to probate, or provisions to that effect, such beneficiary shall thereby forfeit any benefit which said will made for said beneficiary, such provision or provisions shall be void and of no force or effect.[179]

Historically, Louisiana has never enforced a penalty clause to effect a forfeiture, but its case law reflects that in terrorem clauses do not violate public policy or any other law per se.[180] Louisiana's treatment of in terrorem clauses "has not been judicially determined with finality," but certain statutory and case law in effect provide guidelines for a court's analysis.[181] Louisiana's statute provides that "[i]n all dispositions *inter vivos* and *mortis causa* impossible conditions, those which are contrary to the laws or to morals, are reputed not written."[182] If a court invalidates a particular in terrorem clause, the court follows the statutory mandate and removes the clause, permitting the court to review the will as if the clause had not been included.[183]

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176. *See* Begleiter, *supra* note 73, at 630.

177. The authors do not intend to provide an extensive analysis of every state's laws on this subject; however, the authors have focused on several jurisdictions and reviewed certain court opinions and statutory laws. Certain laws may be cited in full for discussion purposes of this Article.

178. FLA. STAT. ANN. § 732.517 (West 2009).

179. IND. CODE ANN. § 29-1-6-2 (LexisNexis 2009).

180. Fox, *supra* note 22, at 1275.

181. Succession of Gardiner, 366 So. 2d 1065, 1067 (La. App. 3d Cir. 1979), *writ denied.* Some Louisiana state courts first consider whether a particular lawsuit amounts to a "contest" within the clause in question; if not, there is no need for the court to determine the validity of the penalty provision because it is inapplicable. *In re* Succession of Scott, 950 So. 2d 846, 248 (La. App. 1st Cir. 2006), *writ denied*, 948 So. 2d 176 (La. 2007); Succession of Rouse, 80 So. 229, 234 (La. 1918). Louisiana courts also emphasize ascertaining the testator's intent. *See, e.g.*, Succession of Wagner, 431 So. 2d 10, 12 (La. App. 4th Cir. 1983).

182. LA. CIV. CODE ANN. art. 1519 (2008).

183. *See* Fox, *supra* note 22, at 1278.

B. *In Terrorem Clauses Are Valid But Unenforceable Due to Overbreadth*

Several courts have struck down no-contest clauses when the clause in question is overly broad.[184] As an example, one testator had threatened to revoke all legacies and bequests to any beneficiary who "file[d] any exception to [her] account or otherwise [took] action contrary to her interest."[185] The court refused to uphold the penalty clause, determining that "the enforcement of it would establish a vicious principle of law, dangerous in its effect, and create a potential instrument of defense in the hands of a faithless or negligent fiduciary."[186]

In another case, a testator included an in terrorem clause that mandated that all the trust beneficiaries approve and ratify the trustees' administration and actions with regard to the trust agreement and income from the trust.[187] The court held that clause was "so comprehensive in its scope as to cover the entire period of administration of the trusts, and is broad enough to absolve the trustees during the entire terms of the trusts from all responsibility for their actions, regardless of the legality of their administration of the trusts."[188]

C. *In Terrorem Clauses Are Enforceable Without Exception*

Other states have treated in terrorem clauses as enforceable without citing any exception.[189] One court has famously noted, "there is no exception to enforcement of a 'no contest' clause even when litigation is brought in good faith and with probable cause."[190]

1. Alabama

There have been only a few cases to address anti-contest provisions in Alabama jurisprudence, and no statute has been enacted to date to address the same.[191] In those cases, courts have either enforced the no-contest clause without exception or refused to enforce it because the contestant did

184. *See* Beyer, Dickinson, & Wake, *supra* note 3, at 244. Overbreadth could result from a poorly drafted in terrorem clause or an overzealous testator. *Id.*

185. *In re* Sand's Estate, 66 Pa. D&C 551, 551 (Pa. Orph. 1948).

186. *Id.* at 555.

187. *In re* Andrus' Will, 281 N.Y.S. 831, 840 (1935).

188. *Id.* at 852.

189. The authors do not intend to provide a survey of the laws in each state. Rather, this Article focuses on certain states' case law opinions and statutory law developments for purposes of later comparison to Texas law.

190. Ackerman v. Genevieve Ackerman Family Trust, 908 A.2d 1200, 1202 (D.C. 2006).

191. *See* Harrison v. Morrow, 977 So. 2d 457, 461-62 (Ala. 2007); Kershaw v. Kershaw, 848 So. 2d 942, 951 (Ala. 2002); Donegan v. Wade, 70 Ala. 501, 502 (1881).

not breach the clause in the proceeding; however, courts have not analyzed whether an exception for good faith or probable cause would apply.[192]

In the first decision by the Alabama Supreme Court on this issue, *Donegan v. Wade*, the court focused on the "spirit" of the in terrorem clause and enforced the forfeiture provision, reasoning:

> The testator possessed the right of disposing of his property as he saw fit, so long as he violated no law or established principle of sound public policy. He could bestow or withhold benefactions, as an attribute of the jus disponendi, without regard to considerations of justice, or of caprice. So, he could make such dispositions on conditions precedent or subsequent, not illegal. He chose to attach a ground of forfeiture, which would divest the interest of any one of his children who might seek to resist or oppose his will. It is not denied that this is a legal or valid condition, when attached to a legacy or devise. Its purpose, too, is clear. It was designed to prevent the inauguration or prosecution of a suit or contest in the courts, commenced with the view of defeating the will of the testator as he had seen fit to make it. Such contests often breed irreconcilable family feuds, and lead to disgraceful family exposures. They not [i]nfrequently, too, waste away vast estates, by protracted and extravagant litigation.[193]

In a more recent opinion, *Kershaw v. Kershaw*,[194] the Alabama Supreme Court did not extend the rationale in *Donegan* to enforce the in terrorem clause without exception, noting that "reliance upon *Donegan* as support for enforcing an *in terrorem* clause in all instances where the court finds a violation of the spirit but not the letter of such a clause would embrace a rule of construction favoring forfeiture."[195] In other matters in which it has construed contractual provisions, the court has embraced a policy of strict construction.[196] Upon reviewing other jurisdictions' laws, the court found persuasive the authority proposing strict construction with respect to no-

192. *See* cases cited *supra* note 191.

193. *Donegan*, 70 Ala. at 505.

194. *Kershaw*, 848 So. 2d at 954. In *Kershaw*, the court found that the in terrorem clause was not violated when a beneficiary brought a claim to determine the proper use of life insurance proceeds on the decedent's life. *Id.* at 942. The pertinent part of the no-contest clause in question stated: "[i]f either of my sons *in any manner*, directly or indirectly, contests or attacks the *validity* of this Will or the validity of any trust . . . *or any disposition* made under this Will or under any Trust." *Id.* at 951 (emphasis added). The court reasoned that the executor's role is to distribute the estate assets, while the testator's role is to control the disposition of the estate assets. *Id.* at 952. On that basis, the court concluded that the beneficiary had not attacked the "validity of the will" or "any disposition [made] under the will;" a challenge to the *manner of distribution* did not result in a challenge to the *disposition* itself. *Id.* at 954.

195. *Id.* at 954.

196. *Id.*; *see, e.g.*, Hunter-Benn & Co. v. Bassett Lumber Co., 139 So. 348, 353 (Ala. 1932) ("[T]he rule of general application is that stipulations in contracts intended to work a forfeiture of a valuable right will be strictly construed, and strict compliance therewith by the party claiming the forfeiture will be exacted, and doubtful provisions will be resolved against the right to claim such forfeiture.").

contest clauses: "[a] breach of a forfeiture clause [should] be declared only when the acts of a party come strictly within its expressed terms."[197]

By limiting the holding in *Donegan* ("imposing a penalty for a violation of the spirit and not the letter of the *in terrorem* clause") to the facts presented therein,[198] the court refused to establish a rule whereby it would enforce the forfeiture provision against a contestant for violating an in terrorem clause when the spirit, but not the letter, of the clause was violated; such a rule would create a tremendous burden on the court to determine the spirit of the in terrorem clause in situations in which such a clause is unambiguous.[199] In *Kershaw*, the court read the no-contest clause narrowly to find forfeiture only when there "has been a clear violation of the unambiguous terms of an *in terrorem* clause by at least one beneficiary."[200] Because the court did not find a violation of the no-contest clause, it did not have to analyze whether it should recognize a good-faith exception to the enforcement of such clauses.[201]

2. Massachusetts

In *Rudd v. Searles*, the high court of Massachusetts refused to adopt the good faith and probable cause exception.[202] The court reasoned that implementing such an exception would intentionally contravene the testator's expressed intent and prevent the contingent beneficiary receiving the gift over in the event of contest.[203] In that opinion, the court expounded on its rationale, noting that will contests bring the testator's private life into the limelight:

> Contests over the allowance of wills frequently, if not invariably, result in minute examination into the habits, manners, beliefs, conduct, idiosyncrasies, and all the essentially private and personal affairs of the

197. *See Kershaw*, 848 So. 2d. at 955 (quoting Claudia G. Catalano, Annotation, *What Constitutes Contest or Attempt to Defeat Will Within Provision Thereof Forfeiting Share of Contesting Beneficiary*, 3 A.L.R.5th 590 § 2[a] (1992)).

198. *See id.* The court indicated that another beneficiary had clearly violated "the letter" of the in terrorem clause in *Donegan*. *Id.*

199. *Id.* The court further noted that the lower court had erred by allowing parol evidence to establish the testator's intent. *Id.*; *see Ex parte* Employees Retirement Sys. Bd. of Control, 767 So. 2d 331, 334-35 (Ala. 2000) ("This Court has stated that in interpreting a will '[e]xtrinsic evidence is not admissible to vary, contradict or add to the plain and unambiguous language of the will.' Cook v. Morton, 254 Ala. 112, 116, 47 So. 2d 471, 474 (1950). This Court often has stated that it will not look beyond the four corners of an instrument unless the instrument contains latent ambiguities. Martin v. First Nat'l Bank of Mobile, 412 So. 2d 250, 253 (Ala.1982).").

200. *See Kershaw*, 848 So. 2d at 955.

201. *Id.* And, in the most recent case the Alabama Supreme Court addressed with respect to no-contest clauses, *Harrison v. Morrow*, 977 So. 2d 457, 458-59 (Ala. 2007), the court did not address the possibility of probable cause or good faith exception.

202. Rudd v. Searles, 160 N.E. 882, 886 (Mass. 1928).

203. *Id.*

> testator, when he is not alive and cannot explain what may without explanation be given a sinister appearance. To most persons such exposure to publicity of their own personality is distasteful, if not abhorrent. The ease with which plausible contentions as to mental unsoundness may be supported by some evidence is also a factor which well may be in the mind of a testator in determining to insert such a clause in his will. Nothing in the law or in public policy, as we understand it, requires the denial of solace of that nature to one making a will. A will contest not infrequently engenders animosities and arouses hostilities among the kinsfolk of the testator, which may never be put to rest and which contribute to general unhappiness. Moreover, suspicions or beliefs in personal insanity, mental weakness, eccentricities, pernicious habits, or other odd characteristics centering in or radiating from the testator, may bring his family into evil repute and adversely affect the standing in the community of its members. Thus a will contest may bring sorrow and suffering to many concerned. A clause of this nature may contribute to the fair reputation of the dead and to the peace and harmony of the living. Giving due weight to all these considerations, we are unable to bring our minds to the conviction that public policy requires that a testamentary clause such as here is involved be stamped as unlawful, even if the contestant had good grounds for opposing the allowance of the will. It seems to us that, both on principle and by the weight of authority, this is the right result.[204]

3. Missouri

The Supreme Court of Missouri has held that an anti-contest provision in a will does not violate any constitutional provision or contravene public policy and that probable cause does not excuse an unsuccessful contest of such instrument.[205] In *Rossi v. Davis*, the court further explained the policy considerations regarding the enforcement of no-contest clauses without an exception for probable cause by commenting that "[t]o engraft upon the condition thus distinctly expressed by the maker an exception not expressed nor reasonably implicable from the language of the instrument is to nullify the will of the maker, if in fact it be his will."[206] In addition, the court specifically discussed that a disgruntled beneficiary may petition the court to determine whether the purported instrument is, in fact, the testator's will:

> Whether or not it is in fact his will is a question which any legatee or devisee or beneficiary may submit to the arbitrament of the courts. He is not precluded by the no-contest clause from seeking redress in the courts. The courts are open to him to show, if he can, that the alleged will or instrument is not the will of his ancestor—is not valid—in which case the

204. *Id.*
205. *See In re* Estate of Chambers, 18 S.W.2d. 30, 36-37 (Mo. 1929).
206. Rossi v. Davis, 133 S.W.2d 363, 372 (Mo. 1939).

> whole instrument falls. But if it be adjudged to be the will of the maker, why should it not be given effect as written, absent some prohibitive rule of public policy or established rule of law? The dissatisfied legatee or beneficiary has his day in court. He may, without legal restraint, submit to the court the question, is the purported instrument in fact the will of the maker? If it be adjudged that it is not, he wins. If it be adjudged that it is, he loses. But every litigant takes and must take the chance to win or lose in a lawsuit. There is no obligation on the part of a disappointed legatee or beneficiary to question the sanity of him from whom the gift comes, —or, we may add, to question whether or not the purported instrument was the product of undue influence. In *Moran v. Moran*, we read: "The condition is lawful and one which the testator has a right to annex in the disposition of his own property. The legatees are not bound to accept the bequest, but, if accepted, it must be subject to the disabilities annexed. It must be taken *cum onere*, or not at all."[207]

4. New Jersey

For a long period of time, New Jersey followed the rule that a testator had the right to dispose of his or her property and to impose valid conditions against contest.[208] The New Jersey Court of Chancery noted:

> [W]e do not recognize, as do some jurisdictions, exceptions or limitations of the rule [sustaining the validity of a forfeiture clause], depending on whether the gift is of realty or personalty, and if of personalty, whether there is a gift over and whether the contest is in good or bad faith or on probable cause.[209]

In 1977, however, the New Jersey Legislature enacted a statute that renders in terrorem clauses in wills unenforceable if probable cause for a will contest exists.[210] In 1981, the New Jersey Supreme Court declined to adhere to its long-standing common law and followed a recently enacted statute, even though the statute did not apply to the will in question.[211] The court reasoned that the statute indicated the legislature's intent to "create a policy less inhibitory to the bringing of challenges to testamentary instruments" and determined it should be responsive to the public interest

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207. *Id.* (quoting Moran v. Moran, 123 N.W. 202, 206 (Iowa Sup. 1909)) (emphasis added) (internal citations omitted).

208. Provident Trust Co. of Phila. v. Osborne, 33 A.2d 103, 104 (N.J. Ch. 1943).

209. *Id.*

210. N.J. STAT. ANN. § 3B:3-47 (West 2009) ("A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.").

211. Haynes v. First Nat'l State Bank, 432 A.2d 890, 902-03 (N.J. 1981). The statute was enacted with respect to wills of decedents who died nearly a year after the death of the decedent in *Haynes*. *Id.*

and policy set forth in the statute in its "judicial quest for important societal values."[212]

5. Rhode Island

In *Elder v. Elder*, a Rhode Island court reasoned that a no-contest clause should be upheld without exception, so long as it is lawful.[213] According to the court:

> Where the language of a will is unequivocally clear and the condition is lawful, we cannot find constitutional or statutory authority for a court to enforce or not to enforce a forfeiture clause in its discretion, or to rewrite the will according to its own disposition as to the motives prompting a contest. In our view we may not arbitrarily strike out the condition that the testator affixed to his gift in language which is as clearly expressed as the gift itself and which violates no positive rule of law or public policy. Once the will has been contested and found by the jury and court to be the true will of the testator, as here, the conditional provision for forfeiture which is inseparably affixed to a gift is as much a part of the will as any other provision, and therefore it should be given equal effect.[214]

The court also noted that those advocating the good faith and probable cause exception overlooked the fact that the statute of wills is the "properly declared public policy in respect to testamentary gifts" and further commented that a court has no right to make public policy or "write into" the statute what the legislature might have intentionally left out.[215]

6. Wyoming

Wyoming followed a similar reasoning as Rhode Island in a case of first impression by declining to follow the good faith and probable cause exception.[216] The court heavily emphasized that it could not expand on the testator's unambiguous intent from the language of the will.[217] In addition, because the Wyoming legislature had not incorporated the UPC's provision on the enforcement of no-contest clauses (which provided an exception for a contest brought in good faith and with probable cause), the court found that fact persuasive and chose not to judicially legislate.[218]

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212. *Id.* at 903.
213. Elder v. Elder, 120 A.2d 815, 820 (R.I. 1956).
214. *Id.* at 819.
215. *Id.* at 819-20.
216. Dainton v. Watson, 658 P.2d 79, 82 (Wyo. 1983).
217. *Id.* at 81-82.
218. *Id.* at 82; *see* WYO. STAT. ANN. § 2-6-301 (LexisNexis 2009).

D. *In Terrorem Clauses Are Enforceable Subject to Certain Exceptions*

The majority of the United States follows UPC guidelines (or a variation thereof) and enforce no-contest clauses subject to certain exceptions. The main exception that courts cite is whether the contestant brings an action in good faith and with probable cause.[219] This methodology was first applied in England in 1688 in the case of *Powell v. Morgan*.[220] The Court of Chancery did not impose a forfeiture because it found that the contestant had *probabilis cause litigandi*.[221]

In the United States, the dicta from an old South Carolina case is often quoted regarding the foundation for the probable cause exception to the enforceability of in terrorem clauses:

> Without intention or authority to commit the Court to this extent, I express my own opinion, in which Chancellor Johnston fully concurs, that a condition subsequent of this description is void, whether there be a devise over or not, as trenching on the "liberty of the law," . . . and violating public policy . . . . It is the interest of the State, that every legal owner should enjoy his estate, and that no citizen should be obstructed by the risk of forfeiture from ascertaining his rights by the law of the land. It may be politic to encourage parties in the adjustment of doubtful rights by arbitration or by private settlement; but it is against the fundamental principles of justice and policy to inhibit a party from ascertaining his rights by appeal to the tribunals established by the State to settle and determine conflicting claims. If there be any such thing as public policy, it must embrace the right of a citizen to have his claims determined by law.[222]

The first court to allude to a judicial probable cause exception is the Supreme Court of Pennsylvania.[223] The court discussed certain authorities promulgating that if *probabilis causa litigandi* existed, the forfeiture provision should not be observed; however, in that case, the court did not find that probable cause exempted the beneficiary from the forfeiture provision.[224]

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219. *See, e.g.*, N.M. STAT. ANN. § 45-2-517 (West 2009); *In re* Estate of Cocklin, 17 N.W.2d 129, 135 (Iowa 1945); *In re* Estate of Foster, 376 P.2d 784, 786 (Kan. 1962); Ryan v. Wachovia Bank & Trust Co., 70 S.E.2d 853, 856-57 (N.C. 1952); Wadsworth v. Brigham, 259 P. 299, 306-07 (Or. 1927); *In re* Estate of Friend, 58 A. 853, 854-56 (Pa. 1904); Rouse v. Branch, 74 S.E. 133, 135 (S.C. 1912); Tate v. Camp, 245 S.W. 839, 842-44 (Tenn. 1922); *In re* Estate of Chappell, 221 P. 336, 338 (Wash. 1923); Dutterer v. Logan, 137 S.E. 1, 3 (W. Va. 1927); *In re* Will of Keenan, 205 N.W. 1001, 1006 (Wis. 1925).

220. Powell v. Morgan, (1688) 23 Eng. Rep. 668 (Ch.); 2 Vern. 90.

221. *Id.*

222. Mallett v. Smith, 27 S.C. Eq. (6 Rich. Eq.) 12, 14 (1853) (holding that an in terrorem clause containing a gift over in the event of forfeiture was valid).

223. Appeal of Chew, 45 Pa. 228, 230 (1863).

224. *Id.*

In *South Norwalk Trust Company*, the Supreme Court of Errors of Connecticut further elaborated on the good faith and probable cause exception (although, like the court in Pennsylvania, this court did not apply the exception to the facts of the instant case).[225] The court reasoned that this exception rests upon sound public policy, noting:

> The law prescribes who may make a will and how it shall be made; that it must be executed in a named mode, by a person having testamentary capacity and acting freely, and not under undue influence. The law is vitally interested in having property transmitted by will under these conditions, and none others. Courts cannot know whether a will, good on its face, was made in conformity to statutory requirements, whether the testator was of sound mind, and whether the will was the product of undue influence, unless these matters are presented in court. And those only who have an interest in the will will have the disposition to lay the facts before the court. If they are forced to remain silent, upon penalty of forfeiture of a legacy or devise given them by the will, the court will be prevented by the command of the testator from ascertaining the truth, and the devolution of property will be had in a manner against both statutory and common law.[226]

The court also specifically stated that this exception would not place an additional burden on courts in finding probable cause than the burden required by finding similar facts in other types of cases.[227]

1. Arizona

Arizona has recently considered the probable cause exception. Arizona Revised Statute § 14-2517 reads as follows: "A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for that action."[228] Then, in *In re Estate of Shumway*, the Arizona Supreme Court addressed the issue of whether a legal presumption of undue influence is sufficient probable cause under the Arizona statute.[229] The court carefully analyzed the standard of probable cause to be applied under the statute. It noted that the appellate court had relied on the widely accepted definitions of probable cause used in criminal and civil cases dealing with false arrest or malicious prosecution—that is, probable cause requires an independent, objective determination of whether

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225. S. Norwalk Trust Co. v. St. John, 101 A. 961, 962-64 (Conn. 1917).

226. *Id.* at 963.

227. *Id.*

228. ARIZ. REV. STAT. § 14-2517 (2005). This statute is based on the UNIFORM PROBATE CODE § 2-517 (amended 2006).

229. *In re* Estate of Shumway, 9 P.3d. 1062, 1064 (Ariz. 2000).

reasonable persons in the given situation would have acted similarly.[230] While the Arizona Supreme Court agreed with the appellate court's standard, it pointed out that because will contests are so unique (especially in light of the public policy factors and competing interests involved), it preferred to apply a standard specifically related to will contests.[231] It adopted the definition of probable cause promulgated by the Restatement, which reads:

> [T]he existence, at the time of the initiation of the proceeding, of evidence which would lead a reasonable person, properly informed and advised, to conclude that there is a substantial likelihood that the contest or attack will be successful. The evidence needed . . . should be less where there is strong public policy supporting the legal ground of the contest or attack. . . . A factor which bears on the existence of probable cause is that the beneficiary relied upon the advice of disinterested counsel sought in good faith after a full disclosure of the facts.[232]

Based on this definition, the court mandated that the trial court should "refer to the evidence known at the time" a contest is initiated to determine whether the standard of probable cause is met.[233] The court also noted that good faith is not the sole test, but a factor, and that the subjective belief in the basis of the challenge is necessary for the required belief in the "substantial likelihood" of success.[234]

Then, the court focused on the application of the statute and the standard of probable cause to the case in question. The court noted that the statute should be "liberally construed, especially when the grounds include such matters as undue influence."[235] Although it was later determined through evidence and the development of the facts at trial that the will was valid and there was no undue influence, the court found that a reasonable person, properly informed and advised, had grounds to believe there was a substantial likelihood of success and that probable cause to contest the will existed.[236] The court vacated the lower court's finding and did not apply the penalty clause to the beneficiary.[237]

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230. *Id.* at 1066.

231. *Id.*

232. *Id.* (emphasis omitted) (quoting RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 9.1 cmt. j. (1983)). Other jurisdictions have also adopted this definition of probable cause, including Colorado, Kansas, and Nevada. *See In re* Estate of Peppler, 971 P.2d 694, 697 (Colo. App. 1998); *In re* Estate of Campbell, 876 P.2d 212, 216 (Kan. Ct. App. 1994); Hannam v. Brown, 956 P.2d 794, 799 (Nev. 1998).

233. *In re* Estate of Shumway, 9 P.3d. at 1067.

234. *See id.* at 1066.

235. *Id.* at 1067.

236. *Id.* at 1067-68.

237. *Id.* at 1068.

2. California

The California Legislature recently passed a bill that made sweeping changes to the state's jurisprudence, and no-contest provisions in California wills, trusts, and other "protected instruments"[238] are not enforceable unless they comply with the new law (effective as of January 1, 2010).[239] Pursuant to California Probate Code § 21311, a no-contest clause will only be enforced against three types of contests: (1) "[a] direct contest that is brought without probable cause,"[240] (2) "[a] pleading to challenge a transfer of property on the grounds that it was not the transferor's property at the time of the transfer,"[241] and (3) "[t]he filing of a creditor's claim or prosecution of an action based on it."[242] With regard to property ownership disputes and creditor claims, a no-contest clause will only be enforced "if the no contest clause expressly provides for that application."[243]

Interestingly, the statute expressly provides that the statute is not a "complete codification" of the law regarding no-contest clauses, but that common law also governs such clauses to the extent the statute does not apply.[244] The statute, however, "applies notwithstanding a contrary provision in the instrument."[245] In addition, when considering the intent of the transferor, the statute directs that the clause be strictly construed.[246]

When enacting the new law, the California Legislature provided that probable cause exists "if, at the time of filing a contest, the facts known to

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238. CAL. PROB. CODE ANN. § 21310(e) (West 2010). "Protected instrument" means all of the following instruments: "(1) the instrument that contains the no contest clause" and "(2) [a]n instrument that is in existence on the date that the instrument containing the no contest clause is executed and is expressly identified in the no-contest clause, either individually or as part of an identifiable class of instruments, as being governed by the no contest clause." *Id.*

239. *See id.* §§ 21310-21315. The statute applies to any instrument, whenever executed, that became irrevocable on or after January 1, 2001. *Id.* It does not apply to an instrument that became irrevocable before that date. § 21315.

240. § 21311(a)(1). A "direct contest" is one that:

> [A]lleges the invalidity of a protected instrument or one or more of its terms, based on one or more of the following grounds:
>
> (1) Forgery.
>
> (2) Lack of due execution.
>
> (3) Lack of capacity.
>
> (4) Menace, duress, fraud or undue influence.
>
> (5) Revocation of a will pursuant to § 6120, revocation of a trust pursuant to §15401, or revocation of an instrument other than a will or trust pursuant to the procedure for revocation that is provided by statute or by the instrument;
>
> (6) Disqualification of a beneficiary under Section 6112, 21350, or 21380.

Id. § 21310(b).

241. § 21311(a)(2). "Pleading" means a petition, complaint, cross-complaint, objection, answer, response, or claim." § 21310(d).

242. § 21311(a)(3).

243. *Id.*

244. *See* § 21313.

245. § 21314.

246. *See* § 21312.

the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery."[247]

3. Michigan

In short, Michigan has codified a rule of limited enforceability of no-contest clauses, but does not require good faith to bring a contest. The statute reads: "[a] provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings."[248]

4. Nevada

Nevada law specifically directs the court to enforce no-contest clauses.[249] The statute recognizes that a beneficiary may, without penalty, seek enforcement of the will or trust or seek a judicial ruling as to the *meaning* of the will or trust.[250] The law also recognizes an exception where legal action challenging the validity of the document is "instituted in good faith and based on probable cause that would have led a reasonable person,

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247. § 21311(b).

248. MICH. COMP. LAWS ANN. § 700.2518 (West 2010).

249. NEV. REV. STAT. § 137.005(1) (2009).

250. *Id.* The provision states:

> Enforcement of no-contest clauses; exceptions.
>
> 1. Except as otherwise provided in subsections 3 and 4, a no-contest clause in a will must be enforced by the court.
>
> 2. A no-contest clause must be construed to carry out the testator's intent. Except to the extent the will is vague or ambiguous, extrinsic evidence is not admissible to establish the testator's intent concerning the no-contest clause. The provisions of this subsection do not prohibit such evidence from being admitted for any other purpose authorized by law.
>
> 3. Notwithstanding any provision to the contrary in the will, a devisee's share must not be reduced or eliminated if the devisee seeks only to:
>
> (a) Enforce the terms of the will;
>
> (b) Enforce the devisee's legal rights in the probate proceeding; or
>
> (c) Obtain a court ruling with respect to the construction or legal effect of the will.
>
> 4. Notwithstanding any provision to the contrary in the will, a devisee's share must not be reduced or eliminated under a no-contest clause because the devisee institutes legal action seeking to invalidate a will if the legal action is instituted in good faith and based on probable cause that would have led a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the will was invalid.
>
> 5. As used in this section, "no-contest clause" means one or more provisions in a will that express a directive to reduce or eliminate the share allocated to a devisee or to reduce or eliminate the distributions to be made to a devisee if the devisee takes action to frustrate or defeat the testator's intent as expressed in the will. (Added to NRS by 2009, 1625).

Id.

properly informed and advised, to conclude that there was a substantial likelihood that the [trust or other trust-related instrument] was invalid."[251]

5. New York

Like California, the New York Legislature has enacted rather detailed statutory law on the matter of will contests. The applicable New York statute provides in full that a "condition, designed to prevent a disposition from taking effect in case the will is contested by the beneficiary, is operative despite the presence or absence of probable cause for such contest," subject to the following:

> (1) Such a condition is not breached by a contest to establish that the will is a forgery or that it was revoked by a later will, provided that such contest is based on probable cause.
>
> (2) An infant or incompetent may affirmatively oppose the probate of a will without forfeiting any benefit thereunder.
>
> (3) The following conduct, singly or in the aggregate, shall not result in the forfeiture of any benefit under the will:
>
> > (A) The assertion of an objection to the jurisdiction of the court in which the will was offered for probate.
> >
> > (B) The disclosure to any of the parties or to the court of any information relating to any document offered for probate as a last will, or relevant to the probate proceeding.
> >
> > (C) A refusal or failure to join in a petition for the probate of a document as a last will, or to execute a consent to, or waiver of notice of a probate proceeding.
> >
> > (D) The preliminary examination, under SCPA 1404, of a proponent's witnesses, the person who prepared the will, the nominated executors and the proponents in a probate proceeding.
> >
> > (E) The institution of, or the joining or acquiescence in a proceeding for the construction of a will or any provision thereof.[252]

New York commentators have noted that the legislature struck a balance between allowing a testator to discourage contests and providing a way for

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251. *Id.*

252. N.Y. EST. POWERS & TRUSTS LAW § 3-3:5 (McKinney 2009); *see also* N.Y. SURR. CT. PROC. ACT LAW § 1404 (McKinney 1995) (discussing the examination of witnesses and proof required to probate a will).

legitimate contests to be brought to the courts' attention, namely where the will is not validly executed or underhanded activities such as fraud, undue influence, or forgery seem apparent.[253] The New York statute provides a number of exceptions to enable a beneficiary to question aspects of the will without actually contesting it.[254]

In a recent landmark decision in New York jurisprudence, *In re Estate of Singer*, the New York Court of Appeals held that the safe harbor provisions of § 3-3.5 and SCPA 1404 are not exclusive and that they must be applied on a case-by-case basis; the court stated that although the statutes specify certain groups who may be examined, circumstances may permit other persons not outside the statutory parameters to be deposed.[255] The court essentially set forth a two-prong analysis to determine whether a beneficiary's conduct triggers an in terrorem clause: (1) whether the conduct falls within the statutory safe harbor provisions, and if not, (2) whether the conduct violated the testator's intent.[256] In *Singer*, the court held that a beneficiary's deposition of the testator's former attorney (not the draftsman of the will in question) regarding previously drafted wills did not violate the in terrorem clauses in the testator's will.[257] The court construed the clauses narrowly and held that the attorney had a long history of representing the testator (he had drafted seven prior wills), and that the beneficiary was simply gathering information on the testator's estate plan.[258] In fact, the court commented that the purpose of an in terrorem clause is to permit a beneficiary to weigh the risk involved in contesting a will; in this matter, the court noted that the deposition satisfied this principle.[259] A broader construction of the clauses (that is, to preclude the examination of other witnesses outside the safe harbors of the statutes) would "cut off all other persons from being asked for information, no matter the potential value or relevance."[260]

Another recent decision of note is the *Shamash v. Stark* case.[261] In *Shamash*, the issue was whether will and trust contests in Florida (where

253. *See, e.g.*, Donna R. Bashaw, *Are In Terrorem Clauses No Longer Terrifying? If so, Can You Avoid Post-Death Litigation with Pre-Death Procedures?*, 2 NAT'L ACAD. ELDER L. ATTY'S J. 349, 351 (2006); Elizabeth A. Hartnett, *Estates and Trusts*, 55 SYRACUSE L. REV. 981, 992-93 (2005).

254. *See* sources cited *supra* note 252.

255. *In re* Estate of Singer, 920 N.E.2d 943, 946 (N.Y. 2009). *But see* Hallman v. Bosswick, 72 A.D.3d 616, 617 (N.Y. App. Div. 2010) (holding that a judicial expansion of the statutory safe harbor provisions established by the legislature should begin with the trial court, not the New York Court of Appeals).

256. *See Singer*, 920 N.E.2d at 964.

257. *Id.* at 944, 947. There were two clauses in the testator's will and revocable trust: one general and one specifically targeting the beneficiary in question to prevent him from instituting a court proceeding against, or attempting to contest, the testator's will and trust. *Id.* at 944.

258. *Id.*

259. *Id.*

260. *Id.*

261. Shamash v. Stark, 6/16/09 N.Y.L.J. at 38 col. 2 [Sur. Ct. N.Y. 2009]. For a discussion of this case and link to the court document see Robert Harper, *Triggering In Terrorem Clauses*

no-contest clauses are void as against public policy under statutory law) would trigger an in terrorem clause contained in a New York trust instrument.[262] The New York court dismissed the petition, holding that the beneficiary lacked standing to seek an accounting or removal with respect to the trust.[263] The court reasoned that because the trust was governed by New York law and in terrorem clauses are enforceable in New York, the beneficiary triggered the trust's in terrorem clause by contesting the will and trust in Florida.[264] The fact that Florida does not recognize no-contest clauses was immaterial. As individuals move across state lines for jobs, retirement, or family matters, this case is important because the contest of a will or trust in another state where no-contest clauses are not enforceable may trigger such a clause in an instrument governed by a state such as New York and result in forfeiture.

6. Oklahoma

Oklahoma favors the strict constructionist viewpoint, holding that an in terrorem clause must be "strictly construed against forfeiture, enforced as written, and interpreted reasonably in favor of the beneficiary" and that a broad interpretation should not be given to the language of the instrument, nor may the court employ a "strained or overly technical construction upon the language."[265] If a party's actions fall within the express terms of the penalty clause, the court may find a breach.[266] The Oklahoma Supreme Court recognized that a forfeiture clause should not be invoked if the contestant has probable cause to challenge a will based on forgery or subsequent revocation by a later will or codicil.[267] In *Westfahl*, the Oklahoma Supreme Court noted that the word "contest" means "any legal proceeding designed to result in the thwarting of the testator's wishes as expressed in the will"; the court further stated that "a clear and unequivocal attack must be made on the will before the penalty contained in the no contest clause will be invoked."[268]

7. Oregon

Interestingly, the Oregon statute specifically directs that the testator's intention, as expressed in the will, controls:

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with Out-of-State Will and Trust Contests N.Y. STATE LITIG. BLOG (Sept. 11, 2009), http://www.nyestatelitigationblog.com/tags/shamash-v-stark/.

262. Harper, *supra* note 261.

263. *Id.*

264. *Id.*

265. *In re* Estate of Westfahl, 674 P.2d 21, 24 (Okla. 1984).

266. *Id.*

267. *Id.*

268. *Id.*

> The intention of a testator as expressed in the will of the testator controls the legal effect of the dispositions of the testator. The rules of construction expressed in this section, ORS 112.230 [providing that the local law of the instrument governs unless it is contrary to Oregon's public policy standards] and 112.410 [noting that the general disposition or residuary clause has no effect on a testator's power of appointment unless there is specific reference to such power] apply unless a contrary intention is indicated by the will.[269]

V. INTERPRETING AND DRAFTING IN TERROREM CLAUSES IN LIGHT OF CURRENT TEXAS LAW AND SUGGESTIONS FOR FUTURE IMPROVEMENT

A. Recommendations to Clarify the Texas Statutes

1. Definitions of "Good Faith" and "Probable Cause"

Although the 2009 legislation incorporated the good faith and probable cause exception into the Texas Probate and Trust Codes, Texas House Bill 1969 did not provide definitions of those concepts.[270] Undoubtedly, by amending the current statutes to account for these definitions, the Texas Legislature would provide estate planning attorneys, testators, fiduciaries, beneficiaries, and potential will contestants with much-needed clarification.

a. Good Faith

Although many jurisdictions refer to good faith in tandem with probable cause as a single recognized exception to the imposition of an in terrorem clause, there have been no statutes that define good faith in connection with will contests. The concept of good faith is rather elusive:

> taking on different meanings and emphases as we move from one context to another—whether the particular context is supplied by the type of legal system (e.g., common law, civilian, or hybrid), the type of contract (e.g., commercial or consumer), or the nature of the subject matter of the contract (e.g., insurance, employment, sale of goods, financial services, and so on).[271]

Black's Law Dictionary defines good faith as follows: "A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of

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269. OR. REV. STAT. ANN. § 112.227 (West 2009).

270. *See* Act of June 19, 2009, 81st Leg., R.S. ch. 414, §§ 1-5, 2009 Tex. Gen. Laws 995-96.

271. ROGER BROWNSWORD ET AL., *Good Faith in Contract*, *in* GOOD FAITH IN CONTRACT: CONCEPT AND CONTEXT 1, 3 (Roger Brownsword ed., 1999).

fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage."[272]

In Texas, at least one trial court has submitted the following definition of good faith to a jury: "an action which is prompted by honesty of intention or a reasonable belief that the action was probably correct."[273] A notable Texas estate planning professor, Gerry Beyer, has proposed the following definition with respect to a revision of the Texas statutes: "good faith" means "that a beneficiary honestly believes that the instrument or a provision thereof is invalid."[274] The Texas Legislature should adopt a definition similar to the one proposed by Professor Beyer. Like the Arizona Supreme Court noted in *In re Estate of Shumway*, however, good faith should not be the sole test with respect to exempting a beneficiary's actions from an in terrorem clause, but a factor that the subjective belief in the basis of the challenge is necessary for the required belief in the "substantial likelihood" of success.[275]

b. Probable Cause

The notion of probable cause has received much more commentary over the years in the context of will contests, most likely because of the inherent evaluation of specific facts and circumstances involved in a given case. The Restatement defines probable cause as follows:

> Probable cause exists when, at the time of instituting the proceeding, there was evidence that would lead a reasonable person, properly informed and advised, to conclude that there was a substantial likelihood that the challenge would be successful. A factor that bears on the existence of probable cause is whether the beneficiary relied upon the advice of disinterested counsel sought in good faith after a full disclosure of the facts. The mere fact that the person mounting the challenge was represented by counsel is not controlling, however, since the institution of a legal proceeding challenging a donative transfer normally requires representation by legal counsel.[276]

Although the definition has not been specifically incorporated into the Arizona statute, the high court in Arizona directed that its courts follow the Restatement's definition of probable cause instead of the widely used

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272. BLACK'S LAW DICTIONARY 762 (9th ed. 2009).

273. Beyer & Major, *supra* note 160, at 3 (citing JIM HARTNETT, JR. ET. AL, NO CONTEST PROVISIONS—DO THEY REALLY WORK? 12 (presented at the Dallas Bar Association Probate Section Meeting on Jan. 27, 2009)).

274. Beyer, Dickinson, & Wake, *supra* note 3, at 269.

275. *In re* Estate of Shumway, 9 P.3d. 1062, 1066 (Ariz. 2000); *see supra* Part IV.D.1.

276. RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 8.5 cmt. c (Tentative Draft No. 3254, 2001); *see* discussion *supra* Part V.

criminal and civil definitions.[277] The court stated that the evidence known *at the time a contest is initiated* should be considered.[278]

The California Legislature expressly provided a definition of probable cause in its recently revised statute, and while it is similar to the Restatement definition, it is not identical.[279] Under that statute, probable cause exists "if, at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery."[280] Like the Arizona court's proscription and the Restatement's definition, this definition provides a contesting beneficiary with a means to bring the matter before the court for further investigation, so long as such individual believes that there is a reasonable likelihood that his or her request would be granted.

Another definition of "probable cause" that has been promulgated with respect to will contests follows: probable cause exists when the contestant "reasonably believes in the existence of facts upon which his claim is based and reasonably believes that under such facts the claim may be valid at common law or under an existing statute, or so believes in reliance upon the advice of counsel."[281] Under this definition, which permits reliance upon an attorney's guidance as a sole means to exempt a beneficiary's actions, it is arguable that a court could determine in virtually all situations that a beneficiary had probable cause and a reasonable chance of success, and

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277. *See* discussion *supra* Part V. BLACK'S LAW DICTIONARY defines "probable cause" in the context of criminal law and torts:

> 1. *Criminal law.* A reasonable ground to suspect that a person has committed or is committing a crime or that a place contains specific items connected with a crime. Under the Fourth Amendment, probable cause—which amounts to more than a bare suspicion but less than evidence that would justify a conviction—must be shown before an arrest warrant or search warrant may be issued.—Also termed *reasonable cause*; *sufficient cause*; *reasonable grounds*; *reasonable excuse*. "Probable cause may not be established simply by showing that the officer who made the challenged arrest or search subjectively believed he had grounds for his action. As emphasized in *Beck v. Ohio* [379 U.S. 89, 85 S. Ct. 223 (1964)]: 'If subjective good faith alone were the test, the protection of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects" only in the discretion of the police.' The probable cause test, then, is an objective one; for there to be probable cause, the facts must be such as would warrant a belief by a reasonable man." Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 3.3, at 140 (2d ed. 1992). 2. *Torts.* A reasonable belief in the existence of facts on which a claim is based and in the legal validity of the claim itself. In this sense, probable cause is usu[ally] assessed as of the time when the claimant brings the claim (as by filing suit). 3. A reasonable basis to support issuance of an administrative warrant based on either (1) specific evidence of an existing violation of administrative rules, or (2) evidence showing that a particular business meets the legislative or administrative standards permitting an inspection of the business premises.

BLACK'S LAW DICTIONARY 1321 (9th ed. 2009).

278. *Shumway*, 9 P.3d. at 1066 (emphasis added).

279. CAL. PROB. CODE ANN. § 21311(b) (West 2010).

280. *Id.*

281. Beyer, Dickinson, & Wake, *supra* note 3, at 268 (quoting Geisinger v. Geisinger, 41 N.W.2d 86, 93 (Iowa 1950)).

invalidate the in terrorem clause.[282] While the Restatement definition provides that reliance on a disinterested counsel's advice is a factor, it is not, by itself, probable cause.

In Texas, at least one court has instructed a jury that "probable cause" means that the "actions of [the beneficiary challenging the will] in prosecuting the will contest were based on reasonable grounds that there was a fair and honest cause or reason for said actions."[283] With respect to amending the Texas statutes, Professor Beyer has proposed that "probable cause" should mean "that the beneficiary reasonably believes in the existence of facts and law which would permit that beneficiary to successfully contest the instrument."[284] While this definition would provide clarity to the current Texas statutes, the Texas Legislature should consider following the Restatement's guidance. The definition under the Restatement is based on the objective standard of what a "reasonable person, properly informed and advised" would conclude, rather than the subjective standard of what a particular beneficiary believed.[285] Moreover, it would be helpful for the legislature to also include a list of factors that bear on the existence of probable cause; one such factor noted by the Restatement is that the beneficiary relied upon the advice of disinterested counsel sought in good faith after a full disclosure of the facts. Any such list of factors, however, need not be an exhaustive list, and any such factors would not, taken alone, establish probable cause; of course, the court would be required to examine the facts and circumstances on a case-by-case basis.

In sum, the good faith and probable cause exception should not be satisfied merely because a particular beneficiary (perhaps uninformed or uneducated, but certainly biased) believed that an instrument (or a provision thereof) was invalid; the statutory exceptions should require a higher and more objective standard of whether a reasonable person (informed and advised) would conclude the same.

2. Definition of "Court Action"

Texas Probate Code § 64 and Trust Code § 112.038 apply to forfeiture clauses that are triggered by "bringing any court action, including

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282. *Id.* at 269.

283. *See* Beyer & Major, *supra* note 160, at 3 (alteration in original) (citing HARTNETT, JR. ET. AL, *supra* note 273, at 12). Note that in the event the Texas Legislature adopts REPTL's proposal to change "probable cause" to "just cause" in the statutory language as discussed in Part III.D *supra*, Texas courts have used an identical jury instruction to define "just cause." *See In re* Estate of Longron, 211 S.W.3d 434, 434 (Tex. App.—Beaumont 2006, pet. denied); Garton v. Rockett, 190 S.W.3d 139, 147-48 (Tex. App.—Houston [1st Dist.] 2005, no pet.); Collins v. Smith, 53 S.W.3d 832, 841 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

284. Beyer, Dickinson, & Wake, *supra* note 3, at 270.

285. *See* RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 8.5 cmt. c.

contesting a [will or trust]."[286] The statutes do not define "bringing any court action."[287] The phrase is broader than merely actions to contest, but how broad? For example, are the statutes applicable to a clause triggered by a beneficiary joining in an action initiated by another party or by a beneficiary providing favorable testimony in another party's contest?

Texas courts have held that the following actions do not trigger forfeiture clauses: actions to construe a will provision;[288] actions that are filed but dismissed with no further proceedings;[289] or testimony in a contest brought by other beneficiaries.[290] Actions to construe a will or trust provision and actions that are initiated but later dismissed are likely within the scope of "bringing any court action" under Texas Probate Code § 64 and Trust Code § 112.038.[291] Thus, beneficiaries who bring such actions should have the benefit of the protection offered by Probate Code § 64 or Trust Code § 112.038 if probable cause exists and the actions are brought and maintained in good faith.

With respect to a beneficiary testifying in a contest brought by other beneficiaries, Texas courts have held that such testimony does not trigger in terrorem clauses even if the in terrorem clause specifically prohibits beneficiaries from providing such testimony.[292] The courts cite public policy reasons because the enforcement of in terrorem clauses in such cases would discourage full disclosure of the facts and interfere with the judicial process. Thus, even if the scope of Texas Probate Code § 64 and Trust Code § 112.038 is not broad enough to apply to forfeiture clauses triggered by testifying in another beneficiary's contest, Texas courts will likely be reluctant to enforce such clauses due to public policy reasons.

Another action that may be outside the scope of the plain language of Texas Probate Code § 64 and Trust Code § 112.038 is an action to join in a proceeding initiated by another beneficiary, which arguably does not qualify as "bringing a court action." The public policy concern that likely prevents enforcement of in terrorem clauses in the context of beneficiaries providing testimony does not seem relevant with respect to a beneficiary joining a proceeding.[293] Thus, if beneficiaries wish to join a proceeding without triggering an in terrorem clause, they will likely have to rely on case law. The basis for refusing to enforce in terrorem clauses in many Texas court decisions is the strict construction of such clauses with the result that the beneficiaries are not within the scope of the triggering actions

286. TEX. PROB. CODE ANN. § 64 (West 2009).

287. *Id.*

288. *See* Calvery v. Calvery, 55 S.W.2d 527, 528, 530-31 (Tex. 1932).

289. *See In re* Estate of Hamill, 866 S.W.2d 339, 344-46 (Tex. App.—Amarillo 1993, no writ); Sheffield v. Scott, 662 S.W.2d 674, 676-77 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.).

290. Hazen v. Cooper, 786 S.W.2d 519, 520-21 (Tex. App.—Houston [14th Dist.] 1990, no writ).

291. TEX. PROB. CODE ANN. § 64 (West 2009); TEX. PROP. CODE ANN. § 112.038 (West 2009).

292. *Id.*; *see* Beyer, Dickinson, & Wake, *supra* note 3, at 258.

293. *See, e.g.*, *Hamill*, 866 S.W.2d at 342-46; *Hazen*, 786 S.W.2d at 520-21.

described in the testamentary instrument.[294] For example, if the terms of a will provide that a forfeiture is triggered by a "contest," Texas courts have applied that term narrowly and have declined to trigger forfeitures if the beneficiaries' actions are not clearly within the scope of a "contest."[295]

If an in terrorem clause includes a specific and comprehensive list of triggering events, including "joining in any proceeding," then the action would likely trigger the clause despite a court's strict construction. Unless a court rules directly that the probable cause and good faith exception is applicable, which no Texas court has previously done, then well-intentioned beneficiaries joining, rather than initiating, a proceeding may not be able to escape forfeiture. A distinction between application of the probable cause and good faith exception as between those beneficiaries who initiate and those who join a proceeding should not exist. Thus, to promote consistency, the Texas Legislature should consider amending Texas Probate Code § 64 and Trust Code § 112.038 to apply to clauses triggered by "bringing *or joining* in a court action" or to otherwise amend the statutes to provide a clear definition of "court action."

3. Texas Probate Code § 64 Should Be Non-Waivable to Be Consistent with Texas Trust Code § 111.0035(b)(6)

In addition to adding Texas Probate Code § 64 and Trust Code § 112.038, Texas House Bill 1969 also added Trust Code § 111.0035(b)(6) to provide that § 112.038 cannot be waived by the terms of a trust instrument.[296] The Probate Code contains no corresponding provision prohibiting the waiver of § 64 by the terms of a will. Thus, to promote clarity and consistency with the Trust Code, the Texas Legislature should consider amending § 64 to provide that the provision may not be waived by the terms of a will.

4. Enforceability of In Terrorem Clauses Against Minors

Jurisdictions differ over whether to enforce in terrorem clauses against minors. At least one Texas court has favorably cited a Michigan Supreme Court decision holding that, where a will contest is made in the name of a minor through a guardian appointed by the probate court, a forfeiture clause is invalid as against public policy.[297] The reason given for invalidating forfeiture clauses against minors is that the clauses seek to deprive courts of

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294. *See, e.g.*, *Sheffield*, 662 S.W.2d at 676-77; Calvery v. Calvery, 55 S.W.2d 527, 529-30 (Tex. 1932).

295. *See, e.g.*, *Hazen*, 786 S.W.2d at 520-21.

296. Act of June 19, 2009, 81st Leg., R.S. ch. 414, §§ 2-3, 2009 Tex. Gen. Laws 995-96.

297. Stewart v. Republic Bank, Dallas, N.A., 698 S.W.2d 786, 788 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.) (citing Farr v. Whitefield, 33 N.W.2d 791, 791 (Mich. 1948)).

the powers and duties imposed on them by law for the protection of infants and minors.[298] In such proceedings, however, minors are represented by guardians appointed to promote and protect their best interests, and guardians are appointed so that courts can make binding decisions in proceedings involving minors. As a result of the protection provided by guardians representing the minors' interests, it seems unnecessary to invalidate in terrorem clauses with respect to beneficiaries solely because they are minors.[299] A blanket invalidation of in terrorem clauses against minors allows minor beneficiaries, through their guardians, to contest testamentary instruments even if such contests are not brought in good faith and with probable cause.[300] Such a result almost certainly violates the intent of most testators who include in terrorem clauses in their testamentary instruments and who can easily draft an exemption for minors in such clauses if that is their intent.[301] In the future, the Texas Legislature should consider clarifying the effectiveness of in terrorem clauses against minor beneficiaries. In the opinion of the authors, such clauses should be enforced against minors to the same extent as all other beneficiaries because Texas Probate Code § 64 and Trust Code § 112.038 provide protection for all beneficiaries—minors or otherwise—so long as actions are brought and maintained in good faith and with probable cause.

5. Alternate Dispute Resolution

As our society generally seeks to minimize litigation to relieve over-burdened courts, and as Texas lawmakers have promulgated and encouraged parties to pursue alternate dispute resolution, such as mediation and arbitration (especially in the family law context), it may also be appropriate for the Texas Legislature to consider incorporating a provision that directs parties to a will contest to first seek to resolve their disputes in this manner. Will contests, like family law disputes, involve an emotional element that is not present in most other legal disputes. Mediation or arbitration conducted by a certified, neutral third party has significant benefits that could be particularly helpful for intra-family disputes, including the following: (1) it keeps personal and private family matters confidential; (2) it permits and encourages the parties to address emotional aspects (not just the legal issues); (3) it minimizes the costs and time involved in the process (which can be substantial in litigation); (4) it provides the parties with a greater sense of control over the dispute resolution process; (5) it can repair or improve family relationships; and

298. *Id.*

299. *See* Peter G. Billings, *Infants and In Terrorem Clauses: Rethinking New York Estate Powers and Trusts Law Section 3-3.5*, 22 QUINN. PROB. L. J. 397, 405-09 (2008).

300. *Id.*

301. *Id.*

(6) it can craft flexible remedies that may be unique to the parties and the circumstances that a court cannot provide.[302]

There are, however, several drawbacks to alternate dispute resolution for will contests. Unlike case law decided by litigation proceedings, they do not establish precedent to resolve future similar disputes, and if parties do not come to an agreement, they could choose to litigate those issues.[303] In addition, arbitration is not necessarily more cost-effective than an actual lawsuit, because the parties must still engage in discovery. Although alternate dispute resolution is generally preferable to court litigation, there is no practical way to cause potential contestants to pursue it, absent their agreement or absent a statute that proscribes mandatory mediation or arbitration.

6. Cross-Jurisdictional Issues

In addition, it would behoove the Texas Legislature to consider cross-jurisdictional reaches of its statutes as our society becomes increasingly mobile and individuals move among states for various reasons.[304] The *Shamash* case from New York is a prime example.[305] That case is important because a beneficiary's proceeding regarding a trust instrument in one state, in which no-contest clauses are considered void and unenforceable, barred his petition in another state, which recognized no-contest clauses.[306] The latter state's law governed the instrument in question, and when the beneficiary attempted to bring the matter before the court of that state, the court determined that the beneficiary lacked standing.[307] Moreover, the court reasoned that the proceeding in the first state actually triggered the in terrorem clause and resulted in forfeiture of the beneficiary's bequest.[308] Our legislature should consider whether it would (1) bar a proceeding if a prior proceeding had been instituted in a state that did not recognize anti-contest provisions, and (2) impose the forfeiture designated by the in terrorem clause. The legislature could add a short clause in the Texas Probate Code and Trust Code that deals with cross-jurisdictional matters, such as:

> If (a) an individual has instituted a prior court action in another state which (i) does not recognize in terrorem provisions or (ii) has deemed

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302. *See* Stimmel, *supra* note 77, at 206-10.

303. *Id.* at 212-13.

304. It is outside the scope of this Article to address the possible ramifications of individuals moving around the world.

305. *See* Shamash v. Stark, 6/16/09 N.Y.L.J. at 38 col. 2 [Sur. Ct. N.Y. 2009]; discussion *supra* Part IV.D.5.

306. *See* sources cited *supra* note 305.

307. *See Shamash*, 6/16/2009 N.Y. L.J. at 38.

308. *Id.*

> them void as against public policy, and if (b) the same individual institutes a court action on the same matter in this state, which governs the instrument in question, then the prior out-of-state court action shall not be deemed to bar such individual from bringing such matter before a court in this state, and such prior court action shall not, by itself, trigger the in terrorem clause in question.[309]

While the Texas Legislature may not go so far as to incorporate such a provision into its statutes, cross-jurisdictional matters should be an issue that the legislature considers in its review of the statutes.

Ultimately, with respect to the statutory framework regarding in terrorem clauses, there is a difficult line to balance, primarily due to the important public policy considerations discussed above. On one hand, the statutes should include sufficient specificity so that testators drafting wills (or settlors drafting trusts) and potential contestants assessing whether to bring an action are able to understand the statutes and reasonably predict whether an in terrorem clause will likely be enforced. On the other hand, the statutes should be sufficiently general to cover the very different circumstances involved in each unique situation. Drafting a specific statute that covers every possible situation and exception to the enforceability of in terrorem clauses would be extremely difficult, if not impossible.[310] Rather, the Texas Legislature seems to have the right idea in drafting the statutes generally but could further improve upon Texas Probate Code § 64 and Trust Code § 112.038 by providing clarity regarding the definitions of good faith and probable cause and identifying which triggering events are within the scope of statutory exception, including beneficiaries who join court actions. Texas case law, present and future, can offer additional guidance with respect to specific exceptions and other nuances regarding the enforceability of in terrorem clauses. In addition, testators and drafting attorneys can also influence the clarity of a particular in terrorem clause by providing sufficient specificity and tailoring the clause pursuant to the testator's unique circumstances.

B. Drafting In Terrorem Provisions In Light of Texas Jurisprudence

For those jurisdictions that enforce no-contest clauses (or enforce them subject to strict constructionist viewpoints or certain exceptions), it can be exceptionally difficult for drafting attorneys to craft clauses when they are recognized but disfavored in the law and subject to competing policy

309. The authors have drafted this provision as an example for discussion purposes only; they have not considered any cross-references or defined terms that may be currently used in the Texas Probate and Trust Codes.

310. The authors do not think that the specific statutory framework with the numerous exceptions utilized by the California and New York Legislatures would best fit with Texas jurisprudence.

interests. Some commentators have advised attorneys to specifically tailor a no-contest clause to the client's circumstances and not just insert a standard boilerplate provision.[311] As a preliminary matter, with any client executing a testamentary document, the drafting attorney must ensure that the client has the requisite testamentary capacity. It may be prudent for the attorney and other staff members working on the client's matter to document in the attorney's files that the client has testamentary capacity, is not subject to undue influence, and has executed the testamentary instrument properly.[312]

1. There Must Be A Carrot

In general, for a no-contest clause to be effective, there must be a carrot to go with the stick. A testator must leave the beneficiary something large enough to have an impact and place the beneficiary at risk if he or she contests the will. Otherwise, beneficiaries have nothing to lose for contesting the instrument. As a hypothetical example, assume there is a testator who has two children (of the same marriage) and his wife has predeceased him. The testator has a $1,000,000 estate and plans to leave it all to one child and exclude the other child, save for a $1.00 bequest. Because the testator's estate is $1,000,000, and the excluded child would have received $500,000 (under the state intestacy statutes), the $1.00 bequest to the excluded child is not enough to deter the excluded child from contesting the will. After all, the excluded child only has $1.00 to lose! The bequest should be more significant to compel the excluded child to consider the impact of bringing a contest against the will; in this instance, such amount might be $50,000 or $100,000 (or possibly more). Understandably, the amount depends on the size of the estate and the beneficiaries—the testator must give careful thought to those beneficiaries who might be more inclined to attack his will and consider what amount would prevent such action.

Of course, some clients will not acquiesce to providing one cent to a family member, regardless of the looming attack their estates might face. Clients intent on leaving nothing to a particular family member should take note of the estate of Leona Helmsley. The late Ms. Helmsley is best known for leaving twelve million dollars in trust for her dog, Trouble.[313] What many may not know is that her will, probated in New York, contained the following no-contest clause:

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311. *See* Bashaw, *supra* note 253, at 356.

312. *Id.*

313. Joanna Grossman, *Last Words from the "Queen of Mean": Leona Helmsley's Will, The Challenges That Are Likely To Be Posed By It, and the Likely Fate of the World's Second Richest Dog*, FINDLAW (Sept. 18, 2007), http://writ.news.findlaw.com/grossman/20070918.html.

> If any beneficiary under this Will shall, directly or indirectly, file or cause to be filed objections to this Will, or shall in any other manner contest this Will, in part or in whole, or attempt to prevent the probate thereof, or shall, directly or indirectly, institute or prosecute any action or proceeding to invalidate or set aside this Will or any of its provisions, or shall assert any claim against me or my estate, then any bequest under this Will to for the benefit of such beneficiary (whether outright or in trust) and his or her issue shall not be paid to them or for their benefit and such beneficiary and his or her issue shall be deemed to have predeceased me for all purposes of this Will. The determination of my Executors concerning the application of this Article shall be conclusive on all interested parties.[314]

The problem was that Ms. Helmsley, who was survived by four grandchildren, completely disinherited two of the grandchildren ("for reasons which are known to them"), rendering the no-contest clause useless with respect to them.[315] The grandchildren challenged the will by asserting that Ms. Helmsley lacked testamentary capacity, and her estate was subject to costly litigation, which was eventually settled by paying the two grandchildren six million dollars plus their legal costs.[316]

2. Being Specific Is Good—But Not Too Specific

Certain commentators have advised to specifically tailor a no-contest clause to the client's circumstances and not just insert a standard boilerplate provision.[317] The clauses should expressly indicate the beneficiaries who can precipitate a contest, the document being challenged that creates the contest, the conduct that will trigger forfeiture of the gift, and the assets that will be forfeited if the contest is unsuccessful. While most states do not require a gift over, it is good practice for a no-contest clause to name the contingent beneficiary to receive the property in the event it is forfeited.[318] Tailoring a no-contest clause for each client who wishes to use one not only ensures that the clause reflects the client's true intent but may also increase the likelihood that the clause will be upheld if challenged in a court proceeding. One could argue that a court should give greater deference to a uniquely tailored no-contest clause drafted with the testator's specific intentions in mind, rather than boilerplate no-contest language included in every testamentary instrument that the drafter of the instrument prepares.

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314. Sewell Chan, *Leona Helmsley's Unusual Last Will*, N.Y. TIMES CITY ROOM BLOG (Aug. 29, 2007, 3:20 PM) http://cityroom.blogs.nytimes.com/2007/08/29/leona-helmsleys-unusual-last-will/?ref=sewellchan.

315. *Id.*

316. Edith Honan, *Judge Trims Dog's $12 Million Inheritance*, REUTERS, June 16, 2008, http://www.reuters.com/article/2008/06/16/us-helmsley-dog-idUSN1634773920080616.

317. *See* Bashaw, *supra* note 253, at 355-56.

318. As discussed earlier in this Article, under the traditional English rule, a gift over is required for a no-contest clause to be valid with respect to gifts of personal property. *See id.*; *infra* notes 44-50.

With respect to the conduct that triggers the clause, the drafting attorney should consider and discuss the matters with the client. For example, does filing a contest to the will cause forfeiture? Or, must there be actual judicial proceedings? Will a challenge to the fiduciary named under the will or trust cause forfeiture? What about a challenge to the dispositive provisions? Will an indirect attack be considered the same as a direct attack on the will? That is, if a beneficiary "assists" another beneficiary's contest (for example, participates in discussions or written communications or participates in secret agreements) but does not become a party to the lawsuit, will that be treated the same and result in forfeiture? Undeniably, these clauses should be drafted to precisely indicate when forfeiture will become effective to ensure the testator's intent is clear.

In certain situations, however, testators may feel so strongly about "disinheriting" a particular individual and including an in terrorem clause in their instruments that they may direct the drafting attorney to include certain language explaining their intent and feelings. While such language does clarify the testator's intent, it also can show the judge or jury that the testator is mean, bitter, unfair, antagonistic, or even incompetent.[319] It is important for the drafting attorney to discuss with the client that including derogatory language in his or her will or trust could reflect poorly on the testator in the event of a contest, and, if the language is harsh enough to defame an individual, it could even subject the testator's estate to "testamentary libel."[320] If the drafting attorney is directed to include such language in the client's documents, it would be prudent for the drafting attorney to include a memorandum in his or her files that he or she discussed the matters with the client and that the client specifically directed the attorney draft the clause in such a manner.

3. Should In Terrorem Clauses Be Standard in Testamentary Instruments?

Some attorneys include an anti-contest clause in their standard boilerplate provisions in a testamentary document, even if a client has not requested such a provision to be included. Although it is arguable that such a clause is merely one of many standard boilerplate provisions (that, in general, most clients do not read), it would be the better practice to discuss it with a client and leave the clause out of the document when the client is not concerned with a potential contest. Overusing anti-contest clauses in the boilerplate section of a testamentary document can weaken their effectiveness, as the testator's intent may not be completely clear.[321] In addition, it may be advisable for an attorney to obtain a written consent

319. Dennis W. Collins, *Avoiding a Will Contest—The Impossible Dream?*, 34 CREIGHTON L. REV. 7, 27 (2000).

320. *Id.*

321. *See* Bashaw, *supra* note 253, at 356.

from the client if a no-contest clause is not included in a testamentary instrument; the drafting attorney could avoid a possible malpractice issue in the future.[322]

4. *Drafting Around the Texas Statutes—Using A Conditional Gift as the Carrot Without a Stick?*

A few commentators have suggested that the testator's intent on preventing will contests (even if brought and maintained in good faith and with probable cause) might attempt to draft around the application of Texas Probate Code § 64 and Trust Code § 112.038 by using a conditional gift rather than a traditional in terrorem clause.[323] The plain language of the statutes applies to "a provision in a [testamentary instrument] that would cause a forfeiture of a devise or void a devise."[324] Thus, rather than leaving property to beneficiaries under a testamentary instrument subject to forfeiture, with the forfeiture conditioned on the beneficiaries' actions, the idea is to instead make the initial bequest conditional on the beneficiaries' actions so that there is no need for a subsequent forfeiture.[325] For example, if Beneficiary X refrains from challenging the testamentary instrument, he or she will receive Y dollars. Texas courts tend to evaluate the enforceability of such conditional bequests by determining whether there is a lawful purpose behind the condition.[326] There is currently no authority regarding the effectiveness of such an approach in avoiding the applicability of Texas Probate Code § 64 and Trust Code § 112.038, but perhaps future cases will test this issue.

5. *Sample Provisions*

An in terrorem provision may be crafted countless ways, with general boilerplate language or detailed specificity. Several sample provisions are included below for discussion purposes.

A basic sample provision (and one that is very broad) is set forth below:

> If any beneficiary under this will (or any trusts created hereunder) contests or challenges this will (or trusts) or any of its (their) provisions in any manner, be it directly or indirectly (including the filing of a will contest action), all benefits given to the contesting or challenging beneficiary are

322. *Id.* at 356-57.
323. *See* Beyer & Major, *supra* note 160, at 3.
324. *See* TEX. PROB. CODE ANN. § 64 (West 2009).
325. Beyer & Major, *supra* note 160, at 3.
326. *Id.* (citing Ellis v. Birkhead, 30 Tex. Civ. App. 529, 71 S.W. 31 (Big Spring 1902, writ ref'd)).

> revoked and those benefits pass under the terms of this will as if the contesting beneficiary predeceased me without descendants.

A more detailed provision is set forth below:

> If any person, who is or claims under or through a devisee, legatee, or beneficiary of this Will or any Codicil thereto, or who, if I died intestate, would be entitled to share in my estate (an "objector"), in any manner whatsoever, directly or indirectly, contests or attacks this Will or any of its provisions, or performs any act that would frustrate the dispositive plan contemplated in this Will or conspires or cooperates with anyone attempting to contest, attack, or frustrate this Will, then in that event I specifically disinherit each such objector, and any portion of my estate not disposed of under the foregoing provisions of this Will shall go to my heirs at law according to the laws of succession of the State of Texas then in force and effect, excluding all objectors, all descendants of any objector, and all persons conspiring with or voluntarily assisting any objector. Provided, however, that a petition, made in good faith and not opposed by my executor, seeking an interpretation of this Will shall not be considered a contest of, an attack on, or an attempt to frustrate the dispositive plan of this Will.

Interestingly, the sample clause above specifies a number of actions that would trigger forfeiture: (1) direct and indirect attacks on the will or any of its provisions, (2) any act that would frustrate the testator's dispositive plan, and (3) an act to conspire or cooperate with another to contest the will. There is an exception made, however, for a petition brought in good faith that is not opposed by the estate's executor that seeks an interpretation of the will is not a contest. It is important to note that this exception does not mention probable cause, and although a court would not likely require probable cause for such a petition because of the express provisions in the will, it would be curious to know how a court would reason in that event.

A clause permitting a good faith and probable cause petition for instructions:

> If any beneficiary shall contest the probate or validity of this will or any part of it, or shall institute or join in, except as a party defendant, any proceeding to contest the validity of this will from being carried out in accordance with its terms, not including a petition for instructions for the interpretation of this will instituted in good faith and for probable cause, then all benefits provided for such beneficiary (and his or her descendants) are revoked and shall pass under my will as if the beneficiary (and his or her descendants) had predeceased me.

A clause limiting participation to a party defendant:

> If any beneficiary shall contest the probate or validity of this will or any part of it, or shall institute or join in, except as a party defendant, any proceeding to contest the validity of this will from being carried out in accordance with its terms, regardless of whether or not such proceedings are instituted in good faith and for probable cause, then all benefits provided for such beneficiary (and his or her descendants) are revoked and shall pass under my will as if the beneficiary (and his or her descendants) had predeceased me.

A more detailed provision from a revocable trust is set forth below:

> The Settlor has intentionally and with full knowledge omitted to provide for his heirs except for such provisions as are made specifically in the Settlor's Will (including any codicils) and in this Trust Agreement (including any amendments). If any person, who is or claims under or through a devisee, legatee, or beneficiary of the Settlor's Will (including any codicils) or this Trust Agreement (including any amendments), or who, if the Settlor died intestate, would be entitled to share in the Settlor's estate, in any manner whatsoever, directly or indirectly, contests or attacks:
>
> (i) the Settlor's Will (including any codicils);
>
> (ii) this Trust Agreement (including any amendments);
>
> (iii) any sale or gift of property to the Settlor's descendants or the Settlor's advisors (including but not limited to [certain individuals]); or
>
> (iv) the terms of any option, partnership agreement, shareholders' agreement, limited liability company agreement or bylaws, or buy-sell agreement related to any business interest the Settlor owned prior to his death (including but not limited to any partnership, limited liability company, or corporation), hereinafter, items (i)-(iv) are collectively referred to as the Settlor's "Dispositive Plan"), or performs any act that would frustrate the Settlor's Dispositive Plan or conspires or cooperates with anyone attempting to contest, attack, or frustrate the Settlor's Dispositive Plan (an "objector"), then in that event the Settlor specifically disinherits each such objector and any portion of the Settlor's estate which would have otherwise passed to such objector under his Dispositive Plan shall be distributed in equal shares among those of the following individuals who are not objectors: [certain individuals]; all objectors and all persons conspiring with or voluntarily assisting any objector shall be excluded from such distribution. If any of these individuals is not then living, that individual's share under this paragraph shall be distributed to his or her then living descendants, per stirpes. Any share passing to [Settlor's Spouse] under this paragraph shall be held and administered in the [Spouse's Marital Trust], under Article [Insert Article Number] of this

> Trust Agreement. Any share passing to a descendant of the Settlor under this paragraph shall be held and administered in the trust established for such descendant under this Trust Agreement (or, if no trust has been established for such descendant, such a trust shall be established).
>
> Any claim that (i) property the Settlor has identified as his separate property is community property, (ii) property the Settlor has identified as his separate property is the separate property of [Settlor's Spouse], or (iii) property that is community property owned by [Settlor's Spouse] and the Settlor is the separate property of [Settlor's Spouse], shall be considered a contest or attack on the Settlor's Dispositive Plan. In addition, the following shall be considered a contest or attack on the Settlor's Dispositive Plan: (i) any election, or attempt to elect, under the law of any state to take against the provisions of the Settlor's Dispositive Plan (or against any other trust the Settlor may have established) or to receive any property that is a part of the Settlor's estate or Dispositive Plan which is contrary to the provisions of the Settlor's Dispositive Plan; or (ii) any exercise, or attempt to exercise, any right to share in the Settlor's estate or Dispositive Plan which is contrary to the provisions of the Settlor's Dispositive Plan, by way of dower, curtesy, or otherwise. In applying the provisions of this Article [Insert Article Number], in determining the Settlor's Dispositive Plan, it shall be assumed that no law of any state other than Texas relating to marital property rights shall apply. Provided, however, that a petition, made in good faith and not opposed by the Settlor's executor, seeking an interpretation of the Settlor's Dispositive Plan shall not be considered a contest of, an attack on, or an attempt to frustrate the Settlor's Dispositive Plan.
>
> All reasonable costs and expenses incurred in defending a contest or attack against the Settlor's Dispositive Plan shall be paid out of the assets of this Trust.
>
> In addition, in the event of a contest or attack on the Settlor's dispositive plan by [Settlor's Spouse], it is the Settlor's intent that [Settlor's Spouse] not receive any of Settlor's assets created or acquired prior to his marriage to [Settlor's Spouse], including [certain assets]).

The clause above is crafted in such a way to prevent direct or indirect contests or attacks on the settlor's (1) will, (2) revocable trust, (3) any sale or gift of property to certain individuals, and (4) the terms of certain company agreements or collateral agreements related to any business interest the settlor owned. Thus, the settlor specifically reflected his intent regarding his entire dispositive plan, even though some of his assets may not have been owned by his revocable trust at his death. In addition, the settlor also noted that any claim changing the character of his property (separate or community) would also be considered an attack or contest on his dispositive plan.

Finally, below is a sample provision that seeks to enforce forfeiture even if a proceeding is brought in good faith and with probable cause.

Although Texas Probate Code § 64 does not expressly provide that the good faith and probable cause exception may not be waived by the terms of a will, it seems likely that Texas courts would apply the exception and refuse to enforce the clause if an action was brought and maintained in good faith and with probable cause. Nevertheless, the effect of such a clause is not completely certain, and drafters might purport to override the statutory exception to give beneficiaries further pause before initiating or joining in a contest.

> If any beneficiary hereunder shall contest the probate or validity of any provision or provisions of this will or any trust hereinabove referred to or shall institute or join in (except as a party defendant) any proceeding to contest the validity of this will or such trust or to prevent any provision of either from being carried out in accordance with the terms of the applicable instrument (regardless of whether such proceedings are initiated in good faith and with probable cause), then and in that event such beneficiary shall thereupon forfeit any and all right, title or interest in or to any portion of my estate (in addition to similar forfeiture of such beneficiary's interest in the trust as therein provided), and my estate shall be distributed in the same manner as would have occurred had such beneficiary predeceased me. Each benefit conferred herein is made on the condition precedent that the beneficiary shall accept and agree to all of the provisions of this Section. Any such contest or proceeding described hereunder shall include those brought by any third person as next friend of the beneficiary, if that beneficiary happens to be a minor at the initiation of such contest.

Regardless of careful planning and precaution, however, there is no guarantee that a contest will not occur. It is imperative for drafting attorneys to consider the current Texas statutory framework, discuss in terrorem clauses with their clients to determine the clients' intent, and properly document such intent in their files.

VI. CONCLUSION

In conclusion, testators have been using in terrorem clauses to encourage beneficiaries to comply with the terms of their testamentary instruments for as long as individuals have been using carrots and other enticements to induce animals to plough their fields and pull their wagons.[327] The construction and enforcement of in terrorem clauses has evolved over time with many courts being reluctant to enforce the "stick"—forfeiture of a beneficiary's interest.[328] Texas courts have been unwilling to broadly enforce such harsh consequences on beneficiaries and have instead

327. *See supra* Part II.

328. *See supra* Part II.H.

strictly construed in terrorem clauses in testamentary instruments.[329] Unlike courts in many jurisdictions, however, Texas courts have not directly ruled on the applicability of a common exception permitting beneficiaries to contest testamentary instruments without triggering forfeiture if such actions are brought and maintained in good faith and with probable cause.

The Texas Legislature clarified the uncertainty in 2009 with the statutory enactment of the good faith and probable cause exception under Texas Probate Code § 64 and Trust Code § 112.038.[330] Although this enactment offers reassurance for many well-intentioned beneficiaries wishing to contest testamentary instruments on legitimate grounds, the new statutes could be improved, namely with clarification of the definitions of good faith and probable cause, and explanation regarding the scope of in terrorem clauses under the statutes.[331] In the meantime, testators wishing to use in terrorem clauses should carefully draft such clauses in consultation with their advisors and should understand that no in terrorem clause can guarantee that there will not be a contest, particularly if the testator is not willing to leave a large enough carrot to potential contestants. Likewise, beneficiaries should understand that the new statutory enactments in Texas do not provide complete immunity from the stick of forfeiture.

329. *See supra* Part III.
330. *See supra* Part III.D.
331. *See supra* Part V.